

# The First Amendment and Land Use An Overview

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## I. Introduction

The First Amendment changes everything. The Supreme Court has interpreted the First Amendment's guarantee of freedom of expression very expansively, and the constitutional protection for freedom of expression is perhaps the strongest protection afforded to any individual right under the Constitution. It is also fair to say that the constitutional protection for freedom of expression in the United States is seemingly unparalleled in the constitutional systems of other democratic nations and that in the United States, as a constitutional matter, the value of freedom of expression generally prevails over other democratic values.<sup>1</sup>

What this means in practice is that laws or governmental actions that clearly would be upheld under other constitutional provisions are more likely to be invalidated when they also implicate the interest in freedom of expression. For the litigating lawyer challenging the constitutionality

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<sup>1</sup> See generally Robert A. Sedler, *Essay on Freedom of Speech: The United States Versus the Rest of the World*, 2006 MICH. ST. L. REV. 377 (2006).

## 2 Local Government, Land Use, and the First Amendment

of a law or governmental action, it is almost always preferable to assert that challenge on First Amendment grounds, and for the defending lawyer, the defense against such a challenge is usually the most difficult one to make.

So it is with respect to First Amendment challenges to land use regulation. The customary judicial deference to legislative judgment that appears in due process and equal protection challenges to land use regulation is completely absent when the regulation affects the use of the land for expressive purposes. Thus, aesthetic considerations that are relied upon to sustain the constitutionality of regulations relating to the appearance of residential property are not sufficient to justify bans on lawn signs containing political or even commercial messages.<sup>2</sup> Bans on billboards, which can generally be justified as advancing legitimate traffic safety and aesthetic concerns, run into First Amendment problems when they make exceptions that allow billboards to convey some messages but not others.<sup>3</sup> A city's seemingly reasonable decision to avoid a proliferation of newsracks on the public streets by excluding newsracks that contain only advertising and promotional materials has been held to violate the First Amendment.<sup>4</sup> And even the government's efforts to prohibit or regulate the operation of the commercial sex industry are constrained by the First Amendment when those efforts reach sexual expression in "adult bookstores" and nude dancing establishments.<sup>5</sup>

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<sup>2</sup> See, e.g., *City of Ladue v. Gilleo*, 512 U.S. 43, 53 (1994); *Linmark Assocs., Inc. v. Willingboro Twp.*, 431 U.S. 85, 93 (1977); *Cleveland Area Bd. of Realtors v. City of Euclid*, 88 F.3d 382, 388 (6th Cir. 1996); *Arlington Cnty. Republican Comm. v. Arlington Cnty.*, 983 F.2d 587, 594 (4th Cir. 1993).

<sup>3</sup> See *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 513 (1981).

<sup>4</sup> See *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 430–31 (1993).

<sup>5</sup> As we will see, however, what the First Amendment protects is only the message of sexuality conveyed by sexually oriented entertainment. The government may extensively regulate the location and operation of adult entertainment establishments to deal with the undesirable secondary effects associated with the operation of adult entertainment establishments. But precisely because sexually oriented entertainment is protected by the First Amendment, locational restrictions must allow for ample alternative avenues where sexually oriented entertainment can take place, see, e.g., *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 52 (1986); *Schad v. Borough of Mt. Ephraim*, 452 U.S. 61, 71–72 (1981); *Young v. Am. Mini Theatres, Inc.*, 427 U.S. 50, 71 fn. 34 (1976), and regulations on the presentation of sexually oriented entertainment cannot prevent the entertainer from conveying the message of sexuality. See, e.g., *City of Erie v. Pap's A.M.*, 529 U.S. 277, 292–93 (2000).

The First Amendment does indeed change everything when land use regulation extends to expressive activity taking place on the land. The regulation then becomes subject to constitutional challenge under what I refer to as the “law of the First Amendment.”<sup>6</sup>

## II. The “Law of the First Amendment”

The “law of the First Amendment” consists in large part of concepts, principles, specific doctrines, and precedents that the Supreme Court has developed over the years in the process of deciding First Amendment cases. In practice, the constitutional protection of freedom of expression is very much a matter of identification and application. In many cases, once the appropriate concept, principle, specific doctrine, or precedent has been identified and applied, the parameters for the resolution of the First Amendment issue have been established, and the result is often fairly clear.

### A. The Chilling Effect Concept and the “Overbreadth” Doctrine

The concepts, principles, specific doctrines, and precedents of the “law of the First Amendment” often interact with each other. The chilling effect concept, which is the most fundamental and pervasive concept in the “law of the First Amendment,” has been the basis for a number of principles and specific doctrines of the “law of the First Amendment.” It has been the basis for the overbreadth or void-on-its-face doctrine. In order to prevent a chilling effect on expression resulting from the existence and threatened enforcement of overbroad or vague laws regulating or applicable to acts or expression, such laws may be challenged on their face for substantial overbreadth or vagueness without regard to whether the activity of the party challenging the law is itself constitutionally protected. The “overbreadth” doctrine is very important in practice, not only because it permits a First

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<sup>6</sup> See generally Robert A. Sedler, *The First Amendment in Litigation: The “Law of the First Amendment,”* 48 WASH. & LEE L. REV. 457 (1991); Robert A. Sedler, *The “Law of the First Amendment” Revisited,* 58 WAYNE L. REV. 1003 (2013).