LEGAL PROTECTIONS for the STREET EVANGELIST

Restoring Religious Liberty for All Americans

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INTRODUCTION

Religious speech is entrenched in constitutional bedrock, which provides supreme legal protections to those called to do the work of the evangelist.[1] This creates a foundation of solid rock upon which an evangelist may build a ministry. The Supreme Court of the United States recognizes, "[t]he dissemination of the individual's opinions on matters of public interest is for us, in the historic words of the Declaration of Independence, an 'unalienable right' that 'governments are instituted among men to secure.'"[2] This unalienable right creates a presumption of invalidity against laws limiting free speech. That means, whenever the government infringes on public religious expression, it is likely violating the First Amendment. But, like other constitutional rights, speech rights have a few limitations.

This paper reviews the constitutional protections American jurisprudence grants to religious speech in public and; thus, to the street preacher. It also offers tips for researching local laws that can facilitate interactions with government officials. This framework aims to provide important legal information and preparation in evangelists' quest to spread the gospel.

LEGAL LANDSCAPE

The United States Constitution Protects Religious Expression

It is beyond dispute that the First Amendment of the U.S. Constitution protects the communication of religious views in public.[3] Fortunately for the street preacher, oral speech is a highly protected means for conveying religious viewpoints and it is shielded by both the Free Speech and Free Exercise Clauses of the First Amendment.[4] While this paper will focus primarily on free speech protections, the Free Exercise Clause augments the Free Speech Clause, providing dual protections for religiously motivated speech.

Often, state constitutions also contain language that closely mimic First Amendment protections, reinforcing free speech and religious free exercise rights. Keep in mind that if police officers or other governmental officials violate the constitutional rights of individuals—such as the right to the free exercise of religion and the right to free speech—and these rights are clearly established in the law, they may be held personally liable.

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[1] *Texas v. Johnson*, 491 U.S. 397, 414 (1989) ("If there is a bedrock principle underlying the First Amendment, it is that government may not prohibit the expression of an idea simply because society finds the idea offensive or disagreeable."); *Murdock v. Pennsylvania*, 319 U.S. 105, 110 (1943) (holding that spreading one's religious beliefs or preaching the Gospel through distribution of religious literature and through personal visitations is an age-old type of evangelism with a high claim of constitutional protection).

2 *Curtis Pub. Co. v. Butts*, 388 U.S. 130, 149 (1967).

[3] *Capitol Square Review & Advisory Board v. Pinette*, 515 U.S. 753, 760 (1995).

[4] U.S. CONST. AMEND. I; *Watchtower Bible & Tract Soc'y of N.Y., Inc. v. Vill. of Stratton*, 536 U.S. 150, 161 (2002); *Heffron v. Int'l Soc'y for Krishna Consciousness, Inc.*, 452 U.S. 640, 647 (1981); *Edwards v. South Carolina*, 372 U.S. 229, 235-36 (1963) ("religious harangue" protected); *Parks v. City of Columbus*, 395 F.3d 643, 647 (6th Cir. 2005) ("preaching…has been recognized as protected speech under the First Amendment").

Forum Analysis

In analyzing government speech restrictions, courts evaluate where the speaker is located when he or she delivers the message. That location, called the forum, will determine what type of regulations the government may legally impose.[5] Fora are determined by the make-up, history, and open nature of such locations. The government is not permitted to alter the status of a forum at its leisure.[6]

Public fora are the most well-protected places for free speech. It is well established that public streets, sidewalks and parks are "quintessential public forums" for speech.[7] Both the Supreme Court and appellate courts repeatedly acknowledge that traditional public fora retain their protected status as long as they remain free and open to the public, even when a permitted event is transpiring in that location.[8] The status of traditional public forum carries with it significant weight that severely limits the government's ability to restrict expression in those locations.[9] The government may also create designated public fora by opening a nontraditional public forum for public expression, either temporarily or permanently.[10]

Second, the government may establish a limited public forum where the government can reserve the forum for use by certain groups or for the discussion of certain topics.[11] State fairs,[12] public universities,[13] and a public school building used after hours[14] have qualified as limited public forums for First Amendment purposes.

The third category is nonpublic fora or locations that cannot be classified as either traditional public fora or designated public fora.[15] The government has more flexibility to limit

[5] *Frisby v. Schultz*, 487 U.S. 474, 479 (1988) (citation omitted).
[6] *See United States v. Grace*, 461 U.S. 171, 179-180 (1983) (government cannot destroy traditional forum status by "ipse dixit").
[7] *See Minn. Voters All. v. Mansky*, 585 U.S. __, __, 138 S. Ct. 1876, 1885 (2018); *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983) (streets and parks); *Saieg v. City of Dearborn*, 641 F.3d 727, 734 (6th Cir. 2011) (sidewalks).
[8] *Frisby*, 487 U.S. at 481 (As the Supreme Court stated, "No particularized inquiry into the precise nature of a specific street is necessary [because] all public streets are held in the public trust and are properly considered traditional public fora."); *see e.g.*, *Parks*, 395 F.3d at 652; accord *Teesdale v. City of Chicago*, 690 F.3d 829, 834 (7th Cir. 2012) *Startzell v. City of Philadelphia*, 533 F.3d 183, 196 (3d Cir. 2008); *Gathright v. City of Portland*, 439 F.3d 573, 579 (9th Cir. 2006).
[9] *Parks*, 395 F.3d at 653 (citation omitted).
[10] *Ark. Educ. Tv Comm'n v. Forbes*, 523 U.S. 666, 677 (1998).
[11] *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 106 (2001).
[12] *Heffron v. Int'l Soc'y for Krishna Consciousness*, 452 U.S. 640, 655 (1981).
[13] *Christian Legal Soc'y Chapter of the Univ. of Cal. v. Martinez*, 561 U.S. 661, 681 (2010).
[14] *Good News Club*, 533 U.S. at 121.
[15] *Minn. Voters All.* 138 S. Ct. at 188.

speech in nonpublic fora.[16] The Supreme Court has considered polling places[17] and airport terminals[18] nonpublic forums under the First Amendment.

Finally, the forum category with the least amount of First Amendment speech protections is private property. There is no First Amendment right to access private property to deliver a message. Private property owners may limit access to their property; speech, even based on content; or other expressive conduct. Private property includes parking lots and shopping centers and gaining access may require permission from the owners.

In sum, street evangelists should choose to speak in traditional public fora to avoid questionable legal standing. By preaching on public streets, sidewalks or parks as his or her pulpit, preachers guarantee their strongest constitutional protections are engaged.

Speech Restrictions

The government is allowed to place reasonable time, place, and manner restrictions on speech, if the regulation is content-neutral.[19] In other words, the government is prohibited from discriminating based on the viewpoint of the speaker.[20] To be valid, any restriction on expression must be narrowly tailored to achieve a significant, meaning less than compelling, government interest and leave open ample alternative channels for communication.[21] For example, reasonable time, place, and manner restrictions include bans on demonstrations that block traffic or a pedestrian's entrance into a building.[22]

While the government may lawfully limit expression to a reasonable time, place and manner, it may not restrict the content or type of speech. If the government places restrictions on specific content or categories of speech, or if it limits speech only because of what the speaker is talking about, that is an impermissible content-based regulation.[23] In these instances, the government must justify such regulations under the strict scrutiny standard.[24] Strict scrutiny requires the government demonstrate that the regulation serve a compelling government interest and is necessary to serve that interest.[25] Necessary means that the regulation is drawn as narrowly as possible to accomplish the named interest.[26] Strict scrutiny is exceptionally demanding, making most content-based regulations unconstitutional.

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[16] *Id.*
[17] *Id.*
[18] *Int'l Soc'y for Krishna Consciousness v. Lee*, 505 U.S. 672 (1992).
[19] *Parks*, 395 F.3d at 653.
[20] *Ark. Educ. Tv Comm'n.*, 523 U.S. at 677; *Good News Club*, 533 U.S. at 106; *Minn. Voters All.* 138 S. Ct. at 188.
[21] *Id.*
[22] *Cox v. Louisiana*, 379 U.S. 536, 555 (1965) ("A group of demonstrators could not insist upon the right to cordon off a street, or entrance to a public or private building, and allow no one to pass who did not agree to listen to their exhortations.").
[23] *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2226 (2015) ("Content-based laws—those that target speech based on its communicative content—are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests").
[24] *Id.*
[25] *Id.*
[26] *Id.*

A few categories of unprotected speech exist. Unprotected speech includes obscenity;[27] fraudulent misrepresentation;[28] defamation;[29] advocacy of imminent lawless behavior;[30] and fighting words.[31] Please be advised that threatening or intimidating behavior at others may not be protected under the law.

Speech Permit Requirements

Some local governments consider individual speech a "demonstration" that requires a speech or demonstration permit be obtained in advance. Although a permit may be appropriate for large or private events, like a parade, rally, or concert,[32] courts have unanimously held that permit requirements for individual and small group expression are not narrowly tailored measures.[33] For example, when the government requires would-be speakers to apply for permission even ten days in advance, this would deter speakers from speaking at all.[34] Thus, an advance notice requirement, as applied to individual expression, may be unlawfully burdensome.[35]

A permit requirement to speak is a prior restraint on speech and thus, it bears "a heavy presumption against its constitutional validity."[36] Prior restraints must provide "narrow, objective, and definite standards" to guide the licensor.[37] Any code must provide criteria or guidelines explaining whether or when a permit should issue.

Additionally, a permit requirement on speech must refrain from vesting unbridled discretion in the licensing official.[38] Such discretion does not pass constitutional muster.[39] Neither

[27] *Sable Commc'ns of Cal. v. FCC*, 492 U.S. 115 (1989).
[28] *Ill. ex rel. Madigan v. Telemarketing Assocs.*, 538 U.S. 600, 612 (2003).
[29] *N.Y. Times v. Sullivan*, 376 U.S. 254, 279-280 (1964); *Curtis Publishing Co.*, 388 U.S. at 134.
[30] *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969).
[31] *Cohen v. California*, 403 U.S. 15, 20 (1971).
[32] *Forsyth Cnty. v. Nationalist Movement*, 505 U.S. 123, 130 (1992).
[33] *See, e.g., Watchtower Bible & Tract Soc'y of N.Y., Inc. v. Vill. of Stratton*, 536 U.S. 150, 164 (2002) (recognizing that a requirement that one must register before he undertakes to make a public speech is incompatible with the requirements of the First Amendment) (citation omitted); *Marcavage v. City of Chicago*, 659 F.3d 626, 635 (7th Cir. 2011) (recognizing growing and "powerful consensus" among circuits that permit schemes applicable to groups of ten and under to be constitutionally suspect); *Knowles v. Waco*, 462 F.3d 430, 436 (5th Cir. 2006) ("[O]rdinances requiring a permit for demonstrations by a handful of people are not narrowly tailored to serve a significant government interest."); *Cox v. City of Charleston*, 416 F.3d 281, 285 (4th Cir. 2005) ("[T]he unflinching application of the Ordinance to groups as small as two or three renders it constitutionally infirm"); *Grossman v. City of Portland*, 33 F.3d 1200, 1206-07 (9th Cir. 1994) (permit requirement for individuals "making an address" in public places not narrowly tailored); *Lederman v. United States*, 291 F.3d 36, 44-46 (D.C. Cir. 2002) (ban on "demonstrations" defined broadly to include "leafletting" and "speechmaking" by a lone individual on sidewalks around capitol building not narrowly tailored).
[34] *Boardley v. U.S. Dep't of Interior*, 615 F.3d 508, 523 (D.C. Cir. 2010); *see Santa Monica Food Not Bombs v. City of Santa Monica*, 450 F.3d 1022, 1034, 1039 (9th Cir. 2006) (explaining that advance notice requirements do not further legitimate interests when applied to small groups).
[35] *See e.g., Grossman*, 33 F.3d at 1208 (invalidating seven day advance notice requirement to demonstrate in public park); *Douglas v. Brownell*, 88 F.3d 1511, 1524 (8th Cir. 1996) (struck down five day advance notice requirement).
[36] *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963).
[37] *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 150-51 (1969).
[38] *Forsyth Cnty.*, 505 U.S. at 130.
[39] *See City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 763-64 (1988) (ordinance that allows licensors to grant or deny permits based on content or viewpoint vests unbridled discretion and is unconstitutional).

the presence of a public event nor generic crowding concerns are sufficient to alter this conclusion.[40] After all, "[t]he First Amendment protects the right of every citizen to reach the minds of willing listeners and to do so there must be opportunity to win their attention."[41] Even a permit to speak elsewhere or at some other time when there are fewer people to reach, is legally insufficient.[42] Warren Burger, former Chief Justice of the United States Supreme Court, summed it up: "[p]rior restraints on speech and publication are the most serious and least tolerable infringement on First Amendment Rights."[43]

Speech permit requirements are found in city ordinances. As you research your local laws, lookout for permit requirements for individual or small group public speech. These may be ripe for challenge.

Local Laws and Ordinances

Although a speech permit is generally not constitutional in public places, other regulatory permits, such as for sound amplification, signage or leafleting are generally lawful. When surveying a prospective speech platform, understand that some city ordinances mandate speakers apply for permits at a specified time in advance in order to use sound amplification devices. In addition, it is helpful to review local ordinances for noise and decibel limits. If applicable, local ordinances may limit distribution of literature or handheld signs. Many cities also restrict loitering or obstructing free passage, therefore ensure the local laws are followed in these regards.

CONCLUSION

The law provides ample protection for the street evangelist. The U.S. Constitution protects religious expression through the Free Exercise and the Free Speech Clauses. The scope of the speech protection will vary based on where the speech is delivered with public forums being the most protected places. Local ordinances will provide details for other important factors, like noise restrictions or passing out literature. If you need more information about the legal rights of street evangelists, contact First Liberty Institute at (972) 941-4444 or visit our website at FirstLiberty.org.

[40] *Bays v. City of Fairborn*, 668 F.3d 814, 823-25 (6th Cir. 2012) (ban on expression, including "stationary preaching" in public park during public festival not narrowly tailored to pedestrian traffic flow and reducing congestion).
[41] *Heffron*, 452 U.S. at 655.
[42] *Schneider v. New York*, 308 U.S. 147, 163 (1939) ("[O]ne is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place.").
[43] *Neb. Press Ass'n v. Stuart*, 427 U.S. 539, 559 (1976).