



Bans on Political Discrimination in Places of Public Accommodation and Housing

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In several major cities and counties, in some territories, perhaps in the whole state of California, and to a small extent in Minnesota, private businesses may not discriminate against patrons based on certain of their political activities. In most of these jurisdictions (plus in South Carolina) it's also illegal to discriminate based on political activities in housing (and sometimes in commercial real estate transactions). Some of these bans are narrow, just protecting the decisions to belong to or support a party. Others are broader, applying to political advocacy more generally, including political advocacy on the business's premises.

I don't know whether these rules are sound in essentially treating political affiliation the same as religious affiliation is treated under many more antidiscrimination laws and political speech as religious speech. But I do believe they are generally constitutionally permissible in many situations, given that property owners generally don't have a First Amendment right to exclude speakers or speech they dislike,^[1] and given the broad acceptance of bans on discrimination based on religious affiliation. And I think it's helpful to gather these rules so as to better understand the options that legislators have chosen with regard to this question, especially when evaluating similar new proposals.^[2] This is particularly so given the interest in using public accommodations law as a model for limiting social media platforms' ability to block users based on their speech or political ideology.^[3]

And it's helpful to see these rules when considering the implications of certain readings of public accommodation law more broadly. Say, for instance, that a wedding photographer has no First Amendment right to refuse to photograph a same-sex wedding in a state with a ban on sexual orientation discrimination by public accommodations. A photographer would then have no First Amendment right to refuse to photograph a Nazi or Communist event in a jurisdiction with a ban on political discrimination by public accommodations. Indeed, briefs and an opinion in such cases have drawn this analogy.^[4]

Here, then, is the list of such bans that I have found, to accompany an older article of mine on laws banning political discrimination by employers.^[5] I arrange these roughly in order from narrowest to broadest, but only roughly; the scope of some of them is hard to determine, and the scope of others doesn't fall on a neat spectrum.

[I.] Political Party Membership: D.C., Ft. Lauderdale, Broward County (Fla.)

D.C., Ft. Lauderdale, and Broward County (Fla.) (which contains Ft. Lauderdale) ban discrimination based on political party membership, both as to public accommodations and as to housing.^[6] The D.C. law also applies to "commercial space."^[7]

Blodgett v. University Club reaffirmed the narrowness of the D.C. statute, holding that it doesn't apply to a club's ejecting a member because of his general political beliefs (as opposed to party affiliation).^[8]

Arboleda v. Pines Master Management, Inc. (Broward County) concluded that bans on all political activity on a particular premises—in that case, bans on political uses of a condominium clubhouse—don't constitute political affiliation discrimination.^[9] (The Broward County ordinance applies to housing as much as to public accommodations).

[II.] "Involvement" in Candidate Campaign Groups or Lobbying Organizations: Miami Beach

Miami Beach (Fla.) bans discrimination in public accommodations and housing based on "[p]olitical group involvement," defined as "[1] ideological support of or opposition to, membership in, or donation of value [2] to an organization or person [3] which is engaged in supporting or opposing candidates for public office or influencing or lobbying any incumbent holder of public office."^[10]

[III.] "Political Affiliation," with No Express Definition: California, V.I., Shreveport, Wayne County (Mich.), Orange County (N.C.)

The Virgin Islands, Shreveport (La.), and Wayne County (Mich.) (which contains Detroit) ban discrimination in public accommodation and housing based on "political affiliation," without defining the term.^[11] Orange County (N.C.) (Durham area) similarly bans discrimination in public accommodation based on "political affiliation."

In the related area of prohibitions on public employment discrimination based on political affiliation, courts have held that "[t]he term 'political affiliation' includes not only partisan political interests and concerns, but also beliefs and commitments,"^[12] and "to commonality of political purpose and support, not political party membership."^[13]

The California public accommodation statute doesn't specifically list political affiliation as a forbidden basis for discriminating in public accommodations or housing, but the California Supreme Court has read it as generally barring a wide range of "arbitrary discrimination," including—though in dictum—political affiliation discrimination:

Under the [Unruh Act], an individual who has [not violated any reasonable rules regulating the conduct of patrons or tenants] cannot be excluded solely because he falls within a class of persons whom the owner believes is more likely to engage in misconduct than some other group. Whether the exclusionary policy rests on the alleged undesirable propensities of those of a particular race, nationality, occupation, *political affiliation*, or age, in this context the Unruh Act protects individuals from such arbitrary discrimination.^[14]

An earlier decision likewise stated that, under the Unruh Act, a shopping center couldn't exclude prospective customers "who wear long hair or unconventional dress, who are black, who are members of the John Birch Society, or who belong to the American Civil Liberties Union."^[15]

[IV.] "Political Affiliation or Belief": Lansing

Lansing (Mich.) ban discrimination based in public accommodations and housing on "political affiliation or belief," with no express definition.^[16] This covers beliefs about politics that go beyond electoral politics—in the related area of prohibitions on public employment discrimination based on political belief, "political beliefs" has been defined to include any "matter of public concern as to how government should be conducted."^[17]

[V.] "Political Ideas": Puerto Rico

Puerto Rico makes it both civilly actionable and a misdemeanor to discriminate in public accommodations or real estate transactions (with no limitation to housing) based on "political ideas."^[18] Again, in the related area of prohibitions on public employment discrimination based on political ideas, "political ideas" has been defined to include any "matter of public concern as to how government should be conducted."^[19]

[VI.] "Political Opinion," Expressly Including a Broad Range of Views: Maryland Counties

Harford, Howard, and Prince George's Counties (Md.) ban discrimination in public accommodations and housing based on "political opinion," defined (with immaterial variation among the ordinances) as "the opinions of persons relating to government, or the conduct of government; or related to political parties authorized to participate in primary elections in the State."^[20]

[VII.] "Activities of a Political Nature": Champaign-Urbana

Champaign and Urbana (Ill.), home of the main University of Illinois campus, ban discrimination in public accommodations and real estate (both housing and commercial space) based on "activities of a political nature."^[21]

It's not clear whether this covers just election-related activities or all activities related to the spread of political ideas more broadly. But it appears to cover political speech (e.g., wearing a MAGA hat or a Socialist Party T-shirt) on a business's property and not just general involvement in a group.

[VIII.] Political Beliefs, Including Speech: Ann Arbor & Madison

Two other prominent Midwestern college towns, Ann Arbor (Mich.) and Madison (Wisc.), ban discrimination based on "political beliefs," defined as "opinion, whether or not manifested in speech or association, concerning the social, economic, and governmental structure of society and its institutions," "cover[ing] all political beliefs, the consideration of which is not preempted by state, federal or local law," except "political beliefs that interfere or threaten to interfere with his or her job performance."^[22]

It's not clear whether the "job performance" language, which appears in the definition of "political beliefs" that governs both discrimination in employment and discrimination in public accommodations, would be adapted to public accommodations, or rejected as inapplicable there.

[IX.] Political Ideology, Including Speech: Seattle

Seattle (Wash.) bans discrimination based on "political ideology," defined as:

any idea or belief, or coordinated body of ideas or beliefs, relating to the purpose, conduct, organization, function or basis of government and related institutions and activities, whether or not characteristic of any political party or group. This term includes membership in a political party or group and includes conduct, reasonably related to political ideology, which does not cause substantial and material disruption of the property rights of the provider of a place of public accommodation.^[23]

The "conduct" "reasonably related to political ideology" language clearly covers displaying political messages while patronizing a business (e.g., wearing a "Make America Great Again" cap^[24]). But it's uncertain whether:

- a business can prohibit wearing clothes bearing messages that offend employees or fellow patrons, on the theory that such offense is "substantial and material disruption" of the business's "property rights";
- the business can reject patrons wearing such clothes only if it can show more than mere offense; or
- the business can't reject patrons wearing such clothes at all, on the theory that disruption requires more than just a "heckler's veto" against unpopular messages^[25] (and perhaps is limited to content-neutral harms, such as conduct that is loud or that blocks walkways).

One nonprecedential Seattle Office for Civil Rights decision, involving the similar ban on employment discrimination based on political ideology, suggests the answer may be (b) or perhaps even (a).^[26] In that case, an insurance agency employee was fired when customers learned from press coverage that the employee belonged to a white nationalist organization; the Office concluded that was permissible because (1) the employee might discriminate against clients (even if there was no specific evidence that she had done so), (2) the Office of the Insurance Commissioner might investigate the employer because of that risk, (3) State Farm Insurance could cancel its contracts with the employer, (4) clients were upset with the employer after the employee's political group memberships became public, and some of them stopped

doing business with the employer, and (5) the employer "received continued harassing phone calls and in-person visits from members of the public who were upset that [the employer] continued to employ a known white nationalist."^[27]

Under the same reasoning, a business would be able to fire an employee—or deny service to a customer—who was (say) notoriously anti-American or anti-police or anti-military or Socialist, if it could show that the person's political beliefs sufficiently offended customers or business partners and could thus lead to lost business or to public hostility. Sufficiently unpopular beliefs would thus in practice be unprotected under the Seattle Office's interpretation, because the business could always cite the threat of public hostility as a defense against a political discrimination claim.

However the ordinances are read, businesses retain the power to exclude people who had engaged in past violence, even far outside that business (since that would be discrimination based on past violent conduct, not based on political ideology). Query, though, whether they may consider membership in an ideological group that had been involved in past violent conduct—and possible reaction of other patrons to the group—in predicting a risk of violence. One nonprecedential case from the Seattle Office for Civil Rights says yes: the Office concluded that a restaurant may deny service to someone who was known to be a member of a political group (Patriot Prayer) that had apparently engaged in some political violence in the past, when the restaurant believed that the person and other patrons—who might be hostile to Patriot Prayer, and vice versa—might therefore come to blows.^[28]

[X.] "Exercise of Political Rights and Privileges": S.C. (Housing)

South Carolina bans "eject[ing] a citizen from a rented house, land, or other property because of political opinions or the exercise of political rights and privileges guaranteed to every citizen by the Constitution and laws of the United States or by the Constitution and laws of this State."^[29] South Carolina law doesn't prohibit such discrimination in public accommodations, though it does prohibit it in employment.^[30]

[XI.] "Clothing That Displays the Name of an Organization": Minn. (Public Accommodations)

Minnesota bans public accommodations from discriminating against a person "solely because the person operates a motorcycle or is wearing clothing that displays the name of an organization or association"^[31] (though excluding conduct that "poses a risk to the health or safety of another or to the property of another," or clothing that "is obscene or includes the name or symbol of a criminal gang"). This on its face covers all organization names, not just motorcycle clubs.