



EFFECTIVE GOVERNING AND THE FIRST AMENDMENT

PARMA CONFERENCE 2018

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Current Political Climate

- Public Participation in Local Government
 - attendance at City Council meetings
 - presence at public events
- Community Activism / Social Activism
 - demonstrations
 - protests
 - marches



First Amendment

Amendment I to the United States Constitution provides:

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.



Article I, Section 2 California Constitution

(a) Every person may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of this right. A law may not restrain or abridge liberty of speech or press.



42 USC § 1983

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



First Amendment

To prevail on a § 1983 claim based on a violation of an individual's First Amendment rights, a plaintiff must show:

- (1) defendants acted with an intent to **inhibit or chill** his or her **free speech**;
- (2) the intent was a **substantial or motivating factor** in his or her arrest; and
- (3) defendants' acts would **inhibit or chill** a person of ordinary firmness from **future First Amendment activities**.

Mendocino Environmental Center v. Mendocino County,
192 F.3d 1283 (9th Cir. 1999)



Public Meetings

Municipalities can enforce rules of decorum to remove citizens from city council meetings if attendee **“actually”** disturbs or impedes a meeting.

Acosta v. City of Costa Mesa, 718 F.3d 800 (9th Cir. 2013)



Public Meetings

Removing an individual from a public meeting does not violate the individual's First Amendment rights, “provided the individual is **sufficiently disruptive** and is **not** removed because of his or her views.”

Dehne v. City of Reno, 222 Fed.App'x 560 (9th Cir. 2007)



Public Meetings

Repeat Attendees

➤ “[F]ear or apprehension of disturbance is not enough to overcome the right to freedom of expression.”

Norse v. City of Santa Cruz, 629 F.3d 966 (9th Cir. 2003)



Public Meetings

Repeat Attendees

➤ Banning a person indefinitely from returning to a state senate building after single act of disruption “clearly exceeds the bounds of reasonableness . . .”

Reza v. Pearce, 806 F.3d 497 (9th Cir. 2015)



Local Ordinances

Public entities are permitted to have local ordinances addressing the rules of decorum at City Council meetings or other events.

BUT...

The existence of an ordinance does not ensure that such an ordinance is constitutionally sound.



Local Ordinances

In *Gooding v. Wilson*, the United States Supreme Court struck down an ordinance that punished the use of “**opprobrious words or abusive language, tending to cause a breach of the peace.**”



Local Ordinances

In *Tinker v. Des Moines Independent Community*, the United States Supreme Court struck down a policy that banned the wearing of armbands to school.



Protests / Demonstrations

Activities such as demonstrations, protest marches, and picketing are clearly protected by the First Amendment.



Protests / Demonstrations

Time, place, and manner restrictions on speech are constitutional if:

- (1) they are **content neutral**;
- (2) they are **narrowly tailored** to serve a governmental interest; and
- (3) they leave open ample **alternative** means of expression



Protests / Demonstrations

The type and scope of restrictions the government may place on speech depends on where the speech occurs.

- Traditional Public Fora
- Designated Public Fora
- Limited Public Fora



Protests / Demonstrations

Traditional public fora are areas historically used by the public for assembly, such as sidewalks, public streets, and parks.



Protests / Demonstrations

Designated public fora are those where the government intentionally opens a nontraditional public forum for public discourse.



Protests / Demonstrations

Limited public fora are public property limited to use by certain groups or dedicated solely to the discussion of certain subjects.



Protests / Demonstrations

Restrictions on First Amendment activities are "subject to a particularly high degree of scrutiny."

Strict Scrutiny



Protests / Demonstrations

The government may **not** prohibit angry or inflammatory speech in a public forum unless it is (1) "directed to inciting or producing imminent lawless action" and (2) "likely to incite or produce such action."

Brandenburg v. Ohio, 395 U.S. 444 (1969) (per curiam)



Protests / Demonstrations

Speech that stirs passions, resentment, or anger is fully protected by the First Amendment.

Terminiello v. Chicago, 69 S.Ct. 894 (1949)



Other Laws

- The Brown Act
- Amendment IV to the U.S. Constitution
- The Bane Act
- Cite and Release



The Brown Act

The Brown Act authorizes members of the public to “directly address the legislative body on any item of interests to the public . . . that [are] within the subject matter jurisdiction of the legislative body . . .”

California Government Code § 54952.2(b)(1)



The Brown Act

Where an event is a private event and does not fit into The Brown Act parameters, conditions for entry to the event **can** be imposed.

BUT. . .

Where public officials are in attendance, any conditions for entry—such as requiring reservations—need to be imposed universally.



The Brown Act

➤ City Council **can** limit public comment to those matters that are within the boundaries of the council's business.

➤ City Council **can** restrict a citizen's speech if it becomes irrelevant or repetitive.

➤ City Council **cannot** restrict a citizen's speech simply because they disapprove of the viewpoint being addressed.



The Fourth Amendment

Amendment IV to the United States Constitution

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause . . .



The Fourth Amendment

The Fourth Amendment requires that an arrest be supported by probable cause.

Atwater v. City of Lago Vista, 532 U.S. 318 (2001)

An arrest is supported by probable cause if, under the totality of the circumstances known to the arresting officer, a prudent person would have concluded there was a fair probability that the defendant had committed a crime.

Luchtel v. Hagemann, 623 F.3d 975 (9th Cir. 2010)



Trespass on Private Property

Generally, the public does not have a First Amendment right to access private property for expression.



Trespass on Property Open to the Public

To establish the offense requires **intentional interference** with any lawful business or occupation, and a refusal to leave the premises when requested.



Trespass at a Public Meeting

Probable cause existed where arresting deputy...

- witnessed chaos during Board of Supervisors meeting
- observed plaintiff raising his voice
- heard the profanity-laced shouting match between plaintiff and others, and
- told by witnesses that plaintiff had started the disturbance



Probable Cause To Arrest Is Not A Free Pass

The existence of probable cause does not dispose of a plaintiff's First Amendment claim.

PROBABLE CAUSE
Under the totality of the circumstances known to the arresting officer, a prudent person would have concluded that there was a fair probability that the defendant had committed a crime.



Probable Cause To Arrest Is Not A Free Pass

Police officers may not use their authority to punish an individual for exercising his or her First Amendment rights.



Probable Cause To Arrest Is Not A Free Pass

A police action motivated by retaliatory animus is unlawful, even if probable cause existed for that action.



Probable Cause Is Never A Bad Thing

- Defense to Fourth Amendment claim
- Bolster Defense to First Amendment claim



Probable Cause Is Never A Bad Thing

STRONG PROBABLE CAUSE EVIDENCE

+

weak retaliatory motive evidence

=

**NO CLAIM FOR VIOLATION OF
FIRST AMENDMENT RIGHTS**



Fourth Amendment

Under the Fourth Amendment, officers may only use such force as is “objectively reasonable” under the circumstances.



The Bane Act

In California, the Bane Act provides a private right of action against a person who interferes by “threats, intimidation, or coercion, or attempts to interfere by threats, intimidation, or coercion, with the exercise or enjoyment by any individual or individuals of rights secured by the Constitution or the laws of the United States, or of the rights secured by the Constitution or laws of this state . . .”

California Civil Code § 52.1



The Bane Act

Elements

- (1) intentional interference or attempted interference with a state or federal constitutional or legal right, and
- (2) the interference or attempted interference was by threats, intimidation, or coercion



Cite and Release

In any case in which a person is arrested for an offense declared to be a misdemeanor, including a violation of any city or county ordinance, and does not demand to be taken before a magistrate, that person shall . . . be released according to the procedures set forth by this chapter, although nothing prevents an officer from first booking an arrestee . . .

Penal Code § 853.6(a)(1)



Cite and Release

Police cannot use their discretion to book arrestees in retaliation for exercising First Amendment rights.



Cite and Release

Driver purportedly arrested for violating a noise ordinance. Driver alleged he was in fact arrested in retaliation for exercising his First amendment rights.



Cite and Release

A reasonable police officer would have understood that he could not exercise his discretion to book an individual in retaliation for that individual's First Amendment activity.



EFFECTIVE GOVERNING AND THE FIRST AMENDMENT

- Dynamic and Evolving Challenge
- Faced By Every Public Entity
- No Simple, All-Encompassing Solution



EFFECTIVE GOVERNING AND THE FIRST AMENDMENT

THE KEY

- LAWFUL STRATEGIES AND PROTOCOLS
- EDUCATE PUBLIC OFFICIALS AND LAW ENFORCEMENT



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