

Discrimination, Distribution, and City Regulation of Speech

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City attorneys are often obligated to be on the front lines of conflict between public regulation and freedom of speech. While trying to run a city, keep traffic moving, maintain an aesthetic appearance, preserve public safety and order, and prevent fraud or violence, you often run up against people who want to speak, march, demonstrate, picket, leaflet, or sell or solicit in the street. It has been my experience that cities are remarkably conscientious about trying to give breathing room for speech. But First Amendment law gives you two distinct sets of commands about regulating speech in the public forum that, I will suggest, sometimes seem to conflict with one another.

First, you may not discriminate, even in the allocation of public property, against speakers for their message, ideology, or subject matter. The Supreme Court has long enforced this ban on content-based discrimination in the public forum¹ and has treated as implicit or presumptive content discrimination any scheme that gives standardless discretion to the mayor or the police to pick and choose among speakers² or allows the hostility of the audience to determine the amount of speech that is heard.³ And, second, you must take care not to restrict too greatly the distribution of speech, even if you do so through content-neutral laws.

This second, distributional constraint holds that a city is a type of public trustee or guardian for First Amendment rights in the public square,

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1. *See, e.g.*, *Boos v. Barry*, 485 U.S. 312, 320 (1988); *Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 95 (1972).

2. *See, e.g.*, *City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 772 (1988) (invalidating mayor's standardless discretion over the placement of newsracks on public property).

3. *See, e.g.*, *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 129, 137 (1992) (invalidating law calibrating parade user's fee to the expected hostility of the audience).

not merely a private property owner who may exercise complete managerial discretion there.⁴ Speakers have a prescriptive easement of access to some kinds of public property, which serve as a place of last resort for people without significant private resources to speak. Those who cannot command the airwaves, the cable network or the Internet may still stand on a soapbox on a street corner or hand out crudely-lettered leaflets to passersby. Thus public spaces provide some ultimate distributional floor ensuring that poorly financed causes may be heard.⁵

In recent years, the Supreme Court has limited the force of this distributional constraint, reading the First Amendment to give cities considerable managerial leeway to impose content-neutral, time, place, and manner regulations on public spaces.⁶ Cautioning that judges should not replace city managers and city officials as the administrators of public spaces, the Court has required deference to cities unless they impose *substantially* greater limitations on speech than are required by the demands of order or aesthetics or protection of the citizenry from fraud, violence, and other dangers.⁷ The Court has thus tried to signal that it is not going to strike down every time, place, and manner regulation that might have been drawn more narrowly, might have applied to a few less portions of the city, or might have been less encompassing. Mere suggestions of less restrictive alternatives will not be sufficient to invalidate such regulations. Rather, courts will defer to cities here so long as they have a good empirical basis for their regulations and they have not banned so much speech as to wipe out entirely speakers' space of last resort.

The discrimination and distribution constraints, however, sometimes seem to catch cities in a kind of pincer movement. Broad prohibitions of conduct in certain areas of a city—such as a peddling ban in a downtown shopping district or a flat ban on any activity other than ingress or egress within a certain distance of an abortion clinic—may prevent speech altogether. So, cities that are conscientious about their distributional role in providing speaking opportunities may try to create exceptions to such prohibitions for conduct closely connected to speech. But they will not want to make such exceptions too broad, lest they immunize bad speakers who

4. See *Hague v. CIO*, 307 U.S. 496, 515 (1939) ("Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions.").

5. See *Martin v. City of Struthers*, 319 U.S. 141, 146 (1943) (noting that handbilling is "essential to the poorly financed causes of little people").

6. See, e.g., *Ward v. Rock Against Racism*, 491 U.S. 781 (1989); *Clark v. Community for Creative Non-Violence*, 468 U.S. 288 (1984).

7. See, e.g., *Ward v. Rock Against Racism*, 491 U.S. at 798-99; *Clark v. Community for Creative Non-Violence*, 468 U.S. at 299.

cause the harms they want to prevent along with good speakers who do not. Any exception that seeks to distinguish the good speakers from the bad, however, runs up against the antidiscrimination constraint: particularized, speaker-based exceptions are likely to render the law impermissibly content-based. The ironic result is that First Amendment law seems to prefer flat bans prohibiting more speech to selective bans prohibiting less speech.

Two recent controversies illustrate the problem. First, recall recent battles over the regulation of street vending of message-bearing merchandise, especially slogan-emblazoned T-shirts. How did the T-shirt wars begin? The seminal case was *Gaudiya Vaishnava Society v. City & County of San Francisco*.⁸ In *Gaudiya*, the Ninth Circuit faced the novel question whether the First Amendment might be violated by a permit scheme for sales of expressive merchandise—merchandise with a message printed on it, such as Greenpeace key rings, California PIRG coffee mugs, or “Save the Whales” T-shirts. The Ninth Circuit held that sales of merchandise that are inextricably intertwined with political, religious or ideological messages do count as speech and thus regulation of such activity triggers First Amendment review.⁹ Having reached such a novel holding, the court went on to apply well-settled law to invalidate the San Francisco ordinance, holding that it granted impermissibly standardless discretion to city officials over permission to speak in the public forum.¹⁰

In the aftermath of *Gaudiya*, a variety of non-profit groups expanded T-shirt sales on the streets of various cities, especially in areas with a flourishing tourist trade, such as Honolulu and Washington, D.C.—which I will focus on—as well as Las Vegas, the port of San Diego, and Key West.¹¹ Unlike groups selling T-shirts as an incident to seeking signatures on petitions or handing out flyers and leaflets about their cause—as the Ninth Circuit appeared to envision the plaintiffs in *Gaudiya*—some of these groups became mass merchandisers of T-shirts pure and simple, using the public forum as a tax-free, rent-free flea market or bazaar. At many of the tables piled high with T-shirts on public sidewalks, the only message being actively conveyed was “5 shirts for \$20.” And yet vendors relied upon *Gaudiya* to assert that they had something like an absolute First Amendment right to engage in such sales, so long as there was some message somewhere on their T-shirts.

8. 952 F.2d 1059 (9th Cir. 1990), *cert. denied*, 504 U.S. 914 (1992).

9. *See id.* at 1063-65.

10. *See id.* at 1065-66.

11. *See One World One Family Now, Inc. v. Nevada*, 860 F. Supp. 1457, 1461 (D. Nev. 1994); *One World One Family Now v. City of Key West*, 852 F. Supp. 1005, 1008 (S.D. Fla. 1994); *ISKCON v. San Diego Unified Port Dist.*, No. 91-1768-B (S.D. Cal. Dec. 10, 1992).

The City of Honolulu experienced an especially strong wave of such T-shirt vending in the mid-1990's. Kalakaua Avenue, the main thoroughfare in Waikiki Beach, was virtually taken over by row after row of long, stationary tables, some complete with thatched fringe tops, at which T-shirts imprinted with colorful pictures of parrots and tropical fish alongside messages such as "Take it Easy, Meditate, Hang Loose Hawaii" sold very briskly. City officials, faced with mounting complaints that the tables were an eyesore and an obstruction and that the T-shirt sales were undercutting business by local merchants, tried very conscientiously to figure out what they could do within the bounds of the First Amendment. I had the privilege of serving on the City's legal team in this endeavor.¹²

A wide variety of options was discussed, but, in the end, they boiled down to two—apart from then-Mayor Frank Fasi's attempt to discourage the T-shirt sales by airlifting some hundred 1,000-pound potted palms to "beautify" the main spots on the avenue that had been occupied by T-shirt vendors (the vendors simply moved or enjoyed the shade.). The first option was to apply to the T-shirt sales a long-standing ordinance flatly banning all peddling in the Waikiki special district, a uniquely populous and historically significant area, favored by tourists, covering less than three-quarters of a square mile within the City of Honolulu.¹³ This approach had the important virtue of content-neutrality; the peddling ordinance aimed at protecting the historical and aesthetic ambiance and public order of the few small areas such as Waikiki that it covered, and it applied to sales of beach mats and suntan oil as much as to sales of message-bearing T-shirts. But this approach would eliminate street sales of message-bearing T-shirts altogether within the special district of Waikiki.

The City's second option was to pass special legislation allowing some T-shirt sales on public streets and sidewalks of Waikiki but regulating their time, place, or manner—for example, by designating a particular vacant lot as a merchandising site or by allowing T-shirts to be sold by hand rather than from tables. But lest the streets become a mass merchandising free-for-all, where "Just Do It" was as much a ticket to street sale as "Hang Loose Hawaii," any such regulation would have to specify what type of T-shirts could be sold—for example, those with genuine religious, political, philosophical, or ideological content or those sold by non-profit organizations. And any such specification would necessarily have the vice of being content-based.

12. My distinguished colleagues in these efforts were Donna Woo, then Deputy City Attorney, and Professor Jon Van Dyke of the University of Hawaii Law School.

13. See HONOLULU, HAW., REV. ORDINANCES § 29-6.2 (b) (7) (1954).

The choice seemed clear: applying the peddling ordinance ran less First Amendment risk than passing legislation specially exempting T-shirt vendors from its strictures, subject to time, place, and manner regulations. To require the City to scrutinize T-shirt messages for their intellectual content, and thus to require police officers on the beat on crowded city streets to ensure that the exempted merchandise was sufficiently "religious, political, philosophical or ideological," seemed a First Amendment nightmare. Far from being less restrictive of speech than the flat peddling ordinance, such an approach appeared more restrictive, entangling government in elusive content determinations. Nor was it an obvious answer to say all "nonprofits" could simply sell what merchandise they wished, because the Supreme Court has suggested that subject matter distinctions between commercial and noncommercial speech are suspect unless linked to their demonstrably distinctive external effects.¹⁴

Thus, even if the flat ban posed any distributive problem, discriminatory exemptions seemed plainly a cure worse than the disease.¹⁵ The City accordingly, on the advice of the legal team assembled by the City Attorney's office, began enforcing the peddling ordinance, thereby engendering a First Amendment challenge by the two largest T-shirt vendors.¹⁶ After a split district court ruling enjoining enforcement of the peddling ordinance on the side streets but not the main avenues of Waikiki, the Ninth Circuit wholly vindicated the City in *One World One Family Now v. City and County of Honolulu*,¹⁷ which upheld the peddling ordinance as a reasonable time, place, and manner ordinance as applied to expressive T-shirt sales throughout Waikiki.

Other jurisdictions that have taken an approach similar to Honolulu's have been similarly successful in defending against First Amendment challenges. For example, a National Park Service regulation banning peddling on the national Mall and other national parks in D.C. was upheld as applied to sales of religious beads and audio tapes¹⁸ and to sales of mes-

14. See *City of Cincinnati v. Discovery Network, Inc.*, 113 S. Ct. 1505, 1517 (1993) (holding that a city may not ban commercial newsracks while allowing noncommercial newsracks that pose identical aesthetic and obstruction harms).

15. Cf. *Clark v. Community For Creative Non-Violence*, 468 U.S. at 297 (noting that exempting expressive camping from a flat ban on camping on certain national parklands "would present difficult problems for the Park Service").

16. The city council did pass a special time, place and manner regulation of expressive merchandise sales as an interim measure pending the outcome of the lawsuit against enforcement of the antipeddling measure, but it was invalidated at an early stage of the litigation, and the City did not pursue this route further.

17. 76 F.3d 1009 (9th Cir. 1996), *cert. denied*, 117 S.Ct. 554 (1996).

18. See *ISKCON of Potomac, Inc. v. Kennedy*, 61 F.3d 949 (D.C. Cir. 1995).

sage-bearing T-shirts,¹⁹ even though it contained an exception for books, newspapers, leaflets, pamphlets, and buttons.²⁰

But jurisdictions that have taken the alternative approach—of trying to allow but regulate certain sales of expressive merchandise—have sometimes gotten into First Amendment trouble by trying to be more permissive toward speech. For example, when Los Angeles barred peddling of anything on the open thoroughfares of the Venice Boardwalk except by non-profit organizations selling merchandise bearing an ideological, political, religious, or philosophical message—an exception perhaps attempting to comply with *Gaudiya*—the Ninth Circuit invalidated the law on its face,²¹ holding that a city may not privilege non-profit organizations over other persons trying to advance a message by selling merchandise.

For a second illustration of how cities may be caught in a vicegrip between admonitions to increase the distribution of speech in public space, and at the same time, to avoid content discrimination, consider recent controversies over the regulation of demonstrations outside abortion clinics. How should a city regulate loud, potentially obstructive, potentially harassing demonstrators outside an abortion clinic who conscientiously believe that abortion is murder and that they are engaged in a very important form of civil rights protest? Some cities have left to private abortion providers the route of seeking injunctions under general nuisance laws that have the effect of creating a buffer zone or bubble around the clinic.²² Some cities have sought similar effects through legislation.²³

There are two possible types of abortion clinic bubbles. One draws a fixed perimeter, or *cordon sanitaire*, delimiting an area outside an abortion clinic from which all demonstrations are kept at bay. The Supreme Court

19. See *Friends of the Vietnam Veterans Memorial v. Kennedy*, 116 F.3d 495 (D.C. Cir. 1997), cert. denied, 118 S.Ct. 1035 (1998).

20. See *id.* The D.C. Circuit found this exception for certain media, as opposed to certain viewpoints or subject matters, content-neutral rather than content-based and rejected the claim that it undermined the Park Service's claimed objectives. See *id.* at 496. The Ninth Circuit likewise found permissibly content-neutral the Honolulu peddling ordinance's exceptions for newspapers, concessions, parade buttons, and souvenirs. See *One World*, 76 F.3d at 1012-13 n.5 (reasoning that exceptions to otherwise content-neutral ordinances are acceptable so long as they do not enable the city to discriminate on the basis of ideas).

21. See *Perry v. L.A. Police Dep't*, 121 F.3d 1365 (9th Cir. 1997). The court found that the ordinance, even if content-neutral, was insufficiently narrowly tailored because it swept in too much protected speech by persons not affiliated with non-profit corporations. See *id.* But underlying this outcome was plainly the court's concern that "speaker-based discrimination is unacceptable." *Id.*

22. See, e.g., *Schenck v. Pro-Choice Network of Western New York*, 117 S.Ct. 855 (1997); *Madsen v. Women's Health Center, Inc.*, 512 U.S. 753 (1994).

23. See, e.g., *Sabelko v. City of Phoenix*, 120 F.3d 161, 161 n.1 (9th Cir. 1997) (reprinting Phoenix ordinance limiting demonstration activity within one hundred feet of a health care facility).

has upheld such flat area bans, so long as they are not too broad.²⁴ The second kind of bubble, however, is more problematic. Suppose a judge or city council provides that a person entering or exiting an abortion clinic may say to a demonstrator who approaches her, "Stay away; don't talk to me; stand at least eight or ten or fifteen feet away," and have that request enforced. Such a protection in effect creates a floating buffer zone that moves with the person. The Supreme Court, in *Schenck v. Pro-Choice Network*,²⁵ recently struck down such a provision of an injunction, holding that it violated the First Amendment to afford entrants to a clinic the right to banish speakers who would address them to a distance 15 feet away.²⁶

The Court reasoned that a floating buffer zone is content-neutral but is not narrowly tailored to public safety or clinic access because it cuts off too much speech.²⁷ One person walking along a sidewalk near a clinic could effectively create a demonstration-free zone much larger than the one created by a 15- or 36-foot fixed bright line—especially because a shifting line, like a vague statute, creates uncertainty as to where, if anywhere, the anti-abortion speaker may speak at all. In *Sabelko v. City of Phoenix*,²⁸ the Ninth Circuit extended the logic of *Schenck* from floating-bubble injunctions to floating-bubble ordinances, even though the Supreme Court had defended its unusually probing scrutiny of otherwise content-neutral abortion-clinic injunctions on the basis that injunctions, unlike ordinances, are targeted at specific speakers.²⁹

But it is more plausible to see the problem with a floating buffer as the one Justice Scalia identified in his dissent in *Schenck*:³⁰ namely, that the person in the bubble should not be given, in effect, a content-based veto power to say "you annoy me, you offend me, go away." Delegation of veto power to audiences in the public forum has generally been treated as presumptively content-based, and the government has been generally forbidden from preempting speech likely to annoy or offend listeners in the

24. *Madsen*, 512 U.S. at 757 (upholding a 36-foot fixed buffer zone); *Schenck*, 117 S.Ct. at 868 (upholding a 15-foot fixed buffer zone).

25. 117 S.Ct. 855.

26. *See id.* at 867-68.

27. *See id.*

28. 120 F.3d at 165 (invalidating a Phoenix ordinance requiring demonstrators within 100 feet of a health clinic to withdraw at least eight feet from any person who communicates a request that they do so).

29. *See Schenck*, 117 S.Ct. at 864. For an analysis supporting the Ninth Circuit's ultimate result in *Sabelko*, see James Weinstein, *Free Speech, Abortion Access, and the Problem of Judicial Viewpoint Discrimination*, 29 U.C. DAVIS L. REV. 471, 521-542 (1996).

30. *See Schenck*, 117 S.Ct. at 871 (Scalia J., dissenting).

public square.³¹ Thus, *Schenck* and *Sabelko* may have reached the right result on floating buffers but for the wrong reason.

The moral of the story here, as with T-shirt sales, seems to be that flat bans will withstand First Amendment scrutiny more readily than measures that afford official or listener discretion to pick and choose the speech that is to be permitted—even if the latter would permit more speech than the flat ban. Does this mean that governing interpretation of the First Amendment ironically gives cities an incentive to ban more speech? To restrict distribution more than they would otherwise in order to avoid discrimination? The answer is partly, frankly yes. For a number of reasons, the Court has, indeed, long regarded content discrimination as a greater sin under the First Amendment than regulation merely inhibiting the distribution of speech.³² Better that there be no speech in a problematic location than police officers or listeners drawing lines at their excessively subjective discretion.

But the Court has also suggested that there are outer limits to what cities can do with flat bans and that those outer limits are adequate to ensure that minimal distributive concerns will be met. Specifically, flat bans on speech, or on conduct closely associated with speech, are permissible only if not excessively broad. T-shirt peddlers in Honolulu could sell on sidewalks outside Waikiki, and those evicted from the Capital Mall could sell on adjacent D.C. sidewalks. The peddling regulations there operated as place limitations channeling speech elsewhere within a jurisdiction rather than as total medium bans throughout a jurisdiction. Similarly, the fixed buffer zones upheld in the abortion clinic cases were at most 36 feet wide. By contrast, consider *Bery v. City of New York*,³³ in which the Second Circuit struck down New York's scheme for licensing peddlers, as applied to peddlers of public art, holding that the licensing ordinance was so restrictive (800 licenses for a city of 8 million) that it actually operated as a de facto citywide total ban on the selling of public art on the streets of New York.³⁴

In sum, the current state of First Amendment law suggests five basic principles that might guide municipal regulation of speech. *First*, what matters when you try to regulate speech is what you aim at, not what you happen to hit. If you aim at public order, safety, aesthetics, economic infrastructure, or other content-neutral goals and do so in a way that is not

31. See *Cohen v. California*, 403 U.S. 15, 26 (1971).

32. See generally Geoffrey R. Stone, *Content Regulation and the First Amendment*, 25 WM. & MARY L. REV. 189 (1983); Geoffrey R. Stone, *Content-Neutral Restrictions*, 54 U. CHI. L. REV. 46 (1987).

33. 97 F.3d 689 (2d Cir. 1996), cert. denied, 117 S.Ct. 2408 (1997).

34. See *id.* at 697-98.

subject-matter specific, not speaker-specific, and not idea-specific, then it does not matter if what you happen to hit is speech. To take a simple example, putting bumper stickers on the back of a van does not entitle one to park in a no-parking zone in order to get one's message to the lunchtime crowd on the sidewalks downtown at high noon. Cities need not be intimidated by decisions like *Gaudiya* into thinking that they have to build speaker-specific exceptions into their general, content-neutral laws.

Second, for all the reasons discussed earlier, flat bans or other regulations that are comprehensive and discretionless are more likely to be upheld than laws conferring any discretion. This is so even when a city tries to build discretion into a law in order to allow more speech, as San Francisco did in the permit regulation invalidated in *Gaudiya*.

Third, while flat bans are better than laws affording excessive discretion, even flat bans must not be too broad. You should regulate only the areas you really have to and rarely citywide. The irony, of course, is that the areas of greatest public sensitivity are also often the very areas speakers most wish to reach. On the other hand, the Court has never suggested that speakers in the public forum are entitled to maximize the effectiveness of their speech.

Fourth, even under the Supreme Court's relatively deferential time, place, and manner standard, a good empirical record is important. Don't just hypothesize that there are public safety or aesthetic justifications for a regulation of speech, but make as good an empirical demonstration of your content-neutral interests as you can, either administratively or, if you are sued, in a trial record. While the intermediate scrutiny applicable to time, place, and manner regulations is deferential, it is not a rubber stamp.

Fifth, and finally, avoid content-based exceptions, even if they have the effect of increasing the amount of permissible speech. Of course, speakers may well gain little from challenging such exceptions, because in many cases, assuming the law would have been passed without the exceptions, the remedy will be to strike the exceptions rather than extend them to the challengers or invalidate the underlying content-neutral law. But courts will sometimes find that the exceptions, like the thirteenth chime of a clock, belie the city's asserted justifications, and, in that event, hold that the underlying law may not be applied to the challenger—a price Los Angeles paid when it wrote what amounted to a content-based exception to its Venice Boardwalk ban.

Thank you and good luck in holding the balance between running your cities and providing adequate and nondiscriminatory platforms for public speech.