



## SMART CITIES: FIRST AMENDMENT

*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.*

### First Amendment

#### *Blurring of public and private*

The government cannot regulate the content of speech except in very narrow circumstances. One question raised in this section is whether the blurring of the public (the municipal government) and the private (i.e., social media platforms), will make private entities look like state actors or their platforms like a public forum. Thus far, the answer is no. But this may change.

See Jonathan Stempel, *Google defeats conservative non-profit's YouTube censorship appeal*, REUTERS (Feb. 26, 2020), <https://www.reuters.com/article/us-google-lawsuit-censorship/google-defeats-conservative-nonprofits-youtube-censorship-appeal-idUSKCN20K33L>.

But see Vanessa Romo, *U.S. Appeals Court Rules Trump Violated 1st Amendment By Blocking Twitter Followers*, NPR (Jul. 9, 2019), <https://www.npr.org/2019/07/09/739906562/u-s-appeals-court-rules-trump-violated-first-amendment-by-blocking-twitter-follo>.

#### *Freedom to Petition*

The First Amendment also guarantees citizens the ability to provide feedback and criticism to the government without fear of reprisal. In the smart city and Big Data context, the adoption of new technologies to engage with citizens can indirectly hinder individuals' ability to practice their right. If, for example, a city only solicits feedback through a social media page, citizens without access to the internet cannot effectively exercise their right to petition. Additionally, smart cities need to be wary of what sorts of feedback they take into account when making decisions. Presuming the wants and priorities of citizens based on aggregated, automatically generated data rather than listening to what citizens are actively saying may be a dangerous road to go down.

#### *Freedom of Association/Assembly*

Also granted under the First Amendment is the right to associate and assemble with others in order to engage in acts of expression. In the smart city and Big Data context, the amount of data generated by modern technology can allow a government entity to much more easily discern an individual's membership in certain groups or societies than in the past and use that information to discourage, retaliate, or even make public someone's membership as retaliation for engaging in expression unfavorable to the government. Relatedly, such can also infringe on the right to *not* associate, such as where Big Data analysis might result in forcing groups to share certain resources or be administered by specific government branches when they would rather be separate entities.

## SMART CITIES AND THE FIRST AMENDMENT

### *Helpful case law*

**Ward v. Rock Against Racism, 491 U.S. 781 (1989).** Government regulation must meet a three-prong test to survive constitutional challenges.

**Packingham v. North Carolina, 137 S. Ct. 1730 (2017).** Government cannot overly restrict lawful speech.

**Manhattan Cmty. Access Corp. v. Halleck, 139 S. Ct. 1921 (2019).** A private entity may qualify as a state actor if it exercises “powers traditionally exclusively reserved to the State,” but admittedly “very few” functions fall into that category.

**Borough of Duryea v. Guarnieri, 564 U.S. 379 (2011).** “The right to petition allows citizens to express their ideas, hopes, and concerns to their government and their elected representatives.”

### *Other helpful sources*

Timothy Zick, *Clouds, Cameras, and Computers: The First Amendment and Networked Public Places*, 59 FL. L. REV. 1 (2007), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=956160](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=956160). This article touches on issues related to ubiquitous surveillance technologies, which could affect who is willing to assemble and what government will know about them (what they read, with whom they associate), as well as governmental control over access to public Wi-Fi.

Danielle Keats Citron & Benjamin Wittes, *The Internet Will Not Break: Denying Bad Samaritans § 230 Immunity*, 86 FORDHAM L. REV. 401 (2017), <https://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=5435&context=flr>. This article discusses a way to continue to promote innovation on the internet while having private entities police their platforms for unlawful activity, rather than fully relying on the liability shield created by § 230 of the Communications Decency Act.