

Oregon Municipal Handbook

CHAPTER 28: FIRST AMENDMENT LAW



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The League of Oregon Cities wishes to extend its sincerest thanks to Markowitz Herbold, a Portland based law firm, for writing this chapter of the Municipal Handbook. Two attorneys, Hanna Hoffman and Harry Wilson, created the chapter.

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Chapter 28: First Amendment Law

City governments thrive under the protections of the First Amendment. Members of the public run for office on campaigns built on freedom of speech, press, and assembly. City residents practice their faiths under the freedom of religion and seek relief from unfair treatment under their right to petition. Each of these public interactions and responsibilities implicate the First Amendment¹ of the United States Constitution and Article I, Section 8² of the Oregon Constitution.

The state and federal constitutions lay out the basic framework for how a government must operate. Both documents list the rights that citizens have and require governments to follow certain rules in order to respect those rights. But unlike statutes, administrative rules, or city charters, constitutional provisions are general, not specific. They have been interpreted by courts whose decisions set forth the nuances and details.

This chapter will focus on the First Amendment to the United States Constitution. But Oregon's Constitution also protects the same freedoms in Article I, Section 8.³

¹ 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. U.S. Const. amend. I.

² **Section 8. Freedom of Speech and Press.** No law shall be passed restraining the free expression of opinion, or restricting the right to speak, write, or print freely on any subject whatever; but every person shall be responsible for the abuse of this right. Or. Const. art. I, § 8.

³ Note that Article 1, Section 8 does not say anything about religion, assembly, or petitions of the government. This is because the Oregon Constitution does not contain any clause expressly relating to assembly or petitions; however, it contains six clauses relating to religion, all of which are separate from Section 8. They are:

Section 2. Freedom of worship. All men shall be secure in the Natural right, to worship Almighty God according to the dictates of their own consciences.

Section 3. Freedom of religious opinion. No law shall in any case whatever control the free exercise, and enjoyment of religeous [sic] opinions, or interfere with the rights of conscience.

Section 4. No religious qualification for office. No religious test shall be required as a qualification for any office of trust or profit.

Section 5. No money to be appropriated for religion. No money shall be drawn from the Treasury for the benefit of any religeous [sic], or theological institution, nor shall any money be appropriated for the payment of any religeous [sic] services in either house of the Legislative Assembly.

Section 6. No religious test for witnesses or jurors. No person shall be rendered incompetent as a witness, or juror in consequence of his opinions on matters of religeon [sic]; nor be questioned in any Court of Justice touching his religeous [sic] belief to affect the weight of his testimony.

Although these two constitutional sections are often closely aligned, there are some differences, which will be noted below.

First Amendment law sets out the rules that city governments must follow in order to protect five crucial rights: freedom of speech, freedom of the press, freedom of religion, freedom of assembly, and freedom to petition the government. But contrary to popular belief, those freedoms are not unlimited. Cities can, and do, place limits on speech, religious practices, and the press. It matters, however, what kinds of limits are applied and why they are applied.

First Amendment law is complex and full of nuances. And because First Amendment law is not intuitive, the public may not understand their own rights or the scope of constraints on their city government. Many people have misconceptions about the First Amendment and how it works—largely because it is so complex. This chapter is designed to answer common questions about the law and how it works, and to clarify misconceptions. Because of the complexity of the topic, it is a good idea to consult this chapter when you interact with a member of the public or a city employee in a way that may implicate the First Amendment (which will happen more often than you think).

This chapter gives a basic overview of the rules that city governments must follow under the First Amendment and Article I, Section 8. Part I gives an overview of who the First Amendment applies to and who it does not. Parts II through VI cover each of the five freedoms or “rights” listed in the First Amendment. Finally, Part VII briefly describes how the First Amendment is enforced.

I. Who Does the First Amendment Apply To?

Section Overview

- The First Amendment prohibits *governments* from abridging freedom of speech, press, assembly, and religion. It does not prohibit private individuals or organizations from enacting private restrictions.
- Social media platforms do not have to follow the First Amendment.
- City officials should keep private social media accounts wholly separate from the accounts they use to discuss public business.

Section 7. Manner of administering oath or affirmation. The mode of administering an oath, or affirmation shall be such as may be most consistent with, and binding upon the conscience of the person to whom such oath or affirmation may be administered.

The First Amendment guarantees individuals' right to freedom of speech, religion, press, assembly, to petition the government and requires the government to respect and protect those freedoms. But the First Amendment does *not* require individual citizens to respect each other's First Amendment rights. Nor does it require private entities to do so. Simply put, private citizens and entities cannot violate the First Amendment because it does not apply to them.⁴ This distinction can be confusing, particularly in the 21st Century where much of our speech occurs on social media platforms run by private businesses. This section explains how this works, who must follow the First Amendment, and who is not required to.

Throughout this section, the most important question is, "Who is acting?" If a government or government official does something—pass an ordinance, enforce a statute, block a reporter on Twitter—the First Amendment rules apply. But if a private business does the same thing—such as block a Twitter account—the First Amendment rules do *not*.⁵

This chart shows how it works:

A	Acts On	B	First Am. Applies?
Individual Citizen	→	Individual Citizen	No
Private Entity	→	Individual Citizen	No
City Government	→	Individual Citizen	Yes
City Government	→	Private Entity	Yes
Individual Citizen	→	Private Entity	No

⁴ See *Hudgens v. N.L.R.B.*, 424 U.S. 507, 513 (1976) ("[T]he constitutional guarantee of free speech is a guarantee only against abridgment by government, federal or state."); see also *Green v. Miss United States of Am., LLC*, 533 F. Supp. 3d 978, 983 (D. Or. 2021) (explaining that the analysis under Art. I, § 8 of Oregon Constitution asks whether a law, not a private actor, is in violation of the constitution).

⁵ This does not mean that private entities have no rules they must follow. To the contrary, many statutes govern what private entities may do. For example, they are forbidden from discriminating against individuals on the basis of race, sex, religion, disability, and national origin, among other characteristics. See Title IV of the Civil Rights Act of 1964, 42 U.S.C. § 2000(d); Title II of the Americans with Disabilities Act of 1990, 42 U.S.C. § 6102; ORS 659A.001 *et seq.*

A. City Governments

The First Amendment says that “Congress shall make no law” infringing the five individual freedoms guaranteed by the amendment.⁶ This reference to Congress suggests that the First Amendment applies only to the federal government, not to state or local government. In fact, this was how the First Amendment was interpreted for many years. But this interpretation changed after ratification of the Fourteenth Amendment in 1868, which included the Equal Protection Clause.⁷ The Equal Protection Clause prohibits *state* governments from depriving individuals of equal protection of the law, including the laws found in the Bill of Rights.⁸ In a series of decisions issued in the first half of the 20th century, the United States Supreme Court ruled that the First Amendment applies to state governments by way of the Equal Protection Clause—and states have been bound by the First Amendment ever since.⁹

Of course, neither the First Amendment nor the Equal Protection Clause expressly mention cities or city governments. However, cities and other municipalities are considered subdivisions of the state for purposes of constitutional law, and the First Amendment applies to them just as it would to a state government.¹⁰ Practically speaking, this means that any person, department, or group who works for or represents a city must abide by the First Amendment. This includes but is not limited to:

- City councils and city council members
- City managers/administrators
- City police departments, fire departments, and municipal courts
- City parks departments

⁶ U.S. Const. amend I., cl. 1.

⁷ “All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall *any state* deprive any person of life, liberty, or property, without due process of law; *nor deny to any person within its jurisdiction the equal protection of the laws.*” U.S. Const. amend. XIV, § 1 (emphasis added).

⁸ *Id.*

⁹ See, e.g., *Gitlow v. New York*, 268 U.S. 652 (1925) (freedom of speech and press); *Near v. Minnesota*, 283 U.S. 697 (1931) (freedom of speech); *Cantwell v. Connecticut*, 310 U.S. 296 (1940) (freedom of religion); *De Jonge v. Oregon*, 299 U.S. 353 (1937) (freedom of assembly); *Edwards v. South Carolina*, 372 U.S. 229 (1963) (right to petition).

¹⁰ See, e.g., *Gathright v. City of Portland*, 439 F.3d 573 (9th Cir. 2006) (applying First Amendment to a Portland city ordinance).

- City planning departments
- City human resources managers
- City employees when interacting with the public
- City elected officials
- City volunteers

The most important thing to remember is that—unlike individual citizens or private businesses—if the government is acting (passing a law, enforcing an ordinance, arresting a person, etc.) it must adhere to the First Amendment and Article I, Section 8. This rule is called the “state action doctrine.”¹¹

B. Social Media

Until recently, the state action doctrine was relatively straightforward. Most speech took place either in private homes or in public spaces, such as parks, sidewalks, or streets, which were monitored and regulated by local government, states, and police departments—all government entities.¹² Today, however, much of what people say publicly and much of what news reporters publish takes place on social media—Twitter, Facebook, Instagram, TikTok, and similar platforms.¹³ Those private businesses are not government bodies, and do not have to follow the First Amendment.¹⁴ It is the legal equivalent of speaking in a shopping mall parking lot instead of a city park.¹⁵ Private businesses are allowed to impose restrictions on speech for users, customers, employees,

¹¹ See, e.g., Louis Michael Seidman, *State Action and the Constitution’s Middle Band*, 117 Mich. L. Rev. 1, (2018-19); State Action Doctrine, U.S. Const. Annotated, Cornell L. School Legal Info. Inst., <https://www.law.cornell.edu/constitution-conan/amendment-14/state-action-doctrine> (accessed Apr. 18, 2022).

¹² See, e.g. *Edwards*, 372 U.S. at 235 (1963) (observing that peaceful protest on a city sidewalk was free speech in its “most pristine and classic form”); *Ward v. Rock Against Racism*, 491 U.S. 781, 797 (1989) (holding that a city has a substantial interest in regulating use of city parks); *Packingham v. North Carolina*, 137 S. Ct. 1730, 1735 (2017) (noting that “[a] basic rule . . . is that a street or a park is a quintessential forum for the exercise of First Amendment rights.”).

¹³ *Packingham*, 137 S. Ct. at 1735.

¹⁴ *Prager Univ. v. Google LLC*, 951 F.3d 991, 998-99 (9th Cir. 2020) (holding that although YouTube provides a platform for speech, it is not a public forum and is not bound by the First Amendment).

¹⁵ *Id.* at 998 (explaining that a private entity, such as a retail establishment, does not become a public actor merely by opening its property to public speech).

visitors, and others.¹⁶ Thus, a person who uses Twitter to post their thoughts, opinions, or links to articles, has no right to free speech *vis-à-vis* Twitter.¹⁷

1. City Governments on Social Media

Although social media platforms can censor speech that appears on their websites, governments cannot.¹⁸ This is an important distinction. City governments or departments often use social media to connect with the public. They create Facebook pages or Instagram and Twitter accounts, and those pages and accounts usually allow public comments.¹⁹ Social media platforms allow members of the public to mention those pages or accounts on their own pages.²⁰ Social media platforms also allow individuals to mention city officials or politicians—or even tag them in posts.²¹

These forms of interaction sometimes result in public criticism for city governments or even for individuals. So, while social media interaction with the public can be useful, it can also be contentious.²² And it can be tempting to block or remove followers or commenters who are being particularly negative or critical.

But the First Amendment does not allow this. With respect to the First Amendment, the question is always, “Who is acting?”—not “Where is the action happening?” It does not matter that speech is taking place on social media; instead, it only matters whether the social media platform or the city is censoring speech.²³ A city cannot block people for being critical, offensive, or for offering misinformation. The rules discussed later in this chapter apply to any situation where a member of the public is

¹⁶ *Id.* at 998-99; *Plotkin v. The Astorian*, 3:20-cv-01865-SB, No. 2021 WL 864946 (D. Or. Mar. 8, 2021) (holding that newspaper could not violate the First Amendment when it removed advertisements from private citizen); *Belknap v. Alphabet, Inc.*, 504 F. Supp. 3d 1156, 1159-60 (D. Or., Dec. 1, 2020) (Simon, J.) (holding that YouTube and Google did not violate the First Amendment when they removed comments citing Breitbart news).

¹⁷ *Id.*

¹⁸ *Packingham*, 137 S. Ct. at 1736 (holding that a state could not prohibit sex offenders from accessing websites that would provide the information about minors).

¹⁹ See, e.g., Portland City Government, Facebook, <https://www.facebook.com/notifypdx> (accessed Apr. 18, 2022); City of Grant's Pass, Instagram, <https://www.instagram.com/grantspassoregon> (accessed Apr. 18, 2022); City of Bend, Oregon, Twitter, <https://twitter.com/CityofBend> (accessed Apr. 18, 2022).

²⁰ See *id.*

²¹ See *id.*; see also, e.g., Ted Wheeler, Instagram, <https://www.instagram.com/tedwheelerpdx> (accessed Apr. 18, 2022).

²² See *id.*

²³ *Packingham*, 137 S. Ct. at 1736.

interacting with a government body, department, or official on any social media platform. The rules are no different for social media than if the interaction occurred in person.²⁴

2. City Officials on Social Media

First Amendment Best Practice: City officials who wish to be online in a private capacity, as well as an official capacity, should create separate and distinct social media accounts—one for their private life that does not discuss city business or government matters and one for their government duties. This creates a clear delineation between when a person is acting in their “private” life and when in their “official” capacity—*i.e.*, on behalf of the government.

The rules described above apply as equally to city officials as they do to city governments. But social media use by officials can become more complicated because many city officials run businesses, hold “day jobs,” or engage in private activities outside of the government office that they hold. And like many people, they use social media to share private activities with family and friends. Often though, the line between the private individual and the public official becomes blurred on social media because they, like other people, mix private and public business on their social media accounts.

As explained above, the First Amendment applies only to the government and government officials. This means that when a city official acts in their official capacity online, they cannot block constituents, censor their comments, or prohibit certain viewpoints from being heard. But when they act in a private capacity, those rules do not apply. (Becoming a member of the city council does not deprive a person of a private life.) The distinction here is much like how a city councilor may decide who they invite to their home and whose opinions they listen to there—but cannot decide who they invite to a city council meeting or whose opinions they hear in that setting.

The question then becomes how do we know when a social media account belongs to “an official” versus “a private” individual?²⁵ After all, “not every social media account operated by a public official is a government account.”²⁶ Courts have identified six factors when answering this question:

²⁴ See *Garnier v. O'Connor-Ratcliff*, 513 F. Supp. 3d 1229 (S.D. Cal. Jan. 14, 2021), appeal docketed, No. 21-55157 (9th Cir. Feb. 24, 2021) (holding that school board may block Facebook commenters only under same circumstances it could remove attendees at a meeting).

²⁵ *Knight First Am. Inst. at Columbia Univ. v. Trump*, 928 F.3d 226, 236 (2nd Cir. 2019), cert granted, vacated on other grounds, *Biden v. Knight First Am. Inst. at Columbia Univ.*, 141 S. Ct. 1220 (mem.) (2021).

²⁶ *Id.*

- 1) How is the account presented?
- 2) How is the account used?
- 3) How is the account categorized?
- 4) How is the account treated and regarded by others, with particular weight to other government officials and agencies?
- 5) To whom is the account made available?
- 6) Did the events giving rise to plaintiff's claim arise out of the defendant's official status (as opposed to a private dispute, such as a divorce or a neighbor dispute)?²⁷

While these factors may sound straightforward, applying them can become complicated when a social media account has a mix of private and public content. The best approach, then, is to keep the accounts wholly separate. The private-citizen account should never discuss public business or anything to do with the city council. The public-official account should discuss only issues relating to city council and city government (although small humanizing details are fine). The goal is to create a clear delineation that shows which account is “acting” on behalf of a government official. Although that official account must adhere to the First Amendment, the other, private account may do as any other person legally does on social media.

II. Freedom of Speech

Section Overview

- Cities cannot regulate speech on the basis of what viewpoint or opinion that a person holds.
- The focus of regulations should be on what people *do* rather than what they *say*.
- Cities can regulate the “time, place, and manner” of speech as long as regulations are neutral, objective, and generally applicable.
- City officials have wide latitude to regulate speech during public meetings.

²⁷ *Phillips v. Ochoa*, No. 2:20-cv-00272-JAD-VCF, 2020 WL 4905535 *4 (D. Nev. Aug. 20, 2020) (relying on *Knight*, 928 F.3d at 236); *Davison v. Randall*, 912 F.3d 666, 680-81 (4th Cir. 2019), *as amended* (Jan. 9, 2019).

- Harassment statutes and ordinances should be drafted as narrowly as possible.
- City employees have free speech rights, but they are limited when the employee is speaking in the scope of their employment.
- Commercial speech is treated exactly the same as other forms of speech under the Oregon Constitution.

Freedom of speech is the first freedom listed in the First Amendment and is likely the most well-known First Amendment right.²⁸ But although “freedom of speech” sounds straightforward it is deceptively complicated for three primary reasons. First, it is subject to two major misconceptions, which conflict with each other. One is that “free speech” means that a person can say anything with virtually no consequences. The other misconception is that “free speech” does not include “harmful” speech (such as racial slurs or misinformation about matters of public concern)—which is not protected. This section will discuss both of these misconceptions, but in summary (1) speech can carry consequences, and (2) nearly all harmful speech is protected under the First Amendment.

The second reason that “freedom of speech” is complicated is that it is not always clear what constitutes “speech” and what constitutes “conduct.” City governments can regulate most “conduct” without violating the First Amendment. Speed limits, for example, regulate conduct—driving a car—not speech. But some conduct is expressive and, therefore, falls under the First Amendment’s protections.

Third, “freedom of speech” is complicated by the fact that cities *can* regulate speech—the First Amendment does not prohibit all regulations that affect speech. But cities can only regulate speech in certain ways. Determining which types of regulations are acceptable is often unclear.

Keeping these complications in mind, this section attempts to explain how and when a city can—and cannot—regulate speech. Although this section does not cover every possible scenario, it attempts to cover the most common and most controversial topics that tend to come up for city governments.

A. Viewpoint Discrimination

The simplest, most straightforward rule relating to the First Amendment is that the government cannot regulate speech on the basis of the viewpoint that the speaker supports.²⁹ This means that a city cannot allow speech that supports Opinion A but

²⁸ U.S. Const. amend. I.

²⁹ “The Fourteenth Amendment does not permit a State to make criminal the peaceful expression of unpopular views. ‘(A) function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it

prohibit speech that supports Opinion B.³⁰ This is called “viewpoint discrimination,” and it is always prohibited.

Viewpoint discrimination—commonly referred to as “censorship”—sounds nefarious but often arises from noble impulses. For example, a local government’s attempt to ban violent pornography that subjugates women³¹, to prohibit displays of crosses by the Ku Klux Klan on public property³², and to prevent racially motivated crimes³³ have all been found unconstitutional because they discriminate on the basis of the speaker’s viewpoint. Because of this rule, bans on hate speech—as well-intentioned as they are—violate the First Amendment.³⁴

Examples of Viewpoint Discrimination	
<ul style="list-style-type: none">• 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	<ul style="list-style-type: none">• 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

induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea. That is why freedom of speech is protected against censorship or punishment, unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest. There is no room under our Constitution for a more restrictive view. For the alternative would lead to standardization of ideas either by legislatures, courts, or dominant political or community groups.”” *Edwards*, 372 U.S. at 237-38, cleaned up (quoting *Terminiello v. Chicago*, 337 U.S. 1, 4-5 (1949)).

³⁰ *Id.*

³¹ *American Booksellers Ass’n, Inc. v. Hudnut*, 771 F.2d 323 (7th Cir. 1985), *aff’d*, 475 U.S. 1001 (1986).

³² *Capitol Square Review Bd. v. Pinette*, 515 U.S. 753 (1995).

³³ *R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377 (1992).

³⁴ *Matal v. Tam*, 137 S. Ct. 1744, 1764 (2017) (“Speech that demeans on the basis of race, ethnicity, gender, religion, age, disability, or any other similar ground is hateful; but the proudest boast of our free speech jurisprudence is that we protect the freedom to express the thought that we hate.”) (quotation marks and citation omitted).

<ul style="list-style-type: none"> • Giving traffic tickets to drivers with bumper stickers supporting a certain party or candidate 	<ul style="list-style-type: none"> • Prohibiting only certain groups from meeting in otherwise-available public spaces
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Some indicators of an ordinance that might unconstitutionally prohibit a viewpoint include:

- Regulating some speech as harmful or unsafe;
- Providing that some speech has more or less value than others; and
- Regulating speech based on how it makes other people feel—guilty, uncomfortable, “bothered,” etc.

The prohibition against viewpoint discrimination does not mean that cities must allow anyone to speak whenever they wish. But it *does* mean that a city must employ a neutral means of regulating speech. This could mean that a city does not allow any comments at all on its Facebook page. Or it could mean that a city might decide not to allow any groups or clubs to use city buildings for meeting space, or only allow meetings at certain times or on certain days.

The bottom line is that a city should not attempt to regulate what people say—and should particularly avoid restricting only certain topics or opinions. If a city wants to regulate speech, it should find other ways of doing so.

B. Regulating Speech

In Oregon, laws that regulate or restrict speech are analyzed under a framework that creates three “categories” of speech.³⁵ Each category allows for increasingly greater government regulation.³⁶

The first category includes laws that are “written in terms directed to the substance of any opinion or subject of communication.”³⁷ These laws are unconstitutional on their face, with some limited historical exceptions, because they regulate or restrict the content of what someone is saying.³⁸ This category includes

³⁵ *Matter of Validation Proceeding to Determine the Regularity and Legality of Mult. Co. Home Rule Charter Sec. 11.60 (“Mult. Co. Home Rule”),* 366 Or. 295, 301 (2020) (en banc) (citing *State v. Robertson*, 293 Or. 402 (1982)).

³⁶ *Id.*

³⁷ *Id.* (quotation marks omitted).

³⁸ *Id.*

viewpoint discrimination, as discussed above, but also extends to “content regulation,” which is broader and includes restrictions on subject matter, not just point of view.³⁹

The second category includes laws that regulate speech on the basis of the effect or harm the speech may cause.⁴⁰ Examples of laws in this category include criminal statutes that prohibit blackmail or extortion.⁴¹ This category also includes laws that prohibit threats.⁴² Laws in this category must be written narrowly; courts will strike down laws that are “overbroad.”⁴³ Because laws cannot be overbroad, “category two” laws must be written narrowly and focus on the effect of the speech, not on its content.⁴⁴

The third and final category includes laws that are not written to regulate speech but ultimately have that effect in some situations.⁴⁵ This category of laws often ends up regulating expressive *conduct*, which is conduct that conveys a message and is therefore treated as if it were speech.⁴⁶ Courts will uphold laws that fall into this category as long as (1) they are not written in a way that targets speech and (2) they regulate expressive and non-expressive conduct identically.⁴⁷ Category three laws are a frequent issue for cities, and this section addresses some common scenarios that may arise. Category three laws are addressed again in the section on freedom of assembly, since these laws often interact with political protest events.

³⁹ *Id.* See also *Nat. Inst. Of Family and Life Advocates v. Becerra*, 138 S. Ct. 2361, 2371 (2018) (“Content-based regulations target speech based on its communicative content . . . and are presumptively unconstitutional[.] . . . This stringent standard reflects the fundamental principle that governments have ‘no power to restrict expression because of its message, its ideas, its subject matter, or its content.’”) (cleaned up).

⁴⁰ *Mult. Co. Home Rule*, 366 Or. at 301-02.

⁴¹ *Id.* at 422-23.

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Robertson*, 293 Or. at 410 (“For a law is overbroad to the extent that it announces a prohibition that reaches conduct which may not be prohibited. A legislature can make a law as ‘broad’ and inclusive as it chooses unless it reaches into constitutionally protected ground.”) (quoting *State v. Blocker*, 291 Or. 255, 261 (1981), *overruled on other grounds*, *State v. Christian*, 354 Or. 22 (2013)).

⁴⁵ *Mult. Co. Home Rule*, 366 Or. at 302-03.

⁴⁶ See, e.g., *Texas v. Johnson*, 491 U.S. 397, 404 (1989) (“The First Amendment literally forbids the abridgment only of ‘speech,’ but we have long recognized that its protection does not end at the spoken or written word. . . . [W]e have acknowledged that conduct may be sufficiently imbued with elements of communication to fall within the scope of the First and Fourteenth Amendments.”) (quotation marks and citations omitted.)

⁴⁷ *Mult. Co. Home Rule*, 366 Or. at 301 (relying on *State v. Babson*, 355 Or. 383 (2014) (en banc) (upholding prohibition on occupying Capitol steps after certain hours, even though the statute resulted in the arrest of protesters whose presence on the steps amounted to expressive conduct.)

1. Public Nudity

One type of conduct that can be considered “expressive” is nudity.⁴⁸ City ordinances relate to nudity in a variety of ways, including regulation of public nudity, strip clubs, and pornography. Because Oregon courts have held that public nudity can be expressive conduct—and therefore protected by the First Amendment—certain rules are important for cities to follow if they choose to regulate nudity:

- 1) Laws that restrict exposing one’s genitals must be construed to prohibit only non-expressive nudity (*e.g.*, public urination). They cannot be used to prohibit nudity as part of a theatrical or dance performance, for example.⁴⁹
- 2) Nude dancing in bars and taverns cannot be prohibited.⁵⁰
- 3) Cities cannot restrict the distance between a nude dancer and the audience or the type of attire the dancer must wear.⁵¹
- 4) Cities can regulate sexual contact between dancers and patrons, but they cannot prohibit touching for the sole reason that it causes arousal.⁵²

This area of law has been well developed in the Oregon courts. But none of these court-made rules keep a city from prohibiting crimes such as public urination, indecent exposure, or sexual harassment and assault. On the other hand, cities should be careful when attempting to regulate adult-oriented entertainment or nudity-centric events such as the Naked Bike Ride⁵³—which would be considered “expressive” and therefore protected.

First Amendment Best Practice: When it comes to nudity, cities should draft regulations as narrowly as possible and focus them on regulating either (1) exposure of genitals for no expressive reason (*e.g.*, urination) or (2) sexual contact.

⁴⁸ *City of Portland v. Gatewood*, 76 Or. App. 74, 79 (1985).

⁴⁹ *Id.*

⁵⁰ *Sekne v. City of Portland*, 81 Or. App. 630 (1986).

⁵¹ *City of Nyssa v. Dufloth*, 339 Or. 330 (2005).

⁵² *City of Salem v. Lawrow*, 233 Or. App. 32, 38-39 (2009).

⁵³ John Patrick Pullen, Portland’s World Naked Bike Ride, Travel Portland, <https://www.travelportland.com/events/naked-bike-ride/> (accessed Apr. 18, 2022).

C. Time/Place/Manner Constraints

One of the most common ways a government is allowed to regulate speech is a category of law referred to as “time, place, manner” restrictions.⁵⁴ This category of laws is as it sounds: laws that control when, where, and how speech can take place, regardless of what is being said. A wide range of laws fall into this category, ranging from requiring permits for parades and demonstrations to imposing curfews in public parks. A few examples are addressed below in greater detail, but generally, Oregon courts apply a three-part test to determine if a law is a permissible time, place, and manner restriction.⁵⁵ The three factors are:

- 1) Whether the law discriminates on the basis of the speech’s content;
- 2) Whether the restriction advances a legitimate state interest without restricting substantially more speech than necessary; and
- 3) Whether ample alternative opportunities exist to communicate the intended message.⁵⁶

For example, in *Babson*, the Oregon Supreme Court upheld a law that imposed an 11 p.m. curfew on the Capitol steps.⁵⁷ The Oregon State Police cited a peaceful protester for criminal trespass when she refused to leave after 11 p.m., and she appealed the citation to the Supreme Court on the theory that her rights to free speech and assembly had been violated.⁵⁸ The Court held that her rights had not been violated because, applying the three-part test: (1) the statute did not regulate the content of the speech; (2) it advanced a legitimate government interest in the safety, security, and aesthetic value of the Capitol; and (3) the protesters had access to alternative locations where they could communicate their message during the hours the Capitol was closed.⁵⁹

This type of law is therefore a quintessential “time, place, manner” restriction. Below are some other common examples. (This topic will also be discussed below in the section on freedom of assembly.)

⁵⁴ See, e.g., *Green*, 533 F. Supp. 3d at 984.

⁵⁵ *Id.*

⁵⁶ *Id.* (citing *Babson*, 355 Or. at 407-08).

⁵⁷ *Babson*, 355 Or. at 388.

⁵⁸ *Id.* at 389.

⁵⁹ *Id.* at 410-11.

1. Public Meetings

City governments often come into contact with private citizens during public meetings—whether in the city council, the city planning commission, or an advisory council. Cities have a fair amount of latitude to regulate public meetings and can use time, place, manner restrictions to keep those meetings running smoothly and to allow everyone the chance to be heard. For example, cities can impose content-neutral rules of decorum at public meetings without running afoul of the First Amendment, as long as they do not restrict any particular group of speakers over another.⁶⁰ As one court noted, limitations on speech at public meetings “must be reasonable and viewpoint neutral, but that is all they need to be.”⁶¹

Restrictions on public meetings include the ability to remove a person from a meeting when that person is “acting in a way that actually disturbs or impedes the meeting.”⁶² A city council can also ban a person who is repeatedly disruptive, although such a ban should not be indefinite and should last only long enough to serve its purpose.⁶³ City councils also have the power to verbally censure their own members without running afoul of the First Amendment, as the freedom of speech does not protect public officials from criticism.⁶⁴

However, one thing a city council cannot do is force attendees to recite the Pledge of Allegiance or even stand for it.⁶⁵ This is because the government cannot compel speech (either in word or in act) and cannot force citizens to profess any opinion or feeling on a subject.⁶⁶ This principle applies equally to requiring attendees to stand for

⁶⁰ See *Garnier*, 513 F. Supp. 3d at 1248.

⁶¹ *DeGrassi v. City of Glendora*, 207 F.3d 636, 646 (9th Cir. 2000) (quotation marks omitted) (citing *Kindt v. Santa Monica Rent Control Bd.*, 67 F.3d 266 (9th Cir. 1995)); see also *Steskal v. Benton Cty.*, 247 Fed. Appx. 890, 891 (9th Cir. 2007).

⁶² *White v. City of Norwalk*. 900 F.2d 1421, 1424 (9th Cir. 1990).

⁶³ *Garnier*, 513 F. Supp. 3d at 1251 (holding that three-year ban from city’s social media page was too long, although initial blocking had been acceptable and akin to temporary bans from city council meetings).

⁶⁴ *Houston Comm. College System v. Wilson*, 142 S. Ct. 1253 (2022) (“The First Amendment surely promises an elected representative . . . the right to speak freely on questions of government policy. But just as surely, it cannot be used as a weapon to silence other representatives seeking to do the same.”).

⁶⁵ *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943) (holding that the government may not force individuals to salute the flag or pledge allegiance to it) (“We think the action of the local authorities in compelling the flag salute and pledge transcends constitutional limitations on their power and invades the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control.”).

⁶⁶ *Id.*

the flag salute; cities are forbidden from imposing this requirement.⁶⁷

Examples of Permissible Restrictions on Public Meetings

- Limits on subject matter (but not views on the subject)
- Time limits on individual testimony
- Restricting testimony to written statements
- Allowing no public testimony at all or no comments at all on public social media pages
- Adopting a policy that prohibits swearing, yelling, name calling, and similar behavior during testimony
- Requiring attendees to adhere to a dress code (shoes, shirts, COVID masks, removing hats, *etc.*)

2. Noise Codes and Harassment

One function of city government is to keep the peace among citizens. Ordinances are often designed to prevent conflict or to balance the needs of competing groups of people who are required to live together. Two common types of ordinances that serve this purpose are noise codes and harassment laws—both of which implicate speech and do so in different ways.

Noise codes are, generally, considered to be permissible time, place, manner restrictions.⁶⁸ As long as a noise code does not target any particular type of speech (for example, bans on amplified sound only for political protests) and is applied using

⁶⁷ *Id.* at 632 (“There is no doubt that, in connection with the pledges, the flag salute is a form of utterance. Symbolism is a primitive but effective way of communicating ideas.”).

⁶⁸ See *City of Portland v. Aziz*, 47 Or. App. 937, 947 (1980) (holding that city ordinance prohibiting unauthorized use of amplified speakers and similar devices was a reasonable time, place, manner restriction).

objective standards such as decibels or earshot distance, it will not run afoul of the First Amendment or Article I, Section 8.⁶⁹ Cities may also permissibly restrict noisy activities in certain areas, such as restrictions on sound trucks (*e.g.*, trucks playing campaign messages on a speaker) and unmuffled engines in residential neighborhoods.⁷⁰ Again, as long as noise restrictions apply equally to everyone, they are permissible.

Harassment laws, on the other hand, are more complicated. While “harassment” laws seem like they would go to the “manner” of speech, courts have found that it is unconstitutional to prohibit most harassing or annoying speech—even if it is highly offensive.⁷¹ Instead, harassment laws can only prohibit speech that has the effect of putting the listener in fear of *imminent* harm or violence.⁷² Words that are insulting, obscene, annoying, or likely to provoke a violent response cannot be prohibited.⁷³ (This is a similar principle to the rule that prohibits the government from outlawing hate speech.)

It may seem counter-intuitive that a city can protect citizens from being annoyed by very *loud* speech but cannot protect them from being annoyed by very *offensive* speech. But this distinction goes back to the difference between “what” a person says and “how” they say it. A noise code is objective and can be applied equally to anyone who is speaking. For example, if a political activist gives a speech in a public park, it is possible to use a decibel meter to determine exactly how loud they are speaking. On the other hand, it is not possible to objectively measure how annoying, offensive, or inciting their words are because different listeners will experience different reactions. Speech that some people find annoying or even abusive may sound inspirational and stirring to others. And even if the activist offends everyone who hears them, they have a right to express their views in public. In other words, the speaker does not have a right to use a microphone, but they have a right to speak.⁷⁴

⁶⁹ *Id.*; see also *City of Portland v. Ayers*, 93 Or. App. 731, 735-36 (1988) (en banc).

⁷⁰ *Ayers*, 93 Or. App. at 735 (relying on *City of Portland v. Tidyman*, 306 Or. 174, 182 (1988) (en banc)).

⁷¹ *State v. Johnson*, 345 Or. 190, 196-97 (2008).

⁷² *Id.* (holding that ORS 166.065(1)(a)(B) is unconstitutionally overbroad unless applied only to speech that creates a fear of imminent harm).

⁷³ *Id.* at 197 (“Defendant’s expression may have been offensive, but the state may not suppress all speech that offends with the club of the criminal law.”)

⁷⁴ Use of a microphone is an example of what “manner” refers to in “time, place, and manner.” It refers to what means a person uses to speak, not what their speech consists of.

3. Sit-Lie Ordinances

When it comes to regulating the “place” that speech takes place, sidewalks are a particularly complicated subject. On one hand, they are a quintessential public forum, open to anyone to speak publicly. On the other hand, they are designed to convey people from one place to another, and they are also the means by which people enter and leave businesses. Because sidewalks serve these multiple purposes, they tend to become a focus of regulation for cities.

One of the most common regulations is a “sit-lie” ordinance, which prohibits people from sitting or lying down on sidewalks, often during certain hours of the day or in such a way that obstructs pedestrian traffic. These ordinances are an example of a time, place, manner restriction, and contrary to (somewhat) popular belief, they are not unconstitutional or otherwise illegal.⁷⁵

There is no First Amendment right to sit or lie on a public sidewalk.⁷⁶ This is true even if the person sitting or lying is also conveying a message.⁷⁷ Sit-lie ordinances do not regulate speech, and as long as they are applied in an objective, even-handed manner, do not present a First Amendment problem.⁷⁸ But sit-lie ordinances cannot be used as a pretext to arrest peaceful protesters or other individuals whose mere presence a city finds objectionable.⁷⁹ Therefore, the best practice is to adopt an ordinance that uses purely objective criteria, such as time of day, limited sections of the city, or certain lengths of time.

First Amendment Best Practice: Use the following criteria to draft a sit-lie ordinance that will comply with Oregon law and the First Amendment.

- It should not target any expressive conduct or speech, including acts of protests or written signage;
- It should be enforced only during certain times of day when sidewalks see increased traffic;

⁷⁵ See, e.g., H.B. 3115, 81st Ore. Leg. (2021).

⁷⁶ *Roulette v. City of Seattle*, 97 F.3d 300, 303-04 (9th Cir. 1996); *see also Amster v. City of Tempe*, 248 F.3d 1198, 1199-200 (9th Cir. 2001).

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Brown v. Louisiana*, 383 U.S. 131, 142 (1966) (holding that breach of the peace statute, which was constitutional as written, could not be used as a pretext to arrest participants of a sit-in to protest Jim Crow segregation).

- It should not apply to all public spaces but should be as limited as possible (*e.g.*, sidewalks narrower than a certain width);
- It should be limited to areas with significant pedestrian traffic or to areas that present a safety risk to individuals who may choose to sit or lie, such as near traffic; and
- It should not be used to criminalize homelessness or result in the arrest of people experiencing homelessness.⁸⁰

D. City Government as an Employer

Much of this chapter focuses on city government’s interactions with the public. However, city employees also have First Amendment rights, and a city must honor those rights as well. This is a complicated issue because the city is both an employer and a government body. Employers have wide latitude to control what their employees say in (and out) of the workplace; by contrast, government entities have little power to do this and are expressly forbidden from doing so in many cases. Courts have therefore laid out a series of tests to determine when a government can act as an “employer” and control employees’ speech and when it must act as a government entity and refrain from doing so.⁸¹ In other words, there are limits on how and when a city can suspend, demote, or fire an employee based on the employee’s speech or expression.

In this context, the general rule is that city employee speech is protected when “the speech is made as a private citizen on a matter of public concern.”⁸² But it is not protected if the employee is speaking pursuant to their job duties as a public employee.⁸³ “Not protected” speech can be grounds for discipline—*e.g.*, firing, demotion, suspension, etc.⁸⁴ If speech is protected, however, it cannot be grounds for discipline. One reason for drawing this distinction is to protect the city employee’s free speech rights. Another is to protect the community’s First Amendment interest “in receiving the well-informed views

⁸⁰ Criminalizing homelessness or arresting all homeless persons is a violation of Oregon law (*see* H.B. 3115) and could be considered cruel and unusual punishment under the United States Constitution. *Anderson v. City of Portland*, No. 3:08-cv-1447-AA, 2009 WL 2386056 (D. Or. Jul. 31, 2009).

⁸¹ *Garcetti v. Ceballos*, 547 U.S. 410, 418-19 (2006) (drawing distinction between government as an employer, who has “a significant degree of control over their employees’ words and actions,” and the government’s responsibility to honor employees’ free speech rights).

⁸² *Id.* at 419.

⁸³ *Id.* at 418-19.

⁸⁴ *Id.*

of government employees engaging in civic discussion.”⁸⁵ In other words, the public deserves to know what its city employees think about the government they help run.

If a city employee believes that the city has punished them for protected speech, they can bring a retaliation claim. This claim is subject to a five-part court-created test that is used to determine if the adverse employment action (firing, demotion, etc.) was the result of retaliation or was a legitimate act by the government as an employer.⁸⁶

First, the employee must show that:

- 1) they spoke on a matter of public concern;
- 2) they spoke as a private citizen rather than a public employee; and
- 3) the relevant speech was a substantial or motivating factor in the adverse employment action.⁸⁷

If the employee succeeds in proving all three criteria, then the city government must show that either (4) it had an adequate justification for treating the employee different than other members or the public⁸⁸ or (5) it would have taken the adverse employment action even absent the protected speech.⁸⁹

The first factor in the test is relatively straightforward. Matters of public concern can range from taxes to wrongdoing within a department to racial equity.⁹⁰ But matters of public concern do not include, for example, issues relating to the employee’s shift schedule or lunches stolen from the breakroom.

The second factor is more complicated. A city employee acts as a private citizen when their speech (1) is directed towards a person who they would not normally interact with in their daily work and (2) does not interfere with the regular operation of the city.⁹¹ When a city employee makes statements “pursuant to their official duties,” however, they are not speaking as a private citizen, and their speech is not protected.⁹² For example, courts have found that writing an internal memorandum that arose out of an employee’s

⁸⁵ *Id.* at 419.

⁸⁶ *Barone v. City of Springfield, Ore.*, 902 F.3d 1091, 1098 (9th Cir. 2018).

⁸⁷ *Id.*

⁸⁸ See, e.g., *City of San Diego v. Roe*, 543 U.S. 77 (2004) (holding that city had a legitimate interest in disciplining police officer who sold in an online auction a video of himself stripping off his uniform and masturbating).

⁸⁹ *Id.*

⁹⁰ See, e.g., *Pickering v. Bd. of Educ. Of Twp. High Sch. Dist. 205*, 391 U.S. 563, 564-65 (1968); *Connick v. Myers*, 461 U.S. 138, 148 (1983); *Barone*, 902 F.3d at 1098.

⁹¹ *Barone*, 902 F.3d at 1098 (citing *Pickering*, 391 U.S. at 569-70).

⁹² *Id.* (citing *Garcetti*, 547 U.S. at 421).

usual responsibility to advise their supervisor was not protected speech.⁹³ Writing a letter to the editor in a newspaper, however, is protected.⁹⁴ (Importantly, it does not matter what an employee's job description says; the question is a practical one that considers an employee's actual tasks and duties, not any formalized job description or employment agreement.)⁹⁵

The third factor asks whether the speech was a substantial or motivating factor for the employee being fired, demoted, etc. This question is as it sounds: did a city do something to an employee because of comments the employee made in their capacity as a private citizen?⁹⁶

If all three criteria are met, it is a city's duty to show either that it had an adequate justification for treating the employee differently than other members of the public or that it would have fired or demoted the employee regardless of the protected speech.⁹⁷ These are fact-based questions that will vary based on context.⁹⁸

The bottom line is that a city government, when acting as an employer, has some control over its employees' speech. But that control is not limitless, and city employees do not sacrifice all of their First Amendment rights by working for the government. Cities should therefore be cautious when disciplining employees for what they say, keeping in mind the *Barone* factors discussed above from the very beginning of the disciplinary process.

E. Elections

This handbook provides a separate chapter on Election Law—which should be used as the primary resource on election-related law. However, election law interacts with the First Amendment in a couple of important ways. One is campaign finance laws; the other relates to restrictions on government employees' speech.

⁹³ *Id.*

⁹⁴ *Pickering*, 391 U.S. at 569-70.

⁹⁵ *Barone*, 902 F.3d at 1099-100 (holding that sheriff deputy's remarks regarding racial profiling at a City Club event were within the course of her official duties because her role required her to do community outreach and receive citizen complaints).

⁹⁶ *Moser v. Las Vegas Metro. Police Dept.*, 984 F.3d 900, 906 (9th Cir. 2021) (holding that this factor was satisfied because city police department demoted officer based on posts he made on his private Facebook page).

⁹⁷ *Barone*, 902 F.3d at 1098.

⁹⁸ *Eng v. Cooley*, 552 F.3d 1062, 1071-72 (9th Cir. 2009).

1. Campaign Finance

Campaign finance is a broad topic and this section is not intended to explore the topic in depth—but will instead only summarize two important aspects of campaign finance as they relate to the First Amendment. (An overview of Oregon’s campaign finance rules is provided in the election law chapter.)

First, campaigning for office is a type of speech that is protected from most interference from the government. That does *not* mean that it cannot be regulated at all. For example, the Oregon Supreme Court has held that campaign finance limits (limits on how much money a person can donate to a candidate) do not violate the First Amendment or Article I, Section 8, simply because they regulate conduct (giving money) rather than speech.⁹⁹ This ruling is important for many reasons, but one is that it allows city governments to impose campaign finance limits in city elections. It also means that candidates for city office should be mindful of any current state limits on campaign contributions (since they may have changed from those in effect during a previous campaign).

Second, there is a distinction between speech on behalf of a candidate and speech on behalf of a ballot measure or public policy issue. In short, spending and campaigning on behalf of a candidate is subject to more regulation and oversight than similar activity on behalf of a ballot measure or policy.¹⁰⁰ Without describing the specific nuances of these regulations—which exceed the scope of this chapter—the reason for the distinction is that there is no risk of corrupting or bribing a ballot measure.¹⁰¹ This distinction is important to keep in mind when a city chooses to adopt campaign finance regulations.

2. Public Employee Political Speech

State campaign finance law prohibits public employees, including city employees, from participating in campaign activity during work hours.¹⁰² As explained in the chapter on Election Law, it works this way:

ORS 260.432 includes three main requirements that affect cities and city employees. First, the law prohibits any public employee from engaging in certain political activity during work hours. Specifically, public employees cannot solicit money, services, or influence, and cannot otherwise support or oppose a candidate, measure, or political committee.

⁹⁹ *Mult. Co. Home Rule*, 366 Or. at 312-13.

¹⁰⁰ *First Nat. Bank of Boston v. Bellotti*, 435 U.S. 765 (1978); *FEC v. Wisc. Right to Life, Inc.*, 551 U.S. 449 (2007).

¹⁰¹ *Wisc. Right to Life*, 551 U.S. at 478-79.

¹⁰² ORS 260.432.

Second, the law prohibits any person from attempting to “coerce, command, or require” a public employee to engage in the prohibited conduct. Third, the law requires that a notice be posted in all public workplaces about the law; this requirement applies to all public employers, including cities and other municipal corporations.

This campaign finance law is modeled on the federal Hatch Act, which imposes similar restrictions on federal government employees. The United States Supreme Court has upheld the Hatch Act on the grounds that the government’s interest in maintaining the efficiency and integrity of official offices outweighs the infringement on public employees’ speech rights during the workday.¹⁰³ Similarly, the state statute, ORS 260.432, has never been held to violate Article I, Section 8—although the Oregon Supreme Court has held that more restrictive statutes that limit *all* political activity, even during non-working hours, by public employees do violate the Oregon Constitution.¹⁰⁴

ORS 260.432 carves out an exception for the rights of public employees to “express personal political views” while at work.¹⁰⁵ The Oregon Secretary of State interprets this exception to mean that a public employee may communicate verbally about politics and wear buttons, t-shirts and other political clothing, and may post campaign signs in their workplace.¹⁰⁶ However, this expression can be limited by content-neutral local policies, particularly where the employee becomes a disruption to the workplace or to the organization as a whole.¹⁰⁷

F. Municipal Courts

Many cities have municipal courts that adjudicate violations of city codes and ordinances, as well as some misdemeanor crimes. These courts encounter the First Amendment in a variety of ways, and although this section is presented as part of the “Free Speech” section of this chapter, courtroom proceedings sometimes implicate the other protections in the First Amendment as well. There is no body of law specific to courtrooms; so instead of a comprehensive legal analysis, here is a synopsis of some of

¹⁰³ *United Public Workers of America v. Mitchell*, 330 U.S. 75, 96-97 (1947).

¹⁰⁴ See, e.g., *Oregon State Police Officers Assn. v. State of Ore.*, 308 Or. 531, 534-35 (1989) (holding that statute was unconstitutional where it prohibited state police officers from engaging in any political activity).

¹⁰⁵ ORS 260.432(2).

¹⁰⁶ Or. Secretary of State, Restrictions on Political Campaigning by Public Employees at 7-8 (2016), <https://sos.oregon.gov/elections/Documents/restrictions.pdf> (last accessed Apr. 18, 2022).

¹⁰⁷ See *id.*

the common ways in which the First Amendment presents itself in courtroom proceedings.

- **Sentencing.** Courts have broad latitude when imposing sentences and can consider nearly any information about the defendant, including information that was not admissible at trial. However, courts *cannot* consider a defendant's political beliefs or membership in a group or organization *unless* that information is relevant to the crime at issue.¹⁰⁸ So, for example, a municipal court could not rely on a defendant's membership in a white supremacy group to impose a harsher sentence on them for driving while intoxicated. But the court could mitigate the sentence on the basis that the defendant joined Alcoholics Anonymous. The reason is that membership in a white supremacy group has no relationship to the crime, but AA membership does. Therefore, using membership in a racist organization as a justification to enhance the sentence is tantamount to punishing the defendant for belonging to an objectionable group. (Doing so would violate their freedom of association, which is discussed later in this chapter.)
- **Treatment Programs.** Municipal courts often handle low-level crimes and violations, including impaired driving and minor drug possession charges. The sentences for those infractions often include participation in a treatment program, some of which are run by religious organizations. As discussed later in this chapter, the government cannot discriminate against religious organizations. So, if a religiously affiliated treatment program is otherwise accredited and meets the court's criteria for a court-sanctioned program, the court must offer it as an option to defendants in exactly the same way it offers secular programs.
- **Public Comments.** In much the same way city councils have significant latitude over their meetings, judges have control over behavior in their courtrooms. A courtroom is a nonpublic forum¹⁰⁹—which means that it is not a public space traditionally set aside for speech (such as a sidewalk or park), nor is it designated specifically for that purpose (such as a city hall conference room that is made available for community meetings). Speech restrictions in a courtroom need only be (1) reasonable and (2) viewpoint

¹⁰⁸ *State v. Fanus*, 336 Or. 63 (2003); *Dawson v. Delaware*, 503 U.S. 159 (1992).

¹⁰⁹ See, *Mead v. Gordon*, 583 F. Supp. 2d 1231, 1239 (D. Or. 2008).

neutral.¹¹⁰ Otherwise, judges can exercise significant control over who speaks and for how long in their courtrooms.

- **City codes.** Municipal courts often enforce city ordinances and codes. As explained elsewhere in this chapter, city codes are sometimes written or applied in a way that targets protected speech that should not be punished. Judges should be aware of the rules throughout this chapter and should decline to enforce obviously unconstitutional laws.

G. Commercial Speech

Much of the “speech” referenced in this chapter relates to public policy, personal beliefs, or political activism. But the First Amendment protects commercial speech too.¹¹¹ Commercial speech includes advertising, packaging, signs, and branding, among other activities. Businesses are subject to government regulation, which often has the collateral effect of regulating commercial speech. This section examines some of the common ways that city codes interact with commercial speech.

1. Advertising

Advertising—the means by which companies speak directly to consumers—is perhaps the most common and obvious form of commercial speech. It may be subject to government regulation because it is invasive (e.g., telemarketers, home solicitors, etc.) or contains a visual element (e.g., signage, billboards, etc.). This section focuses on types of advertising that *cities* are most likely to regulate: signs and billboards.

First, it is permissible for cities to impose a permit scheme on signs and billboards that relies on objective criteria, such as lighting, zoning, and size.¹¹² These are considered “time, place, manner” restrictions like the ones discussed above.¹¹³ A city may also charge a fee for sign permits, as long as it is not unreasonable and does not exceed the cost of the permit program.¹¹⁴

¹¹⁰ *Id.*

¹¹¹ *Northwest Advancement, Inc. v. State of Ore. Bur. of Labor, Wage and Hour Div.*, 96 Or. App. 133, 140 (1989). **Note:** The analysis under Article I, Section 8 is more protective of commercial speech than the analysis adopted by federal courts under the First Amendment. This section therefore focuses on cases arising under the Oregon Constitution.

¹¹² *Outdoor Media Dimensions, Inc. v. Dep’t. of Transp.*, 340 Or. 275, 286-88 (2006).

¹¹³ *Id.* at 288.

¹¹⁴ *Id.* at 290-91.

What is *not* permissible is to create a permit system that distinguishes between the messages found on signs or billboards.¹¹⁵ For example, it is unconstitutional to adopt a law that distinguishes between signs that advertise or relate to the activity on the property (*e.g.*, “Gas here” at a gas station, “Pray for Peace” at a church) and signs that advertise or communicate more generally (*e.g.*, “Pray for Peace” at a gas station or Gas: 10 miles on a billboard).¹¹⁶ This is because those types of regulations seek to control the content of the message—not the sign itself.¹¹⁷

Commercial speech is not limited to private property. Governments can use public property, such as airport terminals or public transit systems, to create a “limited public forum” for the purpose of allowing commercial advertising.¹¹⁸ When it does so, it should allow “selective access” and categorical subject-matter limitations (*i.e.*, prohibiting ads for alcohol and tobacco), with pre-screening of ads.¹¹⁹ In the context of commercial speech on public property, this kind of control is acceptable, much like control over a city council meeting is also acceptable under the First Amendment.

First Amendment Best Practice: If implementing a signage law requires a person to read the sign itself to determine if there is a violation, this is a red flag that the law is an unconstitutional content-based law.¹²⁰

2. Zoning

Cities have broad latitude in imposing zoning ordinances that regulate where certain types of activities are allowed. Within those ordinances a city can categorize businesses in almost any way it chooses, becoming even so specific as to allow ice cream parlors but not dental offices in residential areas.¹²¹ Likewise, it is not a violation of the First Amendment if zoning regulations have the effect of restricting speech as long as

¹¹⁵ *Id.* at 293-95.

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ *Seattle Mideast Awareness Campaign v. King County*, 781 F.3d 489, 497 (9th Cir. 2015) (citing *Lehman v. City of Shaker Heights*, 418 U.S. 298, 303 (1974); *Int'l Soc'y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 682 (1992)).

¹¹⁹ *Seattle Mideast Awareness Campaign*, 781 F.3d at 497-98.

¹²⁰ See also, *Clear Channel Outdoor, Inc. v. City of Portland*, 243 Or. App. 133 (2011) (holding that city could distinguish between free-standing signs and signs painted on building walls, but it could not distinguish between painted advertising and painted murals).

¹²¹ See, *Tidyman*, 306 Or. at 182 (“The constitution does not limit locational regulation to broad categories of structures or enterprises; if a city chooses to allow ice cream stores or beauty shops in residential areas but not taverns or dental offices, no guaranteed right like free expression is invaded.”).

they are not targeted at the speech itself.¹²² This rule is much like other rules found throughout this chapter: targeting speech itself or the content of speech is unconstitutional, but neutral, generally applicable rules are not.

With zoning ordinances, cities can adopt laws that target “location, time, manner, intensity, or invasive effect” of businesses.¹²³ In doing so, the ordinances may generally restrict where commercial businesses can be located, and that restriction may in turn limit where, for example, a bookstore can be located.¹²⁴ This is permissible¹²⁵ because a zoning law that focuses on a category of “commercial business” is neutral as to any speech that takes place within the business. It is irrelevant that the specific business affected by the ordinance is a bookstore; it matters only that it is a commercial business and not, for example, an apartment building, which is not zoned as a “business” but as a multi-family residential unit.¹²⁶ Similarly, it is not unconstitutional to deny a zoning variance for a church¹²⁷ or a newsstand (or similar, expressive activities) if the decision to deny the variance is based on criteria independent of the religious activity or speech taking place in those locations.¹²⁸

But it is *not* permissible to create a zoning ordinance that restricts, for example, the location of adult bookstores.¹²⁹ This is because such an ordinance would impose a government regulation on the basis of the speech contained in the store—*i.e.*, the city is treating adult bookstores differently than other, similar businesses (bookstores, theaters) *because* adult bookstores contain obscene, sexual, or pornographic content.¹³⁰ This does not mean that a zoning ordinance that regulates adult bookstores is *never* constitutional.

¹²² *Id.* at 182-83.

¹²³ *Id.* at 183.

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ Importantly, zoning restrictions for churches must also comply with the Religious Land Use and Institutionalized Persons Act (“RLUIPA”), which protects religious practice from land use laws that either impose a “substantial burden” or treat a religious institution on “less than equal terms” as non-religious institutions. 42 U.S.C. § 2000cc(a) and (b). In other words, cities may impose zoning restrictions on churches but may not treat them differently because they are religious institutions. *See Centro Familiar Cristiano Buenas Nuevas v. City of Yuma*, 651 F.3d 1163, 1171-73 (9th Cir. 2011). Similarly, a city cannot impose zoning requirements so onerous as to make it virtually impossible to site a particular church, for example. *See Int'l Church of Foursquare Gospel v. City of San Leandro*, 673 F.3d 1059, 1070-71 (9th Cir. 2011).

¹²⁸ *See Milwaukie Co. of Jehovah's Witnesses v. Muen*, 214 Or. 281 (1958); *City of Lakewood v. Plain Dealer Pub. Co.*, 486 U.S. 750 (1988).

¹²⁹ *Tidymon*, 306 Or. at 185-86.

¹³⁰ *Id.*

But in order to be considered permissible under the First Amendment, the ordinance must be premised on the specific, objective effects of an adult bookstore’s location—such as increased traffic flow, crime rates in other adult bookstore locations, or a documented effect on housing prices.¹³¹

The bottom line is that although cities can zone buildings and businesses based on almost any possible criteria, they cannot use zoning ordinances to protect citizens from hearing offensive speech or to restrict the proliferation of certain speech.

a. “Vice” Industries

Zoning laws often seek to regulate the location of certain activities that are considered unsavory or undesirable. Examples may include strip clubs, liquor stores, or cannabis dispensaries. The same rules that apply to zoning laws generally apply to these “vice” industries. Here is how it works:

- **Liquor Stores.** No free speech rights are implicated because zoning laws would be regulating the product, not any message. A city should not, however, impose a ban on signs advertising alcohol sales.
- **Cannabis Dispensaries.** No free speech rights are implicated for the same reason as liquor stores; but cities should not impose a ban on signs advertising cannabis.
- **Strip clubs.** As discussed above, nude dancing is considered “expressive activity.” Therefore, although strip clubs can be zoned the same way as other commercial activities they cannot be targeted or singled out on the basis that they offer nude dancing because that would be an unconstitutional restraint on expressive conduct.

3. City Permits for Private Businesses

Private businesses and nonprofits sometimes seek permits to conduct events on city property. For example, a farmer’s market might seek a permit to use a city park on Saturdays—or a nonprofit might seek a permit to sponsor a run through downtown. The issue of permits is discussed elsewhere in this section and in this chapter. But the key rule to keep in mind is this: permit schemes must rely on objective, consistent criteria

¹³¹ *Id.* at 188-89 (explaining that zoning ordinance would need to focus on harms other than the harm of being exposed to offensive speech); *Ore. Entertainment Corp. v. City of Beaverton*, 172 Or. App. 361, 369-70 (holding that city’s denial of conditional use permit for 24-hour adult video store was not unconstitutional because it based its denial on criteria such as crime rates and effects on rental vacancies).

(e.g., location, time, crowd size, etc.) and cannot be tied to the purpose or message of the group seeking the permit.¹³²

Beyond that general rule, a couple additional rules are important to keep in mind when issuing permits to commercial activity. First, a city cannot use the permit system to censor the content of media being shown during an event.¹³³ Permits must be issued on an objective, neutral basis and should not involve reviewing the content of a movie, a theater production, pamphlets, or any other expressive material.¹³⁴

Second, private entities that use public property—such as a farmer’s market—must contend with other members of the public who also have free speech rights in those spaces. This situation implicates two First Amendment rights: the individual’s right to speak and the private group’s right to control its message (discussed in greater detail elsewhere in this chapter). For example, a person who stands on the fringe of an event in a public park and shouts sexist epithets at women will undoubtedly have an effect on the event and its patrons’ experience.¹³⁵ However, in spite of the potential for interference with the event, a city cannot ban or evict a speaker, even if their speech interferes with a private event.¹³⁶ It also cannot allow permittees to evict individuals for exercising their free speech rights—*i.e.*, the farmer’s market cannot remove people for reasons the city would not otherwise be allowed to rely on to do the same.¹³⁷ The city can, however, impose reasonable “time, place, manner” restrictions, as discussed elsewhere in this chapter.¹³⁸ The exception to this rule is if a person attempts to *participate* in an event in such a way that changes or confuses the message of the event.¹³⁹ This issue is discussed at length in the “Freedom of Association” section of this chapter.

III. Freedom of Religion

Section Overview

¹³² *Shuttlesworth v. City of Birmingham, Ala.*, 394 U.S. 147, 150-51 (1969).

¹³³ *City of Portland v. Welch*, 229 Or. 308 (1961) (en banc).

¹³⁴ *Id.* at 320-21.

¹³⁵ *Gathright*, 439 F.3d at 575.

¹³⁶ *Id.* at 578-79.

¹³⁷ *Id.* at 581.

¹³⁸ *Id.* (upholding injunction that allowed city to remove speakers whose presence creates an “insurmountable” impediment to pedestrian or vehicular traffic).

¹³⁹ *Hurley v. Irish-Am. Gay, Lesbian, and Bisexual Group of Boston*, 515 U.S. 557 (1995).

- Government cannot favor religion or inhibit it. It must remain neutral to religion in every circumstance.
- Cities should focus holiday displays on quasi-secular symbols, such as Christmas trees and menorahs, and avoid religious symbols such as nativity scenes.
- Prayer before public meetings can be acceptable, but it should not involve preaching, and it should not be led by city officials.

This section focuses primarily on three situations that commonly arise for city governments: public religious displays, prayer, and ceremonies. Religious freedom issues arise in many other contexts, however, and certain general principles apply regardless of the situation.

Under the Establishment and Free Exercise Clauses of the First Amendment, which prohibit the government from “establishing” a religion or discriminating on the basis of religious belief, a law is constitutional if the following criteria are met: “(1) the law must reflect a clearly secular legislative purpose; (2) it must have a primary effect that neither advances nor inhibits religion (as distinguished from an incidental effect); and (3) it must avoid excessive government entanglement with religion.”¹⁴⁰

The overarching rule is neutrality.¹⁴¹ City codes, ordinances, laws, and programs must treat religious groups and organizations exactly as they treat secular groups and organizations.¹⁴² This rule runs counter to a common misconception that the government is prohibited from giving money or other support to religious groups. In fact, the opposite is true: the government cannot treat religious groups differently than secular groups—for better or for worse.¹⁴³ This is the same principle found in the rule against viewpoint discrimination: the government must remain neutral and objective and cannot favor one perspective over another. And the inverse is also true. If a law is neutral and

¹⁴⁰ *Eugene Sand & Gravel, Inc. v. City of Eugene*, 276 Or. 1007, 1012-13 (1976) (adopting the standard set out in *Lemon v. Kurtzman*, 403 U.S. 602 (1971)) (internal quotation marks omitted).

¹⁴¹ *Good News Club v. Milford Central School*, 533 U.S. 98, 114 (2001).

¹⁴² *Id.*; see also *Espinoza v. Mont. Dep’t. of Rev.*, 140 S. Ct. 2246, 2255-57 (2020) (holding that Montana could not withhold government aid to religious institutions).

¹⁴³ *Id.*

generally applicable, it is not unconstitutional just because it happens to create an incidental burden on religious freedom.¹⁴⁴

Beyond those general principles, which apply to any law or ordinance a city adopts, the following categories present common or frequent issues for city governments.

A. Public Religious Displays

Public religious displays fall into two categories: private displays on public property and public displays erected by a city. The former scenario—private displays on public property—often involves a cross erected in a public park as a memorial or protest. Cities should allow these displays unless they forbid *all* private memorials.¹⁴⁵ The exception would be if the cross were erected in a location (*e.g.*, the roof of city hall) that was likely to imply that the government was endorsing the Christian religion.¹⁴⁶ In that case, a court would likely order the cross removed.

The latter scenario—public displays erected by a city—is less permissive. Because a city cannot endorse a religion, it generally cannot display religious iconography (*e.g.*, the Ten Commandments) because this implies that the government is endorsing the Judeo-Christian religious tradition.¹⁴⁷ This goes back to the principle of neutrality discussed above.¹⁴⁸ The government has an obligation to remain neutral on the subject of religion, and displaying religious texts or symbols is not considered neutral.¹⁴⁹

Another circumstance where this issue arises is in connection with holiday displays. Many cities erect Christmas trees or nativity displays each December. There is no categorical rule against holiday displays, but there are two guidelines. First, holiday displays on public property should not include explicitly religious iconography (*e.g.*, nativity scenes), but can include iconography that carries both a secular and religious message, such as a Christmas tree or a menorah.¹⁵⁰ Second, if the city's holiday display is on private property and includes a variety of otherwise-secular iconography, it can include a nativity scene or other explicitly religious symbols.¹⁵¹

¹⁴⁴ *Empl. Div., Dep't. of Human Resources of Ore. v. Smith*, 494 U.S. 872 (1990), superseded by statute *vis-à-vis* federal government only; *City of Boerne v. Flores*, 521 U.S. 507 (1997).

¹⁴⁵ See *Eugene Sand & Gravel*, 276 Or. at 1026.

¹⁴⁶ *Id.* (holding that erection of cross in city park was constitutionally allowable because it did not create any “excessive entanglement” with the city).

¹⁴⁷ *McCreary Co. v. ACLU of Kentucky*, 545 U.S. 844 (2005).

¹⁴⁸ *Id.* at 875-76.

¹⁴⁹ *Id.*

¹⁵⁰ See, *e.g.*, *County of Allegheny v. ACLU*, 492 U.S. 573 (1989).

¹⁵¹ *Lynch v. Donnelly*, 465 U.S. 668 (1984).

First Amendment Best Practice: In order to avoid legal controversy with holiday displays, confine them to secular or quasi-secular symbols, such as Christmas trees and menorahs.

B. Prayer

Prayer before a public meeting is sometimes permissible. For example, prayer is permissible at the beginning of a public meeting where it is “meant to lend gravity to the occasion and reflect values long part of the Nation’s heritage” and delivered by a chaplain who delivers a prayer that can “find appreciation among people of all faiths.”¹⁵² But a prayer cannot be used to “denigrate nonbelievers or religious minorities, threaten damnation, or preach conversion.”¹⁵³ This tradition of opening prayers delivered by a chaplain is referred to as the “legislative prayer tradition.”¹⁵⁴

In most other situations, however, prayer at public meetings is prohibited. For example, prayer at public meetings is not permissible when members of the audience—particularly children—are required to be present for the prayer.¹⁵⁵ Prayer at public meetings is also unlikely to be permissible if public officials—rather than a chaplain—lead the prayer, because public officials leading the prayer gives the appearance of the government endorsement of a particular religion.¹⁵⁶

First Amendment Best Practice: Ask local clergy from a variety of faiths to offer a pre-meeting invocation—or offer none at all. A good substitute is a moment of silence.

C. Ceremonial Considerations

Finally, religious freedom issues sometimes arise in ceremonial contexts. The Oregon Constitution clearly states that there can be no religious qualification for office¹⁵⁷ and requires that “the mode of administering an oath, or affirmation shall be such as may be consistent with, and binding upon the conscience of the person to whom such oath or affirmation may be administered.”¹⁵⁸ This means that elected officials cannot be required to swear on a Bible or to say “under God.” Instead, the oath of office must comport with

¹⁵² *Town of Greece v. Galloway*, 572 U.S. 565, 582-83 (2014).

¹⁵³ *Id.* at 583.

¹⁵⁴ *Freedom From Religion Foundation, Inc. v. Chino Valley Unified Sch. Dist. Bd. of Educ.*, 896 F.3d 1132, 1145 (9th Cir. 2018).

¹⁵⁵ *Id.*

¹⁵⁶ See *Lund v. Rowan County*, 863 F.3d 268, 278-79 (4th Cir. 2017).

¹⁵⁷ Or. Const. art. I, § 4.

¹⁵⁸ Or. Const. art. I § 7.

the elected official's own beliefs and conscience—and should be modified accordingly. To the extent that a city charter addresses oaths of office, it should mirror the language of Article I Section 7 and should not require any particular religious oath.

IV. Freedom of the Press

Section Overview

- The government cannot prevent the publication of unflattering, sensitive, or embargoed stories.
- The standard for a public official to sue a press outlet for libel is very high, and these lawsuits are almost never successful.

Much of the interaction between the press and city government is controlled by state statutes relating to public meetings and access to public records. Those laws and guidance from the Oregon Attorney General's office are found in the Attorney General's Public Records and Meetings Manual.¹⁵⁹ This section does not discuss those laws but does provide a link to them in the footnotes.

First Amendment law is specific to the press. The rules and principles outlined elsewhere in this chapter apply equally to the press. Media companies are subject to the same zoning and signage laws that regulate other companies; reporters have the same free speech rights in meetings and online as do other private individuals; and, as with any other group or entity, city governments cannot discriminate against reporters or media outlets because of their viewpoint.

This section therefore focuses on two issues that arise most often with respect to the press: prior restraint and libel laws. These issues are not only applicable to the press, but because they arise most often in that context they are included in this section.

1. Prior Restraint

“Prior restraint” refers to the practice of preventing someone from speaking before they attempt to do so.¹⁶⁰ The prior restraint issue arises in many circumstances,

¹⁵⁹ Ellen F. Rosenblum, Attorney General’s Public Records and Meetings Manual, Or. Dept. of Justice (June 2019), https://www.doj.state.or.us/wp-content/uploads/2019/07/public_records_and_meetings_manual.pdf (accessed Feb. 28, 2022).

¹⁶⁰ See e.g., *State ex rel. Sports Management News v. Nachtigal*, 324 Or. 80, 87-88 (1996).

but most often with respect to the media because that is most often where sensitive information is published.¹⁶¹ The prohibition on prior restraint means, as a practical matter, that city officials cannot take any action to prevent a newspaper, TV station, or other media outlet from publishing information—other than to try to persuade them not to do so. This also means that the common practice of embargos on news announcements must be based on nothing more restrictive than the honor system. Newspapers cannot be punished for breaking an embargo, and cities cannot use the court system to enjoin a news story prior to publication.

2. Libel

Because media outlets are in the business of publishing photos and news stories, they are the most common recipients of libel claims. “Libel” is a civil action alleging that someone published a defamatory statement. Bringing a libel claim against a media outlet is difficult—and it is not enough to merely allege that the outlet printed false information. There are two primary reasons for these legal barriers. One arises from case law, the other arises from state statutes.

First, when alleged false statements relate to a public figure¹⁶² in connection with a question of public interest, the First Amendment requires a higher burden of proof.¹⁶³ The plaintiff must show not only that the statements were false but that the defendant—the media outlet—knew of the falsity or acted in reckless disregard of its falsity.¹⁶⁴ That is a hard standard to meet because few media outlets publish false statements on purpose. The higher burden of proof therefore forecloses most libel claims brought by public officials.

Second, Oregon has enacted a statute that allows a defendant—*e.g.*, media outlets—to move to “strike” (dismiss) libel claim under certain circumstances.¹⁶⁵ These motions are allowed against libel claims (1) arising out of legislative, executive, or judicial proceedings; (2) relating to any issues under consideration in those proceedings; (3) arising out of statements made in a public place in connection with an issue of public interest; or (4) relating to the exercise of the rights to free speech or to petition the

¹⁶¹ *Id.* at 83 (Adidas brought suit against a sports magazine in order to enjoin it from printing adidas trade secrets).

¹⁶² “Public figure” can include general public figures, such as a governor or a mayor, and limited-purpose public figures, such as a PTA president who heads up a campaign in favor of a new school bond.

¹⁶³ *Staten v. Steel*, 222 Or. App. 17, 37 (2008) (relying on *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964)).

¹⁶⁴ *Id.*

¹⁶⁵ ORS 31.150.

government on any issue of public interest.¹⁶⁶ If the motion is granted, the libel claim is dismissed.¹⁶⁷

Taking these two standards together, a libel claim brought by an elected or city official against a media outlet is difficult to win.¹⁶⁸ An alternative to a libel claim is to make a formal demand for a retraction or correction¹⁶⁹; but beyond that—and for the reasons discussed here and throughout this chapter—the government has little power to control what the press publishes.

V. Freedom of Assembly

Section Overview

- Freedom of assembly includes two freedoms: to assemble in public spaces and to associate with groups or organizations of one's choosing.
- Cities can regulate protests and demonstrations but should do so using neutral, generally applicable permitting systems and time, place, manner constraints.
- Groups cannot be forced to admit members whose membership would detract from their purpose or message.

Freedom of assembly involves two freedoms: the freedom to assemble in public (to protest, picket, demonstrate, etc.) and the freedom to associate with groups of one's choice.¹⁷⁰ Although these freedoms derive from the same clause of the First Amendment, they are distinct and raise distinct issues and considerations.

¹⁶⁶ ORS 31.150(2)(a)-(d).

¹⁶⁷ ORS 31.150(1).

¹⁶⁸ These standards apply to any allegedly defamatory material, whether or not it is published by a media outlet. This section focuses on the press, but libel suits can be brought against anyone who disseminates an allegedly false statement.

¹⁶⁹ ORS 31.215.

¹⁷⁰ *Shuttlesworth*, 394 U.S. at 152 (holding that the First Amendment protects picketing, parading, and similar public demonstrations); *Williams v. Rhodes*, 393 U.S. 23, 30 (1968) (identifying freedom of association; here, freedom to associate with a particular political party).

A. Protests and Demonstrations

Protests, picketing, and demonstrations touch on some of the same issues already discussed in the “Free Speech” section of this chapter. For example, cities can regulate public gatherings using time, place, manner constraints—just as they can with speech.¹⁷¹ And the same rules apply to these restraints: they must be reasonable and objective in that they (1) do not prohibit assembly entirely; (2) apply to everyone using the sidewalk, park, or other public space at issue; and (3) have nothing to do with the subject matter of the protest or the opinion of the participants.¹⁷² This issue also implicates viewpoint discrimination: it is impermissible to target protests or demonstrations on the basis of the viewpoint or opinion being espoused.¹⁷³

Protests and demonstrations also raise issues of speech versus conduct. Political activists often use expressive conduct to illustrate or emphasize a point or draw attention to an issue. This kind of expressive conduct is protected by the First Amendment. Examples might include flag burning,¹⁷⁴ wearing uniforms, badges, armbands, or other attire intended to convey a political message,¹⁷⁵ or carrying placards, signs, or flags.¹⁷⁶

Sometimes, however, protests and demonstrations involve conduct that is not expressive and is therefore not protected. This is especially true in bigger protests, where a larger number of people creates a greater likelihood that some people will behave in a way that exceeds the bounds of protected activity. Examples of non-expressive conduct that is not protected and can be grounds for an arrest include physical assaults, rioting¹⁷⁷, or property damage.

¹⁷¹ *Police Dept. of City of Chicago v. Mosley*, 408 U.S. 92, 98 (1972) (“We have continually recognized that reasonable ‘time, place and manner’ regulations of picketing may be necessary to further significant governmental interests.”); *State v. Babson*, 355 Or. 383, 407-08 (2014) (en banc).

¹⁷² *Mosley*, 408 U.S. at 97-99 (holding that ban on labor picketing was unconstitutional because it targets picketing on the basis of subject matter); *Barr v. Am. Ass’n. of Political Consultants, Inc.* 140 S. Ct. 2335, 2347 (2020) (holding that it was unconstitutional to create statutory exception for robocalls seeking to collect government-owned debts); *Eagle Point Educ. Ass’n./SOBC/OEA v. Jackson Cnty. Sch. Dist. No. 9*, 880 F.3d 1097, 1105-06 (9th Cir. 2018) (holding that restrictions adopted prior to teacher strike were unconstitutional because they were not reasonable and targeted a particular viewpoint).

¹⁷³ *Eagle Point*, 880 F.3d at 1106-07.

¹⁷⁴ *Johnson*, 491 U.S. at 404-06.

¹⁷⁵ *Tinker v. Des Moines Ind. Comm. Sch. Dist.*, 393 U.S. 503, 505 (1969).

¹⁷⁶ *Collin v. Smith*, 578 F.2d 1197, 1201 (7th Cir. 1978), *cert. denied Smith v. Collin*, 439 U.S. 916 (1978); *Stromberg v. Cal.*, 283 U.S. 359 (1931).

¹⁷⁷ *State v. Chakerian*, 325 Or. 370 (1997).

1. Permits and Licensing

Protests and demonstrations raise additional considerations beyond those already discussed elsewhere in this chapter. One of those considerations is “discretion,” which refers to the government’s ability to make choices about when and to whom permits are issued or when to make arrests. Many city governments use a permit system to manage activities and events such as parades, concerts, fundraisers, and private events in public parks. However, a permitting system can function as a prior restraint on assembly and speech—which means that the system can allow a government to preemptively prevent people from exercising their freedom of speech and freedom of assembly rights. Because of this, courts have created rules governing the criteria cities can rely on when deciding whether to issue permits.

A license or permit system must have “narrow, objective, and definite standards” to guide whoever makes the decision whether to issue permits.¹⁷⁸ The system cannot allow city officials to rely on their own judgement about the public welfare, peace, health, good order, morals, convenience, or similarly abstract, subjective concepts.¹⁷⁹ This is because allowing officials to use their discretion as to who can have a permit opens the door to decisions about whose speech is worth hearing and whose is not, which, as explained elsewhere in this chapter, is never allowed.¹⁸⁰ That does not mean that city officials can never exercise discretion—but they cannot exercise “unbridled” or “unfettered” discretion.¹⁸¹

So, for example, a permit system can distinguish between expressive and non-expressive activity—for example, between an anti-war demonstration and a farmer’s market.¹⁸² But a permit system cannot distinguish between an anti-war protest and an anti-vaccine protest, for example. A permit system can also allow city officials to put conditions on the permit that are designed to keep the event safe, allow for multiple activities in one public space, and control the flow of traffic.¹⁸³ This includes requiring participants to remain on sidewalks, requiring a particular route, imposing waste removal requirements, and similar conditions.¹⁸⁴ It is also acceptable to impose a permit fee, to

¹⁷⁸ See *Shuttlesworth*, 394 U.S. at 150-51.

¹⁷⁹ *Id.* at 150.

¹⁸⁰ *Id.*

¹⁸¹ *Long Beach Area Peace Network v. City of Long Beach*, 574 F.3d 1011, 1019-20 (9th Cir. 2009) (citing *City of Lakewood v. Plain Dealer Publ’g Co.*, 486 U.S. 750, 755-56 (1988)).

¹⁸² *Id.* at 1027-28.

¹⁸³ *Id.* at 1028.

¹⁸⁴ *Id.*

require documentation showing indigent status in order to waive the fee, and to require proof of insurance.¹⁸⁵ Finally, a city can impose advance-notice requirements if the city allows for alternative means of expression for truly spontaneous events—but it must have a legitimate interest (e.g., blocking traffic, disrupting businesses, etc.) before requiring 24-hours’ or more notice.¹⁸⁶

The bottom line is that cities may permissibly require permits for parades, demonstrations, and protests (among other events), and cities can impose conditions and requirements on obtaining those permits. Cities cannot, however, use the permit system to discriminate between groups or viewpoints, and cannot use the permit system to make speech in public spaces virtually impossible.

First Amendment Best Practice: Draft permitting ordinances as specifically as possible. Identify exactly which documents are necessary to show proof of insurance or financial status, provide clear criteria for conditional permits, create a consistent fee schedule, and identify typical routes and hours of use that are compatible with large-scale events.

B. Freedom of Association

The other half of the “freedom of assembly” is the freedom of association: the freedom to join, or not join, a particular group. Practically, this means that people cannot be punished for joining a group¹⁸⁷, cannot be forced to disclose what groups they belong to¹⁸⁸, and cannot be forced to join a group they do not want to join or whose views they do not share.¹⁸⁹

Much of what constitutes “freedom of association” is addressed elsewhere, whether through freedom of assembly, freedom of speech, or campaign finance laws, which are discussed at length in the Election Law chapter of this handbook. However, one important note for cities is that, in some cases, the freedom of association prohibits a government from enforcing non-discrimination laws. Because people have the right to associate in groups that espouse particular beliefs or that support particular messages,

¹⁸⁵ *Id.* at 1028-32.

¹⁸⁶ *Id.* at 1036-38 (relying on *Santa Monica Food Not Bombs v. City of Santa Monica*, 450 F.3d 1022 (9th Cir. 2006)).

¹⁸⁷ *De Jonge*, 299 U.S. 353; *Dawson v. Delaware*, 503 U.S. 159 (1992).

¹⁸⁸ *NAACP v. Button*, 371 U.S. 415 (1963); *Americans for Prosperity Foundation v. Bonta*, 141 S. Ct. 2373 (2021).

¹⁸⁹ *Janus v. AFSCME Council 31*, 138 S. Ct. 2448, 2463 (2018); *Roberts v. U.S. Jaycees*, 468 U.S. 609, 623 (1984).

they have a right to control who participates in those groups *if* the membership of the group has some bearing on the group's message.

For example, a St. Patrick's Day parade that is designed with one message in mind—celebrating St. Patrick's Day—can exclude floats that carry a different message, even if that message is one that is otherwise protected by public accommodation laws.¹⁹⁰ On the other hand, a chamber of commerce association, whose purpose is to promote local business, cannot exclude women as members because the sex of the group's members is irrelevant to its message.¹⁹¹

This is another complicated area of law. In order to apply it correctly, consider the following four questions:

- 1) Is a private organization or membership group involved? *If yes:*
- 2) What is its message or its mission?
- 3) Does the excluded membership have a relationship to that message or mission? *If yes:*
- 4) Would inclusion of that membership negate or dilute the message, or cause confusion about what it is?

If the answer to No. 4 is “yes,” then the government cannot use public accommodation laws to require the group to accept the excluded members. The freedom to associate carries with it the freedom *not* to associate.¹⁹²

VI. Freedom to Petition the Government

Finally, the First Amendment recognizes a right to petition the government for the redress of grievances.¹⁹³ The right to petition the government guarantees the right to direct speech *to the government*—a necessary part of self-governance.¹⁹⁴ However, regardless of where speech is directed, it is analyzed under the freedom of speech principles described earlier in this chapter.

¹⁹⁰ *Hurley*, 515 U.S. 557 (holding that St. Patrick's Day parade could exclude gay pride float); *see also Green*, 533 F. Supp. 3d at 997-98.

¹⁹¹ *Roberts*, 468 U.S. at 623.

¹⁹² *Id.*

¹⁹³ U.S. Const. amend. I; *Wayte v. U.S.*, 470 U.S. 598, 610-11 (1985).

¹⁹⁴ *McDonald v. Smith*, 472 U.S. 479, 482-83 (1985).

VII. Enforcement of the First Amendment

Section Overview

- Individuals and private entities can sue the government for infringing their First Amendment rights.
- They can seek money damages or declaratory or injunctive relief.
- They can sue in state or federal court.

If a person or group believes that their First Amendment rights have been violated, they can sue a city. The primary means of bringing a First Amendment lawsuit against a city government is through 42 U.S.C. § 1983, usually referred to as a “Section 1983 claim.” Section 1983 allows a person to bring suits concerning statutes, ordinances, regulations, customs, or usage that causes a deprivation of constitutional rights.¹⁹⁵ The statute allows the plaintiff to seek money damages or equitable relief—which typically refers to either declaratory or injunctive relief.¹⁹⁶ “Declaratory” relief is a court order declaring a law unconstitutional. “Injunctive” relief is a court order requiring a city to stop enforcing an unconstitutional law.

Importantly, a finding that part of a statute is unconstitutional does not mean that the entire statute is unconstitutional.¹⁹⁷ This principle is called severability. It is also possible for a court to give a “narrowing construction” to a statute that is written too broadly.¹⁹⁸ These principles make it possible for a court to preserve parts of a law or mechanisms of enforcement, rather than striking it down completely. If a court applies one of these principles, it will not issue a sweeping injunction to strike down the entire law. Further, if a court does issue an injunction that prohibits a city from enforcing the law, the court will often explain why the statute is unconstitutional—which provides guidance that the city can use to draft a narrower, permissible law.

A person can bring a First Amendment lawsuit in either state or federal court. Because the claim arises under a federal statute and alleges a violation of federal civil

¹⁹⁵ 42 U.S.C. § 1983.

¹⁹⁶ *Id.*; see also *Outdoor Media*, 340 Or. at 285 (explaining that where plaintiff is not seeking money damages, the only remedy available is injunctive relief.)

¹⁹⁷ *Outdoor Media*, 340 Or. at 300; *City University v. Oregon Office of Educ. Policy*, 320 Or. 422, 425 (1994)

¹⁹⁸ *State v. Moyle*, 299 Or. 691 (1985) (en banc) (applying narrowing construction to harassment statute to confine its meaning to apply only to threats of imminent physical injury).

rights, it can be filed in federal court under federal question jurisdiction.¹⁹⁹ If it is filed in federal court, the first step is for a federal district court—located in Portland, Eugene, Medford, or Pendleton—to hear the suit. Any eventual decision can be appealed to the Ninth Circuit Court of Appeals and, potentially, the United States Supreme Court.

Alternatively, the suit can be filed in state court—usually in the circuit court in the county where the plaintiff lives or the city is situated. Any eventual decision in that court can be appealed to the Oregon Court of Appeals and, potentially, the Oregon Supreme Court. Finally, any decision that relies on an interpretation of the First Amendment could potentially be appealed to the United State Supreme Court. However, a decision that relies on an interpretation of Article I, Section 8 can almost never be appealed to the United State Supreme Court because that cannot interpret or enforce a state constitution.²⁰⁰

¹⁹⁹ 28 U.S.C. § 1331.

²⁰⁰ The exception is if the state supreme court interprets the Oregon Constitution in a way that violates the First Amendment.