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Breaking Bread and the Law: Criminalizing Homelessness and First Amendment Rights in Public Parks

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BREAKING BREAD AND THE LAW: CRIMINALIZING HOMELESSNESS AND FIRST AMENDMENT RIGHTS IN PUBLIC PARKS

I. INTRODUCTION

Fort Lauderdale police arrested ninety-year-old Arnold Abbott on November 5, 2014.[1] Mr. Abbott, a World War II veteran and chef, started Love Thy Neighbor Fund Inc. in 1991 so he could make nutritious and healthy meals for the homeless community of Fort Lauderdale, Florida.[2] Every Wednesday for two decades, Mr. Abbott served hundreds of meals on the beach to the homeless without interruption.[3] However, the City of Fort Lauderdale recently enacted several food sharing ordinances that put Mr. Abbott at odds with the law.[4] After violating the new food-distribution ordinance, police officers arrested, fined, and ordered Mr. Abbott to appear in court.[5]

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1 *See U.S. Activist Faces Jail for Feeding Homeless*, ALJAZEERA (Nov. 8, 2014), http://www.aljazeera.com/news/americas/2014/11/us-activist-faces-jail-feeding-homeless201211844435503178.html [https://perma.cc/JK2R-PQA2] [hereinafter *U.S. Activist*] (characterizing Mr. Abbott's arrest after he violated a newly enacted city ordinance pertaining to food-distribution on public property).

2 *See id.* (discussing Mr. Abbott's role as a chef and his service during World War II); *see also Mission and Vision*, LOVE THY NEIGHBOR, http://lovethyneighbor.org/about-us/mission/ [https://perma.cc/4MQW-KZ9Y] (explaining the mission and vision of Love Thy Neighbor, Inc.).

3 *See U.S. Activist*, *supra* note 1 (describing Mr. Abbott's history of feeding the homeless every Wednesday for two decades).

4 *See* Robbie Couch, *Fort Lauderdale Passes Law That Restricts Feeding Homeless People*, HUFFINGTON POST (Nov. 3, 2014), http://www.huffingtonpost.com/2014/11/03/fort-lauderdale-feeding-homeless_n_6094234.html [https://perma.cc/UE5X-FCYZ] (stating Fort Lauderdale passed an ordinance on October 22, 2014, that limited where groups and individuals could feed the homeless on public property and mandated making portable toilets available before feeding the homeless). The Mayor insisted that Mr. Abbott "was not arrested and taken into custody." Amy Sherman, *Jack Seiler Says Arnold Abbott, 90-Year-Old, Wasn't Taken into Custody for Feeding Homeless*, POLITIFACT (Nov. 17, 2014), http://www.politifact.com/florida/statements/2014/nov/17/jack-seiler/jack-seiler-says-arnold-abbott-90-year-old-wasnt-t/ [https://perma.cc/6GE3-92D9]. According to the police captain, Mr. Abbott's arrest was similar to a misdemeanor, where an arrestee is not taken into custody because he or she is allowed to "just show up in court and let a judge decide the case." *Id.* Several local defense attorneys explained that officers have discretion on whether to take misdemeanants into custody. *See id.* (interviewing several unaffiliated police officers and defense attorneys).

5 *See* Sherman, *supra* note 4 (explaining Mr. Abbott violated the new food distribution ordinance on November 2, 2014, for failing to provide portable toilets). Before issuing the third violation, officers allowed Mr. Abbott to feed everyone who attended his food-distribution event before issuing him his third citation. *See U.S. Activist*, *supra* note 1 (reporting the officers' response to Mr. Abbott's willful violation of the new city ordinance). The officers also explained that they were upholding the law, and they needed to "balance the needs of the entire population of the city." *Id.*

Although the city allowed Mr. Abbott to continue feeding the homeless, the food-sharing laws created several restrictions and requirements.[6] Similar to Fort Lauderdale, restricting the distribution of food to the homeless on public property is a tactic some cities across the country have enacted to appease complaints about the homeless in public areas.[7] In some cities, ordinances channel food distribution to different areas or specifically regulate food distribution by requiring groups to meet particular safety and health standards.[8] Another more odious method cities use to restrict food-distribution on public property is permit requirements.[9]

Consequently, these ordinances have negatively affected groups who desire to feed the homeless.[10] When ordinances discourage group feedings in public parks, the homeless have fewer meal options because other agencies cannot meet the demand for food assistance.[11] In addition

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[6] *See* Sherman, *supra* note 4 (listing the contents of the newly enacted outdoor food-distribution ordinance: (1) individuals cannot feed the homeless within 500 feet of residential areas; (2) groups must provide portable toilets and provide hand washing equipment; and (3) consent from the property owner is required).

[7] *See* NAT'L COAL. FOR THE HOMELESS, SHARE NO MORE: THE CRIMINALIZATION OF EFFORTS TO FEED PEOPLE IN NEED 4 (Michael Stoops ed., 2014), http://nationalhomeless.org/wp-content/uploads/2014/10/Food-Sharing2014.pdf [https://perma.cc/Y5T4-DJWL] [hereinafter SHARE NO MORE] (noting cities across the United States are enacting new legislation impacting food distribution as part of an effort to push the homeless problem out of sight).

[8] *See* FT. LAUDERDALE, FLA. MUN. CODE § 47-18.31(C)(2)(a)(iii) (2015) (obligating outdoor food distribution centers to remain 500 feet away from residential property and mandating compliance with state, county, or city food-service requirements).

[9] *See* SHARE NO MORE, *supra* note 7, at 4 (reporting that between 2013 and 2014, twelve major cities passed ordinances requiring individuals and groups to apply for permits before distributing food to the homeless on public property).

[10] *See id.* at 9, 10, 12 (reporting some groups have stopped applying for permits because their applications were arbitrarily denied, processing fees were cost prohibitive, and groups were funneled away from convenient downtown locations); *see also* Couch, *supra* note 4 (interviewing local food advocate Micah Harris who runs The Peanut Butter and Jelly Project). The Peanut Butter and Jelly Project relies on volunteers and donations to serve daily meals to the homeless in Fort Lauderdale, which "has helped [thirty-six] people get off the street." Couch, *supra* note 4. These people are "literally starving on the streets," claimed one advocate, and these groups help alleviate the daily struggles of the homeless. *Id.*

[11] *See* SHARE NO MORE, *supra* note 7, at 11 (explaining the homeless in Lake Worth, Florida have fewer options for meals because the homeless population is increasing and public food-sharing by large groups is decreasing). A December 2014 survey of major cities across the United States revealed that emergency food assistance programs are unable to adequately meet the demand for emergency food assistance. *See* HUNGER AND HOMELESSNESS SURVEY: A STATUS REPORT ON HUNGER AND HOMELESSNESS IN AMERICA'S CITIES, U.S. CONFERENCE OF MAYORS 11 (2014), http://www.usmayors.org/pressrelease/uploads/2014/1211-report-hh.pdf [https://perma.cc/J7CQ-ARF4] [hereinafter CONFERENCE OF MAYORS] (pointing out that eight-two percent—eighteen of twenty-five cities with food pantries and emergency kitchens—reduced the quantity of food people could receive due to a lack of resources and

to erasing resources, these ordinances infringe on the First Amendment rights of groups that use food sharing as a form of speech.[12]

This Note argues that food distribution is protected, symbolic speech and that food-sharing ordinances throughout the United States fail to protect the constitutional rights of homeless advocates. First, Part II provides background information about homelessness in the United States and First Amendment jurisprudence.[13] Then, Part III examines food-sharing ordinances that incidentally burden the speech of homeless advocates or create prior restraints.[14] Last, Part IV offers a model ordinance that cities should adopt to protect the First Amendment rights of homeless advocates while respecting cities' ability to regulate public space.[15]

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an increase in demand, which also resulted in denying people services in seventy-seven percent of the major cities). To address food insecurity, cities provide healthy food programs via schools, mobile farmer's markets, mobile food pantries, and other service agencies. *Id.* at 12. But, these efforts are limited, and cities that prevent groups from feeding the homeless in public parks seem to counteract efforts to address hunger, especially as emergency kitchens ration limited resources. *Id.* at 11. One explanation for this counteractive response is community groups engaging in "not in my backyard" ("NIMBY") politics. *See* Eliza Barclay, *More Cities Are Making It Illegal to Hand out Food to the Homeless*, NPR (Oct. 22, 2014), http://www.npr.org/sections/thesalt/2014/10/22/357846415/more-cities-are-making-it-illegal-to-hand-out-food-to-the-homeless [https://perma.cc/D8RZ-FMU9] (emphasizing that legislation against food-sharing is a NIMBYism). Nonetheless, local governments must realize that the homeless depend on emergency aid until long-term solutions materialize, such as affordable housing, employment, and social services. *See* CONFERENCE OF MAYORS, *supra* note 11, at 36 (noting that using federal programs and charitable, national initiatives to alleviate homelessness have been successful in the past).

Food insecurity is a major issue in the United States, affecting not only the homeless but households as well. *See* ALISHA COLEMAN-JENSEN ET AL., HOUSEHOLD FOOD SECURITY IN THE UNITED STATES IN 2013, i (2014), http://www.ers.usda.gov/media/1565415/err173.pdf [https://perma.cc/F2Z3-B9L9] (claiming that 14.3 percent of households in the United States "were food insecure at least some time during the year, including 5.6 percent with very low food security"). Thus, for people facing food insecurity, one or more household members' food intake was reduced and "their eating patterns were disrupted at times during the year because the household lacked money and other resources for food." *Id.* Food insecurity is likely even more problematic because homeless families and individuals were omitted from this study. *See id.* at 11 (arguing that by leaving out the homeless, statistics get driven down, which may be substantial).

12 *See infra* Part III (arguing that food sharing on public property is symbolic speech).

13 *See infra* Part II (narrating the history of the homeless in the United States and outlining First Amendment jurisprudence related to speech in public parks).

14 *See infra* Part III (analyzing permit schemes and incidental burdens on speech).

15 *See infra* Part IV (providing a model ordinance for cities to adopt).

II. BACKGROUND

Public parks and other public property have traditionally provided a forum for political discourse and public commentary.[16] Distributing food to the homeless in public parks is a form of political discourse that must receive protection against laws that seek to relocate or ban the voice of homeless advocates.[17] The First Amendment is one avenue of relief against ordinances that directly or indirectly affect food sharing.[18] First, Part II.A will explain historical trends of the criminalization of the homeless in the United States to provide a context for current restrictions on public space.[19] Then, Part II.B outlines First Amendment jurisprudence relating to symbolic speech and regulations that receive intermediate scrutiny.[20] Last, Part II.C offers information regarding permit schemes and the threat of prior restraints.[21]

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[16] *See* RANDALL P. BEZANSON, TOO MUCH FREE SPEECH? 68 (2012) (revealing that the concept of a traditional public forum, such as streets, parks, and sidewalks, took on a "more speech-protective character" during the decades following the 1970s, "which allowed claims of access to a wide range of other public facilities and locations"); *see also* MURRAY DRY, CIVIL PEACE AND THE QUEST FOR TRUTH: THE FIRST AMENDMENT FREEDOMS IN POLITICAL PHILOSOPHY AND AMERICAN CONSTITUTIONALISM 208–15 (2004) (articulating the development of the public forum doctrine that protects speech on public property). However, not all public property receives protection under the First Amendment via the public forum doctrine. *See* Dawn C. Nunziato, *The Death of the Public Forum in Cyberspace*, 20 BERKELEY TECH. L.J. 1115, 1145 (2005) (distinguishing public forum status from unprotected property such as government-owned offices and state prisons, which fall outside the public forum doctrine). Even though lower courts have applied the public forum doctrine when analyzing whether people have a right to access information in public libraries, the Supreme Court refused to extend this doctrine to expressive conduct taking place in public libraries. *See* Elizabeth Henselee, *A Funny Thing Happened on the Way to the Public Forum: Why a Public Forum Analysis Applied to the Library Should Protect Internet Services and Delivery Systems*, 43 CAP. U. L. REV. 777, 778–80 (2015) (asserting that the Court should revisit the public forum analysis regarding the implementation of filtering software in public libraries).

[17] *See infra* Part III.A (arguing that feeding the homeless in public parks is symbolic speech that people use to advocate on behalf of the homeless).

[18] *See infra* Part II.B.2 (highlighting that some city ordinances indirectly impact speech even though they are primarily concerned about regulating conduct on public property).

[19] *See infra* Part II.A.1 (chronicling the historical development of homelessness in the United States and the history of criminalizing the homeless during different eras).

[20] *See infra* Part II.B (describing when speech receives First Amendment protection and the types of regulations that cities may use to limit speech rights of groups and individuals).

[21] *See infra* Part II.C (noting that cities frequently use permit schemes to control food sharing in public parks and potential negative implications these laws have on groups that use food distribution to advocate for the needs of the homeless).

A. Criminalization of the Homeless

Throughout United States history, society has often viewed the homeless with indifference, fear, and contempt.[22] Before discussing new efforts in the twenty-first century to criminalize the homeless, it is important to understand how this mindset weaved itself into the public fabric. First, Part II.A.1 explores the historical progression of laws affecting the homeless.[23] Second, Part II.A.2 explains the difficulty of defining homelessness and some of the efforts to criminalize the homeless.[24]

1. Historical Overview of Cities' Responses to Homeless Populations

Since colonial times, cities and towns have decided how to extend welfare to indigent populations.[25] For example, when community members faced economic hardship, they could rely on assistance from the community to support their needs.[26] People attained community membership by being born into an accepted family or by vote in town hall meetings.[27] However, the law failed to create a duty to provide for

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22 *See* PETER H. ROSSI, DOWN AND OUT IN AMERICA: THE ORIGINS OF HOMELESSNESS 17 (1989) (explaining society's view of the homeless throughout history).

23 *See supra* Part II.A.1 (chronicling community perceptions and treatment of the homeless by cities throughout history).

24 *See supra* Part II.A.2 (highlighting that no clear definition of homelessness exists and listing laws that criminalize the homeless).

25 *See* Ellen M. Marks, Note, *Ordinances Targeting the Homeless: Constitutional or Cost-Effective?*, 19 WASH. & LEE J. C.R. & SOC. JUST. 437, 438–39 (2013) (writing that American colonies adopted Elizabethan poor laws from England, which "remained in force until the early nineteenth century"). These colonial laws were influenced by a variety of English statutes that punished vagrants. *See* SIDNEY WEBB & BEATRICE WEBB, ENGLISH POOR LAW HISTORY: PART 1: THE OLD POOR LAW 24 n.1 (1963) (casting light on English laws that tolerated punishing the poor via compulsory service by a master, whipping bare backs until bloody, branding, and condemnation).

26 *See* ROSSI, *supra* note 22, at 17 (stating how colonial communities taxed community members to provide three years of provisions for economically strapped members). Homeless advocates today are calling for a community approach to address the systemic problem of homelessness that carries on the spirit of the early attempts to provide for people in need. *See* NAT'L L. CTR. ON HOMELESSNESS & POVERTY & NAT'L COAL. FOR THE HOMELESS, FEEDING INTOLERANCE: PROHIBITIONS ON SHARING FOOD WITH PEOPLE EXPERIENCING HOMELESSNESS, 8 (2007), http://nationalhomeless.org/publications/foodsharing/Food_Sharing.pdf [https://perma.cc/S773-JWHG] [hereinafter FEEDING INTOLERANCE] (recommending that cities collaborate with food providers, encourage restaurants to accept food stamps, and provide summer food programs).

27 *See* ROSSI, *supra* note 22, at 17 (describing the process that new members went through to attain settlement rights in colonial communities). Settlement requirements persisted into the 1960s, while harsher practices such as debtors' prisons and whipping unrepentant beggars disappeared during the first two centuries. *See* GREG M. SHAW, THE WELFARE

nonmembers who were considered public charges.[28] In fact, nonmembers who needed public assistance were warned to leave town or face being transported to the jurisdiction's boundaries.[29] "[T]hus . . . a kind of transient poor [arose], shunted from community to community because in place after place they were denied settlement rights."[30] These harsh attitudes towards the homeless continued into the nineteenth century.[31] During economic downturns, cities reverted to rounding up the idle and poor.[32] Despite their contribution to the industrial movement of the late nineteenth century, the transient homeless were not respected members of society.[33]

DEBATE 1 (2007) (commenting on welfare laws and practices that were adopted from Europe by American colonies).

28 *See* ROSSI, *supra* note 22, at 17 (discussing entitlements guaranteed to community members and non-community members, which resulted in self-sufficiency assessments before accepting people into the community).

29 *See id.* (portraying the plight of widows, children, the disabled, and the aged adults who were likely to rely on the public for assistance).

30 *Id. See also* TODD DEPASTINO, CITIZEN HOBO: HOW A CENTURY OF HOMELESSNESS SHAPED AMERICA 6 (2003) (explaining that transients were seen as particularly dangerous in colonial New England, which fostered harsh punishments such as flogging, branding, and ear cropping if the homeless could not explain their reasons for wandering around a town). According to DePastino, "[V]agrancy statutes legitimized and facilitated the mobility of better-off transients while discouraging and criminalizing the movement of the poor." *Id.*

31 *See* PAUL OCOBOCK, CAST OUT: VAGRANCY AND HOMELESSNESS IN GLOBAL AND HISTORICAL PERSPECTIVE 18 (A. L. Beier & Paul Ocobock eds., 2008) (asserting that the colonial rhetoric of the evil vagrant continued into the nineteenth century).

32 *See id.* at 18–19 (pointing out that American cities shared many characteristics with the rest of the world in how they treated the poor during prosperity and stagnated economies). One scholar argues that war, economic crises, and other demographic changes caused authorities to vacillate between repression and indifference towards homeless populations, especially when crime and unemployment increased in nineteenth-century cities. *Id. See also* DEPASTINO, *supra* note 30, at 4 (stating in response to growing numbers of tramps, cities called for mass arrests, chain gangs, workhouses, poor houses hazing, and food poisoning by putting strychnine or arsenic in their meat to drive away the homeless during times of repression). According to DePastino:

> Tramps were both victims and agents of the new economic system, itinerant laborers clinging beneath the speeding freight train of industrial capitalist expansion. Because they seemed strange and placeless—"here to-day [sic] and gone tomorrow"—tramps served as convenient screens onto which middle-class Americans projected their insecurities, anxieties, and fantasies about urban industrial life.

Id.

33 *See* ERIC H. MONKKONEN, WALKING TO WORK: TRAMPS IN AMERICA 9, 11 (1984) (noting the poor provided cheap labor for developing cities and railroads throughout the county, yet society never fully integrated the poor and jailed them when demand for labor waned). Given the city planning at this time, the upper and middle class citizens lived relatively close to homeless slums, and communities viewed homeless as a "dangerous class[]" due to the fear of crime associated with slum dwellers. *See* SHAW, *supra* note 27, at 27–28 (commenting on societal attitudes towards the poor during the 1800s). The relationship between

During the last quarter of the nineteenth century, the homeless became more institutionalized and segregated throughout cities in the United States.[34] Skid rows started popping up to house poor, transient men, especially during the Great Depression.[35] Skid rows remained until the 1950s and 1960s, but cities increased the demolition of cheap living quarters that housed the homeless during the 1970s and 1980s; the homeless creeped into the public eye as fewer accommodations existed.[36] These efforts to remove homeless accommodations forced the public to interact with homeless individuals.[37]

Despite the influx of emergency shelters and public assistance programs since the 1970s, society continued to face the question of how to interact with people living on the streets.[38] The number of current homeless persons in the United States has fluctuated as more people started facing homelessness, but the old homeless of the mid 1900s usually found cheap shelters in skid rows or dilapidated motels.[39] The homeless

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unsanitary living conditions and disease also contributed to the negative perception of the poor as smallpox, cholera, typhoid, and other diseases could easily spread to well-off neighborhoods given their close proximity to the slums. *Id.* at 28.

34 *See* ROSSI, *supra* note 22, at 20 (noting a shift away from transiency that characterized homeless populations during the late nineteenth century and early twentieth century). States and cities also created poorhouses to accommodate the less transient, such as those who were unable to care for themselves, criminals, and the mentally ill; however, it was easier to enter a poorhouse than leave one given the perverse qualities of the facilities. *See* SHAW, *supra* note 27, at 23–24 (examining institutions that housed the poor during the nineteenth century and policy debates regarding their management).

35 *See* ROSSI, *supra* note 22, at 22 (writing about the rise of skid rows in major cities that served as miniature communities for the transient homeless, especially during the 1930s that was marked by economic hardship). This period also started the decline of transient homeless who could crisscross the country to find employment, and "in their place had grown up a new homeless population that [were] . . . permanently unemployed . . . [with] no chance of ever finding steady work." *Id.*

36 *See id.* at 33–34 (noting the striking changes that took place in cities across the country during the 1970s and 1980s). Relaxed police enforcement for status crimes also allowed the homeless to find refuge in the streets. *Id.* at 34.

37 *See id.* at 34 (stating the uncomfortable sight of "shabbily dressed persons acting in bizarre ways, muttering, shouting, and carrying bulky packages or pushing supermarket carts filled with junk and old clothes" filled the streets of cities that destroyed shanty towns).

38 *See id.* at 35–36 (chronicling the emergence of shelters and housing in response to displaced homeless persons during the last part of the twentieth century). Other welfare reforms during the 1990s, such as tax credits, public medical insurance, child support enforcement, and child-care subsidies, have helped low-wage workers avoid dipping into homelessness, but these laws primarily benefit people with a wage earner in the home while families without a wage earner receive less support and face a more tenuous situation. *See* REBECCA M. BLANK ET AL., WORKING AND POOR: HOW ECONOMIC AND POLICY CHANGES ARE AFFECTING LOW-WAGE WORKERS 2–3 (2006) (reporting on the benefits of welfare reforms while noting the policy impacts on the unemployed).

39 *See* ROSSI, *supra* note 22, at 37–38 (detailing the number of homeless in the United States according to the U.S. Department of Housing and Urban Development and population

today face "more severe basic shelter deprivation[s]."[40] In addition to grappling with the homeless, society has struggled to define "homelessness," which is discussed in the following Part.[41]

2. Defining Homelessness and Efforts to Criminalize the Homeless

There is no clear definition of "homelessness."[42] During the nineteenth century, the homeless consisted of immigrant workers, Civil War veterans, and other young men who had limited education and low

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surveys); *see also* MONKKONEN, *supra* note 33, at 11 (describing the role of the homeless during the Industrial Revolution and their ability to find cheap housing in cities throughout the United Sates).

40 ROSSI, *supra* note 22, at 39. In addition to housing issues, various people transition in and out of homelessness because trends such as income inequality, world trade, labor-saving technological advances, immigration, and declines in married couples affect employment and earning abilities. BLANK ET AL., *supra* note 38, at 2.

41 *See infra* Part II.A.2 (discussing the difficulty of formulating a clear definition of "homelessness").

42 *See* Jennifer E. Watson, Note, *When No Place Is Home: Why the Homeless Deserve Suspect Classification*, 88 IOWA L. REV. 501, 503 (2003) (explaining that a clear definition of homelessness does not exist). The Public Health and Welfare title of the United States Code defines homelessness as the following:

> (1) an individual who lacks a fixed, regular, and adequate nighttime residence;
> (2) an individual or family with a primary nighttime residence that is a public or private place not designed for or ordinarily used as a regular sleeping accommodation for human beings, including a car, park, abandoned building, bus or train station, airport, or camping ground;
> (3) an individual or family living in a supervised publicly or privately operated shelter designated to provide temporary living arrangements (including hotels and motels paid for by Federal, State, or local government programs for low-income individuals or by charitable organizations, congregate shelters, and transitional housing);
> (4) an individual who resided in a shelter or place not meant for human habitation and who is exiting an institution where he or she temporarily resided.

42 U.S.C. § 11302(a)(1)–(a)(4) (2012). The same title also defines the homeless as:

> The term "homeless individual" means an individual who lacks housing (without regard to whether the individual is a member of a family), including an individual whose primary residence during the night is a supervised public or private facility that provides temporary living accommodations and an individual who is a resident in transitional housing.

§ 254b(h)(5)(A). The definition of homelessness may also vary within different studies that track the number of homeless. *See* Farida Ali, Note, *Limiting the Poor's Right to Public Space: Criminalizing Homelessness in California*, 21 GEO. J. ON POVERTY L. & POL'Y 197, 200 (2014) (opining that estimates about the homeless population depend on how the study defines homelessness). Sometimes, homelessness is "broadly defined to include those persons without adequate housing or at a high risk of homelessness." *Id.*

job skills.[43] The homeless in the 1930s were defined as transients who were unemployed, destitute, and had nobody to care for them.[44] During an economic boom following World War II, "[t]he stereotypical homeless person was a single white male skid row bum subsisting on mission charity and fortified wine."[45] The period between the 1970s and 1990s cast new light on perceptions of homelessness, however, and the conversation changed from social deviants to people impacted by structural determinants such as economic decline, gentrification, reduced public benefits, and deinstitutionalization.[46] Today, the United States Department of Housing and Urban Development ("HUD") defines chronically homeless individuals as "unaccompanied homeless individuals with disabilities who have either been continuously homeless for a year or more or have experienced at least four episodes of homelessness in the last three years."[47]

Additionally, the number of homeless has fluctuated since the Great Recession.[48] Nineteen major cities in the United States reported an

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[43] *See* ROSSI, *supra* note 22, at 19 (portraying the people who made up the homeless population during the nineteenth century).

[44] *See id.* at 25 (describing the population of homeless sheltered by the City of Chicago during 1933 and 1934).

[45] *See* DON MITCHELL, THE RIGHT TO THE CITY: SOCIAL JUSTICE AND THE FIGHT FOR PUBLIC SPACE 178–79 (2003) (arguing that discourse about the reasons for homelessness during the 1970s and 1980s changed society's perception of the homeless). This perception coincided with the individualist tradition that advocated for self-betterment because addressing structural causes was ineffectual while addressing personal failings was an easier remedy. *See* SHAW, *supra* note 27, at 43 (casting light on the perceptions of the homeless and different policy debates regarding the poor that existed during the 1800s and early 1900s).

[46] *See* MITCHELL, *supra* note 45, at 179 (stating that the explosion of the homeless population that absorbed women, children, and whole families cast new light on the reasons for homelessness). In the spirt of self-betterment that was characterized by the up-by-your-bootstraps mentality, professionalism within the area of social work started to take hold, which focused more intently on targeting individuals. SHAW, *supra* note 27, at 43. The central philosophy of social workers during this time was that "intensive casework . . . could teach improved living skills." *Id.* However, more knowledge about the human psyche shifted the social work field away from the focus on poverty to giving considerable attention to mental health issues. *Id.* Additionally, the field of social work had stark, contrasting views about the role of private relief versus public relief, with the latter ultimately winning as people realized that poverty hinged on economic habits of laying people off "with very little thought of the implications for those who would lose their jobs." *Id.* at 44.

[47] MEGHAN HENRY ET AL., THE 2014 ANNUAL HOMELESS ASSESSMENT REPORT TO CONGRESS (AHAR) 2 (2014), https://www.hudexchange.info/resources/documents/2014-AHAR-Part1.pdf [https://perma.cc/J88F-RDYW]. Chronically homeless people living in families are defined as "people experiencing homelessness in families in which the head of household has a disability and has either been continuously homeless for a year or more or has experienced at least four episodes of homelessness in the last three years." *Id.*

[48] *See The State of Homelessness in America*, NAT'L ALL. TO END HOMELESSNESS 3 (2015), http://www.endhomelessness.org/library/entry/the-state-of-homelessness-in-america-2015 [https://perma.cc/Q8PU-QS5M] (noting homelessness decreased by 2.3 percent from

increase in homelessness after 2008.[49] From 2008 to 2009, the homeless population increased from 636,324 persons to 656,129.[50] In contrast, a 2015 report from HUD stated that 578,424 people living in the United States experienced homelessness on a single night in January 2014.[51]

Despite the small decline in the homeless since the Great Recession, this decrease has not stymied resurging efforts by cities to criminalize the homeless.[52] Criminalization is a term used to describe tactics used by local governments to remove the homeless from public places such as streets and parks "by treating the performance of basic human behaviors—like sitting down, sleeping, and bathing—as criminal activities."[53] For example, Clearwater, Florida, makes it illegal to sit or lie down in public, beg in public, and sleep in vehicles.[54] Similarly, Manchester, New Hampshire made the following illegal in public parks or public places:

2013 to 2014, which took place after "a period of ongoing recovery from the Great Recession").

[49] *See* HUNGER AND HOMELESSNESS SURVEY: A STATUS REPORT ON HUNGER AND HOMELESSNESS IN AMERICA'S CITIES, U.S. CONFERENCE OF MAYORS 13 (2008), http://www.usmayors.org/pressreleases/documents/hungerhomelessnessreport_121208.pdf [https://perma.cc/3UCF-T4U8] (reporting on the number of cities—out of twenty-five surveyed—that saw an increase in homelessness in 2008). Twenty-five cities participated in this poll: Nashville, Kingston, Philadelphia, Salt Lake City, Des Moines, Chicago, Boston, Denver, Cleveland, Los Angeles, Trenton, Santa Monica, Charlotte, Gastonia, Phoenix, Seattle, Portland, San Francisco, Louisville, Charleston, Dallas, and Kansas City. *Id.* at 6. Four cities reported no change in the number of the homeless, and two cities had insufficient data to make an adequate report. *Id.* at 13. However, "[o]n average, cities reported a [twelve] percent increase in homelessness in 2008." *Id.*

[50] *See* M. WILLIAM SERMONS & PETER WITTE, STATE OF HOMELESSNESS IN AMERICA: AN IN-DEPTH EXAMINATION OF HOMELESS COUNTS, ECONOMIC INDICATORS, DEMOGRAPHIC DRIVERS, AND CHANGES AT THE STATE AND NATIONAL LEVEL 7 (2011), http://www.endhomelessness.org/files/3668_file_SOH_report_FINAL_LOW_RES_NOT_embargoed.pdf [https://perma.cc/MFJ3-NJAX] (explaining there was an increase of 19,805 homeless persons from 2008 to 2009). This report also noted an increase in the chronic homeless population. *See id.* at 8 (reporting the chronic homeless population increased from 111,323 persons in 2008 to 112,076 persons in 2009). Chronic homelessness means "people who have disabilities, including serious mental illness, chronic substance use disorders, or chronic medical issues, and who are homeless repeatedly for long periods of time." *Id*.

[51] *See* HENRY ET AL., *supra* note 47, at 6 (providing statistics about homelessness during 2014 as part of an initiative to end homelessness).

[52] *See* Aaron Cantu, *The Growing Criminalization of Homelessness: How Developers and Politicians Create Urban 'Social Hygiene' Campaigns*, ALJAZEERA (July 18, 2014), http://america.aljazeera.com/opinions/2014/7/thegrowingcriminalizationofhomelessness.html [https://perma.cc/M43C-NZWW] (describing an increase in ordinances that target the homeless).

[53] Tristia Bauman et al., *No Safe Place: The Criminalization of Homelessness in U.S. Cities*, NAT'L L. CTR. ON HOMELESSNESS & POVERTY 16 (2014), http://www.nlchp.org/documents/No_Safe_Place [https://perma.cc/AF3N-QKTP].

[54] *See id.* at 8 (mentioning various prohibitions codified in the municipal code of Clearwater, Florida).

lying down, sleeping, sitting down, and camping.[55] When the homeless violate these ordinances, police and private security firms cleanse downtown and urban spaces by enforcing these laws and punishing the homeless with fines or misdemeanors.[56]

Sadly, these laws are gaining popularity.[57] A recent study of 187 cities across the United States concluded that city-wide camping bans have increased sixty percent, and camping bans in particular public areas have increased sixteen percent.[58] Laws that ban begging, sitting or lying down,

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[55] *See id.* (listing City of Manchester ordinances that impact the homeless who use parks). Cities also target the homeless by relying on property sweeps, which makes it easier for police and sanitation workers to confiscate the belongings of homeless individuals left in parks or public property. *See* Gale Holland, *L.A. Is Warned of Possible Suit against Homeless Sweeps Law*, L.A. TIMES (Aug. 12, 2015), http://www.latimes.com/local/lanow/la-me-ln-homeless-sweep-litigation-20150812-story.html [https://perma.cc/V4WJ-RNQW] (describing police tactics used to take apart camps in skid row by seizing and destroying property).

[56] *See* Cantu, *supra* note 52 (stating politicians who enact these ordinances are rarely challenged, and businesses, developers, and city officials partner with private and public security forces to enforce these laws). Exclusionary zoning laws and community outrage are cyclical events that are typically triggered by noteworthy, national events such as deinstitutionalization of the mentally ill or downturns in the economy. *See* Moira J. Kinnally, Note, *Not in My Backyard: The Disabled's Quest for Rights in Local Zoning Disputes under the Fair Housing, the Rehabilitation, and the Americans with Disabilities Acts*, 33 VAL. U. L. REV. 581, 592 (1999) (characterizing the cyclical nature of city ordinances and community opposition to the homeless).

[57] *See* Marc-Tizoc Gonzalez, *Hunger, Poverty, and the Criminalization of Food Sharing in the New Gilded Age*, 23 AM. U. J. GENDER SOC. POL'Y & L. 231, 281 (2015) (writing that criminalizing the homeless began before the Great Recession and is likely accelerating). Gonzalez argues that criminalization of homeless persons must be viewed within the context of what he describes as "the New Gilded Age." *Id.* at 238. Gonzalez further asserts that the "power elite"—people whose positions allow them to command major societal organizations and hierarchies—have shaped our current state of gentrification and shift towards political decisions that scale back programs benefiting fringe classes and people living in poverty. *Id.* at 233, 242–43. For Gonzalez, this context explains why numerous anti-food sharing laws popped up during a time of prosperity and boom before the Great Recession. *Id.* at 280–81. Gonzalez's insight bolsters the argument that food-sharing with the homeless is a direct response to broad, systemic forces that the homeless are unable to change on their own. *See* Watson, *supra* note 42, at 523 (opining that the homeless rarely vote because they are more concerned about providing for their basic needs).

According to another scholar, understanding homelessness begins with asking why the wealthy tolerate and ignore homeless populations instead of asking questions about why people are in poverty. *See* Jane B. Baron, *The "No Property" Problem: Understanding Poverty by Understanding Wealth*, 102 MICH. L. REV. 1000, 1000 (2004) (crediting Kim Hopper and other lawyers with framing the question around wealth instead of homelessness). Baron argues that society must grapple with the "no property" category, which allows the homeless to seek rights to panhandle and sleep outdoors but not to seek rights to housing and public benefits. *Id.* at 1004–05. "[I]f you have no property, and no affirmative legal claim to have property, what else can you seek?" *Id.* at 1023.

[58] *See* BAUMAN ET AL., *supra* note 53, at 8 (offering the results of nation-wide survey of 187 major cities regarding ordinances that impact everyday activity of the homeless).

loitering, and sleeping in vehicles in public have increased twenty-four percent, fifty-three percent, thirty-three percent, and forty-three percent respectively.[59] As cities carry out the process of "Manhattanization," the poor are displaced in the name of development and tourism.[60] Civil rights attorneys have seen these laws proposed and passed throughout the country.[61] These ordinances are "pitting city officials against homeless advocates."[62] Given the trends of downtown revitalization and anti-homeless laws, some scholars go "so far as to predict the 'end of public space,' pointing to the erosion of the public domain as an arena for political protest . . . [due to] 'sanitized' public spaces that encourage the essentially private practices of leisure and consumption of a limited section of society."[63]

Additionally, cities use permit schemes and other restrictive laws to discourage groups from sharing food with the homeless.[64] In 2012, Houston, Texas passed a law making it illegal to have a food service event on public or private property without a permit.[65] The law seeks to ensure

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[59] *See id.* (providing results from an assessment regarding ordinances that impact begging, sitting or lying down, loitering, or sleeping in vehicles in cities across the United States).

[60] *See* Elizabeth Greenspan, *How to Manhattanize a City*, NEW YORKER (Oct. 23, 2013), http://www.newyorker.com/currency-tag/how-to-manhattanize-a-city [https://perma.cc/E38P-QF9K] (defining the term "[m]anhattanize" and its impact on people living in poverty by "turning a city into a playground for the wealthiest inhabitants").

[61] *See* Yamiche Alcindor, *Cities' Homeless Crackdown: Could it Be Compassion Fatigue?*, USA TODAY (June 10, 2012), http://usatoday30.usatoday.com/news/nation/story/2012-06-10/cities-crack-down-on-homeless/55479912/1 [https://perma.cc/QKW6-7P3M] (quoting a civil rights lawyer's comments on the current trend of enacting ordinances that criminalize the homeless).

[62] *Id.*

[63] John Dixon et al., *Locating Impropriety: Street Drinking, Moral Order, and the Ideological Dilemma of Public Space*, 27 POL. PSYCHOL. 187, 189–90 (2006) (internal citations omitted). According to Dixon and the other authors, conduct is categorized as problematic because it is "out-of-place," which allows society to reject the homeless, among other groups, because they bring private conduct—sleeping—to the public sphere. *See id.* at 190 (recognizing that this justification impacts the homeless as well as teenagers, homosexual relationships, and racial or ethnic minorities).

[64] *See* SHARE NO MORE, *supra* note 7, at 4 (explaining that one method of criminalizing the homeless consists of introducing new laws that restrict the ability of groups and individuals to feed the homeless in public parks); *see also* Nate Vogel, *The Fundraisers, the Beggars, and the Hungry: The First Amendment Rights to Solicit Donations, to Beg for Money, and to Share Food*, 15 U. PA. J.L. & SOC. CHANGE 537, 550 (2012) (demonstrating local governments started banning food-sharing with the homeless in public parks as another strategy to deter the homeless from using public parks). According to Vogel, "Similar to laws that ban begging, laws that regulate group feeding attempt to drive the poorest members of society out of the public's sight." Vogel, *supra* note 64.

[65] *See* HOUSTON, TEX., MUN. CODE § 20-252 (2015) (enacting into law a $2,000 fine for violating the city ordinance in regards to food-sharing restrictions). The relevant portion of the ordinance reads as follows:

that the homeless receive quality food under sanitary conditions while simultaneously protecting private interests and the environment.[66] Even so, homeless advocates have noticed that group feedings have decreased since the advent of the law.[67]

In addition, Raleigh, North Carolina requires a permit before groups or individuals can distribute food in public parks or on greenways.[68] Applications are submitted to the Chief of Police who denies petitions if the proposed event will hinder or impede other regular park events or if it will create a nuisance.[69] Medford, Oregon requires a permit from the Parks Director for groups of twenty-five or more persons who want to use any park for any event or festival.[70] Myrtle Beach, South Carolina requires

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> Use of property without consent is prohibited. It shall be unlawful for any organization or individual to sponsor or conduct a food service event [for five or more people] on public or private property without the advance written consent of the public or private property owner or other individual with lawful control of the property.

Id. The ordinance defines a "food service event" as an "instance in which charitable food services are provided to more than five individuals." § 20-251.

66 *See id.* (requiring consent from both public and private property owners before conducting a food service). In contrast, Las Vegas, Nevada spelled out an ordinance that specifically targeted the homeless. *See* D. Matthew Lay, Note, *Do Not Feed the Homeless: One of the Meanest Cities for the Homeless Unconstitutionally Punishes the So-Called "Enablers,"* 8 NEV. L.J. 740, 744 (2008) (chronicling the events leading up to a lawsuit between Sacco and the City of Las Vegas over the constitutionality of the ordinance that banned food sharing in parks with the homeless). The enacted ordinance "[p]rohibited within any City park . . . the providing of food or meals to the indigent for free or for a nominal fee." *Id.* (quoting LAS VEGAS, NEV., MUN. CODE § 13.36.055(a)(6) (2006)).

67 *See* Mary Emily O'Hara, *More US Cities Are Cracking Down on Feeding the Homeless*, VICE NEWS (June 8, 2014), https://news.vice.com/article/more-us-cities-are-cracking-down-on-feeding-the-homeless [https://perma.cc/2764-BB6B] (quoting a food advocate who explained "[a] lot of people who used to serve food [to the hungry] don't serve anymore"). A diverse, local coalition attempted to stop the law from passing, but they were unsuccessful; they hope to use a ballot initiative to overturn it. *Id.*

68 *See* RALEIGH, N.C., MUN. CODE § 9-2022(b) (2015) ("No individuals or group shall serve or distribute meals or food of any kind in or on any City park or greenway unless such distribution is pursuant to a permit issued by the Parks, Recreation and Greenway Director.").

69 *See* § 9-2022(c) (describing the application process). The ordinance states:

> The application shall be submitted to the Chief of Police and shall state the name of the individual or organization and the name and address of its principal officers and of its directors or other governing body and shall also contain such other pertinent information as may be required by the Chief of Police in order to clearly identify the organization submitting the request and the individuals principally engaged in the conduct of its affairs.

Id.

70 *See* MEDFORD, OR., MUN. CODE § 2.185(2) (2015) (explaining that the Parks Director may issue special rules for events in parks). The ordinance states:

groups that distribute food to the homeless in public to obtain a permit issued by the city and proof of compliance with the Department of Health and Environmental Control regulations.[71] Manchester, New Hampshire mandates nonprofits distributing food free of charge within city limits or a police jurisdiction to obtain a permit from the requisite Health Authority.[72] Fort Lauderdale, Florida has also enacted laws that impact

> The City Manager, or his designee, may, subject to Park and Recreation Department rules and regulations for park use, grant a special permit to allow the use of dedicated park lands and recreational facilities for the purpose of conducting concerts, lectures, athletic events; show, craft and art fairs; and other special events or uses as are considered compatible with normal park and recreational activities.

Id.

[71] *See* MYRTLE BEACH, S.C., MUN. CODE § 14-316(f)(1)–(3) (2015) (detailing the requirements for persons or groups who want to use a park or publicly owned facility to distribute food to others). The ordinance states:

> (1) No person shall knowingly sponsor, conduct, or participate in the distribution or service of food at a large group feeding at a park or public facility owned or controlled by the City of Myrtle Beach without a facility use permit properly issued by the city and without proof of compliance with South Carolina Department of Health and Environmental Control Regulation 61-25 for the preparation and service of food.
> (2) No person shall, in the public park, engage in organizing, serving or distributing food to the public in a large group feeding event fail to produce and display any required department of health and environmental control permit for such open air food distribution, or the required special event or facility use permit during a large group feeding event to a law enforcement officer upon demand.
> (3) Not more than one large group feeding facility use permits may be issued to a person, or persons acting in cooperation through joint purpose however loosely associated within a 12-month period. Not more than four large group feeding permits shall be issued to a legally recognized entity, such as an eleemosynary endeavor properly registered with the Secretary of State, association, charity or organization for large group feedings in any 12 consecutive month period.

Id.

[72] *See* MANCHESTER, N.H., MUN. CODE §§ 117.15, 117.17 (2015) (mandating permission from the City before serving food outdoors). One ordinance reads, "It shall be unlawful for any person who does not possess a valid permit issued to him by the Health Authority to operate a food-service establishment within the city or in a police jurisdiction." § 117.15. Another ordinance states, "Any person desiring to operate a food-service establishment shall make written application for a permit on a form provided by the Health Authority." § 117.17. A food establishment is:

> Any fixed or mobile restaurant; cafeteria; coffee shop; cocktail lounge; catering kitchen; sidewalk cafe; commissary; grille, luncheonette; short-order cafe; sandwich shop; soda fountain; tea-room; drive-in; nightclub; roadside stand; industrial feeding establishment; private, public, or nonprofit organization or institution serving the public; or similar place

social service agencies using public property.[73] Santa Monica, California incorporated its food-sharing ordinance with its special events ordinance.[74] Last, Columbia, South Carolina enacted laws that impact food sharing in public parks.[75] Because these ordinances regulate conduct,

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> in which food or drink is prepared for sale for food service on the premises or elsewhere; and any other eating or drinking establishment where food is served or provided for the public with or without charge.

§ 117.01.

[73] *See* FT. LAUDERDALE, FLA. MUN. CODE § 47-18.31(A) (2015) (enacting these laws to prevent social service agencies that have "serious objectionable characteristics, and that may result in adverse secondary effects on adjacent properties"). The ordinance also states:

> *Outdoor food distribution center.* Any location or site temporarily used to furnish meals to members of the public without cost or at a very low cost as a social service as defined herein and is generally providing food distribution services exterior to a building or structure or without permanent facilities on a property.

§ 47-18.31(B)(4). The code goes on to state:

> *Outdoor food distribution center (OFDC).* Shall be subject to the following:
> ii. Shall not be closer than five hundred (500) feet from another food distribution center or outdoor food distribution center.
> iii. Shall not be any closer than five hundred (500) feet from a residential property . . . .
> iv. Shall provide restroom facilities, portable toilets or other similar facilities for persons preparing and serving food as well as for the persons being served food.
> v. Shall provide equipment . . . for the lawful disposal of waste and wastewater at the location.
> vii. Shall provide written consent from the property owner to conduct that activity on the property
> xi. Shall provide service of food within four (4) hours of preparation.
> xii. Where non-prepackaged food is served, a convenient hand washing facility for persons preparing and serving the food.

§§ 47-18.31(C)(2)(c)(ii)–(v), (vii), (xi)–(xii).

[74] *See* SANTA MONICA, CAL., MUN. CODE § 4.68.040(b) (2015) (requiring a permit for any activity that may interfere with public property). The code states:

> Except as otherwise provided by this Chapter or other applicable law, rule or regulation or any permit or license issued hereunder or pursuant to the terms of a permit, lease, or contract which has been specifically authorized by the City Council, a community event permit shall be required to be obtained from the Community Event Committee for the following activities . . . [a]ny activity or event on City owned, controlled, or maintained property not subject to the requirements of subsection (a) of this Section, involving one hundred fifty or more persons, or involving seventy-five or more persons on the Santa Monica Third Street Promenade.

Id. Permits are subject to denial for: making a misleading or fraudulent statement, failing to include all necessary information, failing to satisfy all requirements, leaving out a payment, damaging city property, failing to show proof of insurance or sign an indemnification paper before using public property. § 4.68.070(a)–(e).

[75] *See* COLUMBIA, S.C., MUN. CODE § 15-2(a) (2015) (enacting an ordinance that impacts food-sharing). The ordinance reads:

the next Part offers information about the First Amendment and symbolic speech.[76]

B. The First Amendment and Symbolic Speech

Before receiving protection under the First Amendment, distributing food to the homeless must qualify as symbolic speech.[77] However, not every communicative act receives protection because courts must determine whether the conduct is inherently expressive.[78] Thus, Part II.B.1 explains the development of inherently expressive conduct, and Part II.B.2 explores the latitude city governments have in regulating expressive conduct.[79]

1. Inherently Expressive Conduct

Speech is not limited to verbal or written communication, and courts throughout history have granted First Amendment protection to expressive conduct that qualifies as "symbolic speech."[80] For example, in *Tinker v. Des Moines Independent Community School District*, the Supreme Court considered whether wearing black armbands in public schools should qualify as symbolic speech.[81] Students decided to wear black

> *Permit required; conditions.* Any person, group, association or organization desiring to use any park or recreational facility of the City of Columbia for a group of 25 individuals or more or to conduct an activity or event for which it could be reasonably assumed that 25 or more persons might gather at a park or recreational facility to participate in or witness such activity or event or a festival.

Id. The Director of the Parks Department may deny permits when protecting, "the public health, safety, security, peace, order, welfare, and convenience." *Id.*

[76] *See infra* Part II.B (explaining First Amendment jurisprudence related to symbolic speech).

[77] *See* DANIEL A. FARBER, THE FIRST AMENDMENT 39 (3d ed. 2010) (explaining First Amendment application).

[78] *See infra* Part II.B.1 (stating the development of expressive conduct jurisprudence).

[79] *See infra* Parts II.B.1–2 (exploring inherently expressive conduct and the government's ability to regulate conduct in public spaces).

[80] *See* FARBER, *supra* note 77, at 39 (explaining when speech is symbolic); *see also* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 1117 (5th ed. 2015) (noting that people often communicate through symbols).

[81] *See* 393 U.S. 503, 504–05 (1969) (considering whether a school policy banning black arms bands violated the First Amendment). Justice Marshall Harlan in his dissent would have affirmed the lower court's decision because the petitioner failed to show that the school did not have a legitimate concern such as "prohibit[ing] the expression of an unpopular point of view, while permitting expression of the dominant view." *See id.* at 526 (arguing that in situations described in *Tinker*, petitioners must carry the burden of proof that a school does not have a legitimate concern).

armbands to protest the Vietnam War.[82] Subsequently, school officials suspended students who refused to remove the armbands.[83] The Court held that enforcing the ban through suspension denied students their constitutional right to express their opinion.[84]

To determine whether conduct qualifies as symbolic speech, the Supreme Court provided an important roadmap in *Spence v. Washington*.[85] The Court stated that symbolic speech must satisfy the following test: (1) the speaker must have "an intent to convey a particularized message," and (2) given "the surrounding circumstance," there is a "likelihood . . . that the message would be understood by those who viewed it."[86] Subsequently, the Court formed a more rigorous analysis.[87] In *Rumsfeld v. Forum for Academic Institutional Rights, Inc.*, the Court discussed whether several law schools' messages of nondiscrimination were threatened

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82 *See id.* at 504 (characterizing the reason for wearing armbands in public).

83 *See id.* (describing the principals' meeting on December 14, 1965, that discussed how to address the issue of students wearing black armbands at school).

84 *See id.* at 516 ("[W]earing . . . armbands is 'symbolic speech' which is 'akin to "pure speech"' and therefore protected by the First and Fourteenth Amendments."); *see also* City of Erie v. Pap's A.M., 529 U.S. 277, 289 (2000) (concluding that nude erotic dancing is expressive conduct); Texas v. Johnson, 491 U.S. 397, 420 (1989) (holding that burning a flag was expressive conduct); *but see* Rumsfeld v. Forum for Acad. and Institutional Rights, Inc., 547 U.S. 47, 66 (2006) (reasoning that the law schools' message of nondiscrimination against homosexuals by banning military recruiters from recruiting on campuses was not inherently expressive because it relied on explanatory speech); Wisconsin v. Mitchell, 508 U.S. 476, 484 (1993) ("[P]hysical assault is not by any stretch of the imagination expressive conduct protected by the First Amendment.").

85 *See* 418 U.S. 405, 410–11 (1974) (determining whether hanging a flag upside down with an affixed peace symbol qualified as symbolic speech). The violation in *Spence* took place under the following statute:

> No person shall, in any manner, for exhibition or display: (1) Place or cause to be placed any word, figure, mark, picture, design, drawing or advertisement of any nature upon any flag, standard, color, ensign or shield of the United States or of this state . . . or (2) Expose to public view any such flag, standard, color, ensign or shield upon which shall have been printed, painted or otherwise produced, or to which shall have been attached, appended, affixed or annexed any such word, figure, mark, picture, design, drawing or advertisement.

Id. at 407. At the trial court level, defendant was charged seventy-five dollars, sentenced to ten days in jail, and was suspended from school. *See id.* at 408 (describing the trial court's ruling). The Washington Court of Appeals reversed the decision, but the Washington Supreme Court "reversed and reinstated the conviction." *Id.*

86 *Id.* at 410–11.

87 *See* David Mangone, Note, *Speech at a Crossroads: The Intersection of Symbolic Speech, Government Speech, and the State License Plate*, 8 FED. CTS. L. REV. 97, 118 (2014) (stating in order for symbolic speech to receive protection, "there must not only be an intent to convey a particularized message, but there must also be an overwhelmingly apparent message and a great likelihood that someone would understand the message").

when military recruiters gained access to their campuses.[88] The law schools disagreed with the military's "Don't Ask, Don't Tell" policy regarding homosexuals in the military.[89] The Court held that denying access to military recruiters was not inherently expressive because the expressive component was not created by conduct itself, but "by the speech that accompanie[d] it."[90] Thus, conduct must "convey a particularized message without the aid of explanatory speech."[91]

Conduct that relies on symbols that "have acquired a well-understood social meaning in contemporary society" can receive First Amendment protection.[92] For example, the Court protected hanging a flag with an affixed peace symbol outside a window in response to the United States'

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88 *See* 547 U.S. 47, 52 (2006) (noting that Forum for Academic Institutional Rights ("FAIR") challenged an amendment that denied funding to schools preventing military recruiters from accessing their campuses).

89 *See id.* (discussing FAIR's new policies in response to the military's discrimination against homosexuals). This law precluded openly gay and lesbian Americans from military service. *See* Elisabeth Bumiller, *Obama Ends 'Don't Ask, Don't Tell' Policy*, N.Y. TIMES (Jul. 22, 2011), http://www.nytimes.com/2011/07/23/us/23military.html [https://perma.cc/E9PQ-JE5D] (characterizing the impact of the military's law). President Obama signed the Don't Ask Don't Tell Repeal Act in 2010, which brought an end to the military's seventeen-year-old law. *See* CNN Wire Staff, *Obama Signs Repeal of 'Don't Ask, Don't Tell' Policy*, CNN (Dec. 27, 2010), http://www.cnn.com/2010/POLITICS/12/22/dadt.repeal/ [https://perma.cc/9RYU-24WN] (reporting on how President Obama helped bring an end to "the long political struggle over the military's controversial 'don't ask, don't tell' policy").

90 *Rumsfeld*, 547 U.S. at 66.

91 Charles W. "Rocky" Rhodes, *The First Amendment Structure for Speakers and Speech*, 44 SETON HALL L. REV. 395, 441 (2014). Rhodes states that "only those forms of predominantly communicative conduct that the founders considered expressive (such as parades, instrumental music, and art) are assumed to be covered by the First Amendment." *Id.* at 440. Conduct is inherently expressive "[w]hen the relevant form of conduct is of more recent origin, or involves an activity (such as burning) that in most instances is not expressive . . . ." *Id.* at 440–41. Therefore, the "Court 'defines in' First Amendment coverage for conduct based on either its traditional or inherent expressiveness." *Id.* at 441. For example, the Court in *Rumsfeld* did not find inherently expressive conduct "because no tradition exists of viewing a refusal to allow access as equivalent to expression, and such an action is not inherently expressive . . . ." *Id.* at 444. According to Rhodes:

> The use of the contrary presumption for nonlinguistic acts also appears preferable due to the dangers from overincluding conduct as covered expression. Although most activities contain some "kernel of expression," not every action can implicate the First Amendment, at least not without either significantly diluting First Amendment protections or prohibiting government regulation of a wide swath of activities. As a result, the Court has been cautious in extending First Amendment coverage to nonlinguistic conduct, especially in the absence of a historical expressive pedigree.

Id. at 442.

92 Rhodes, *supra* note 91, at 437. This is true for both new symbols and conduct that is not predominately expressive. *See id.* (stating well-understood methods apply to symbols of recent origin).

Cambodian invasion and the Kent State tragedy.[93] The speaker intended to communicate that "America stood for peace."[94] The Court reasoned that the poignant timing of his act—given the surrounding circumstances—allowed observers to understand the message.[95]

Only two circuit courts have analyzed food sharing as inherently expressive conduct.[96] The Eleventh Circuit assumed, without deciding, that distributing food to the homeless was inherently expressive.[97] The Ninth Circuit stated that food sharing could qualify as expressive conduct under an as-applied challenge.[98] However, neither appeared to seriously question food-distribution as expressive conduct.[99] Even so, courts are split on the correct analysis for restrictions on distributing food to the homeless in public parks.[100] The Ninth Circuit used a time, place, and manner analysis, while the Eleventh Circuit relied on the *O'Brien* test.[101]

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93 *See* Spence v. Washington, 418 U.S. 405, 410 (1974) (describing the expressive conduct used by the appellant).

94 *Id.* at 409.

95 *See id.* at 410 (claiming observers would easily understand the message conveyed by the speaker's conduct). The Court used the Speech model for its First Amendment analysis, which evaluates the various aspects of the speech and the surrounding circumstances to decide if speech is protected. *See* Luke Meier, *A Broad Attack on Overbreadth*, 40 VAL. U. L. REV. 113, 120 (2005) (contrasting the Statutory model with the Speech model for free speech analyses). In contrast, the Statutory model considers whether a particular statute impacting protected expression is constitutional. *Id.*

96 *See* First Vagabonds Church of God v. City of Orlando, 638 F.3d 756, 758 (11th Cir. 2011) (assuming without deciding that feeding the homeless in a park is expressive conduct); *see also* Santa Monica Food Not Bombs v. City of Santa Monica, 450 F.3d 1022, 1032 (9th Cir. 2006) (explaining that Food Not Bombs did not argue that food-sharing is expressive conduct, but it could qualify as expressive "in an as-applied challenge, should one be brought.").

97 *See First Vagabonds Church of God*, 638 F.3d at 761 (concluding feeding the homeless in a public park to communicate a message is expressive conduct).

98 *See Santa Monica Food Not Bombs*, 450 F.3d at 1032 (stating that Food Not Bombs failed to argue that food-sharing is expressive conduct, but the court stated that it could qualify as expressive "in an as-applied challenge, should one be brought").

99 *See id.* at 1032 (finding it unnecessary to determine whether the conduct was expressive); *First Vagabonds Church of God*, 638 F.3d at 761 (presuming that food-sharing in a public park is expressive conduct).

100 *See* Gonzalez, *supra* note 57, at 234 (identifying a circuit split between the Ninth and Eleventh Circuit regarding the constitutionality of permit schemes that impact food-sharing in public parks).

101 *See id.* at 274 (stating the Eleventh Circuit upheld an ordinance using *O'Brien* that restricted activities of homeless advocates in parks, and the Ninth Circuit found a municipal events ordinance unconstitutional using a time, place, and manner analysis). Gonzalez argues courts should adopt the Ninth Circuit's approach because:

> [It] agrees with the Sixth Circuit that narrow tailoring requires a "close relationship" between the ordinance and the size of the assembly to be regulated, in order to justify a governmental entity's time, place, or manner restriction beyond "ordinary" use of such publicly owned

The implications of selecting either choice will be discussed in the following Part.[102]

2. Government Regulations of Inherently Expressive Conduct

Even when conduct receives protection under the First Amendment, "it is [not] immune from government regulation."[103] City governments may place restrictions on conduct that incidentally impacts speech if it has an important interest that does not aim to suppress the speech itself.[104] For example, Fort Lauderdale placed several restrictions on outdoor food sharing.[105] These restrictions were primarily aimed at conduct and only incidentally impacted Mr. Abbott's speech.[106] Using regulations that incidentally impact speech is one approach cities take throughout the United States.[107]

The Supreme Court stated in *United States v. O'Brien* that when conduct combines both speech and non-speech elements, "a sufficiently important governmental interest . . . can justify incidental limitations on First Amendment freedoms."[108] In *O'Brien*, the defendant publicly burned

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> property. In the Eleventh Circuit . . . cities may regulate groups as small as twenty-five people . . . and cities may limit permits to any particular person, group, or organization to no more than two permits per individual, group, or organization, per park, within a twelve-month period.

Id. at 277.

102 *See infra* Part II.C.2 (portraying government regulations on inherently expressive conduct).

103 CHEMERINSKY, *supra* note 80, at 1119.

104 *See id.* (articulating when the government can regulate conduct when it does not directly suppress the message).

105 *See* FT. LAUDERDALE, FLA. MUN. CODE § 47-18.31(C)(2)(c)(i)–(xiii) (2015) (listing regulations for Outdoor Food Distribution Centers that pertain to sanitation, location, methods, and fines).

106 *See id.* (demanding groups follow certain requirements before getting a permit).

107 *See* SHARE NO MORE, *supra* note 7, at 4 (disclosing various tactics cities use to impact food sharing such as placing restrictions on how groups and individuals can use public property or mandating compliance with local food-safety laws). Even though these laws are cumbersome, the National Coalition for the Homeless explained that community actions against the homeless, which are fueled by Not in My Back Yard ("NIMBY") principles, are the most troublesome because local businesses and home-owner coalitions can place immense pressure on city governments to relocate feeding programs and to enact these laws. *See id.* (arguing a major impetus for some of these laws results from businesses and individuals that complain because they do not want to attract the homeless to their communities or places of business).

108 391 U.S. 367, 376 (1968). Vogel argues homeless advocates should try to argue that regulations impacting food distribution to the homeless in public parks are not incidental restraints on speech. *See* Vogel, *supra* note 64, at 561 (explaining advocates will be more successful under the public forum doctrine). Vogel explains convincing the court to use the public forum doctrine over the *O'Brien* test is paramount for food advocates because the

his draft card at a courthouse in protest of the Selective Service.[109] According to the Court, the government can regulate conduct if: (1) "[the regulation] is within the constitutional power of the government;" (2) "[the regulation] furthers an important or substantial governmental interest;" (3) "the governmental interest is unrelated to the suppression of free expression;" and (4) "the incidental restriction . . . is no greater than is essential to the furtherance of that interest."[110]

The Supreme Court clarified the last prong of the *O'Brien* test in *Ward v. Rock Against Racism*.[111] The Court explained governments are not required to draft regulations that are the "least restrictive or least intrusive means of [regulating]."[112] Instead, intermediate scrutiny makes sure the

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O'Brien test is more deferential. *See id.* (describing trial tactics for homeless advocates). Thus, Vogel explains the following for homeless advocates:

> Laws that only require permits for all food sharing, but do not limit the number of permits a group can get are difficult to frame as more than "incidental" restraints on expression. However, laws that put absolute limits on the number of permits an organization can get in a year, or laws that explicitly ban sharing food with the indigent should be seen as targeted at the expression of groups like Food Not Bombs. These laws are not incidental restraints that require them to conform to certain health standards. They are laws that target their particular kind of political activity that requires sharing food.

Id. at 561–62.

109 *See O'Brien*, 391 U.S. at 370 (describing O'Brien's testimony to the jury about his conduct).

110 *Id.* at 377. This test is essentially identical to intermediate scrutiny. CHEMERINSKY, *supra* note 80, at 1119. Despite the requirement of intermediate scrutiny under *O'Brien*, these regulations receive deferential treatment. *See* FARBER, *supra* note 77, at 25 (opining that other than statutes that close a traditional form of communication, the Court rarely overturns a content-neutral regulation).

111 *See* FARBER, *supra* note 77, at 25 (explaining *Ward's* new test borrowed the first two prongs from Warren's opinion and the last prong from Harlan's concurrence). Farber explains:

> Perhaps the most typical aspect of the decisions in *O'Brien* and *Ward* is that they uphold the government regulation. Except for statutes that entirely foreclose a traditional channel of communication such as lawn signs, the Court rarely invalidates a regulation once it has found it to be content neutral. Even the presumption against closing a channel of communication is unreliable: the Court had little difficulty in upholding a ban on attaching posters to utility poles. Thus, the outcome of a given case often turns almost completely on whether the regulation is characterized as content based.

Id.

112 Ward v. Rock Against Racism, 491 U.S. 781, 798 (1989). According to Chemerinsky:

> In appraising *Ward*, there are two important questions, one normative and one descriptive. Normatively the issue is whether least restrictive alternative analysis should be used in evaluating government regulation of speech in public forums because of the importance of the right to use government property for speech. Descriptively the question

law is "not substantially broader than necessary to achieve [the government's] interest."[113] Despite this relaxed standard, the Court stated in 2014 that governments cannot regulate conduct in a way that substantially burdens speech without advancing its goals.[114]

Within the context of food distribution in public parks, the Eleventh Circuit relied on the *O'Brien* test to uphold the City of Orlando's ordinance.[115] In Orlando, two groups fed the homeless weekly in Lake Eola Park.[116] After complaints about the homeless passing through neighborhoods after the feedings, the city enacted a permit requirement for group feedings in parks.[117] The court opined that the ordinance satisfied the *O'Brien* test because the City could enact the ordinance, the City had a substantial interest, the ordinance did not suppress speech, and the ordinance only incidentally impacted speech.[118]

> is whether the distinction makes sense between a requirement for narrow tailoring and a demand for the least restrictive alternative.

CHEMERINSKY, *supra* note 80, at 1199.

[113] *See Ward*, 491 U.S. at 783 (describing when a regulation that supports a legitimate government interest is narrowly tailored). In other words, courts will not invalidate a law just because a less-restrictive alternative can meet the government's interests. *Id.* at 800.

[114] McCullen v. Coakley, 134 S. Ct. 2518, 2535 (2014) (quoting Ward v. Rock Against Racism, 491 U.S. 781, 799 (1989)). Nonetheless, courts have used *O'Brien* to uphold "both anti-begging laws and anti-food sharing laws." Vogel, *supra* note 64, at 561.

[115] *See* First Vagabonds Church of God v. City of Orlando, 638 F.3d 756, 762 (11th Cir. 2011) (reversing the district court because the ordinance was a "valid regulation of expressive conduct that satisfies all four requirements of *O'Brien*").

[116] *See id.* at 758 (explaining the facts leading up to the lawsuit).

[117] *See id.* at 759 (pointing out the enacted ordinances that required a permit and only allowed a limited number of permits that people could obtain for any park within a year).

[118] *See id.* at 762 (explaining how the ordinance complies with the four factors of *O'Brien*). However, Pappas argues that the Eleventh Circuit misused the constitutional-fact doctrine in deciding this case. *See* Fay O. Pappas, Comment, *Wrong Means to an Unjust End? The Eleventh Circuit's Decision in* First Vagabonds Church of God, 64 FLA. L. REV. 1125, 1135 (2012) (arguing that misusing this doctrine will weaken the right to free speech). According to Pappas, the Eleventh Circuit misapplied the constitutional fact doctrine when overturning the district court:

> The district court in the instant case found that the facially content-neutral regulation, which placed a burden on free speech, failed to serve a single interest asserted by the City. The Eleventh Circuit's contradictory finding—that the Ordinance's purported interest in ameliorating overuse of the park system was indeed substantial—was totally outcome-determinative; the Court turned the question of overuse into an issue of constitutional fact subject to de novo review. It thereafter used the constitutional-fact doctrine to re-decide a factual issue upon which the case turns.

Id. at 1134–35.

The Ninth Circuit also addressed a food-sharing ordinance in *Santa Monica Food Not Bombs v. City of Santa Monica*.[119] The City of Santa Monica enacted an ordinance that required permits for community events of 150 people or more in public parks, sidewalks, or streets.[120] Several groups challenged the ordinance, and the court held that it passed constitutional muster, except for the advertising provision.[121] The court concluded the ordinance was a valid time, place, and manner restriction on public forum speech.[122]

Time, place, and manner restrictions prevent speakers from disrupting public property.[123] These restrictions are valid if they are content-neutral, serve a significant governmental interest, and provide "alternative channels for communication of the information."[124]

C. Prior Restraint and Licensing Schemes

A permit scheme is another method governments use to regulate speech.[125] Before engaging in speech, groups or individuals must obtain a license or permit, which creates the danger of preventing speech from occurring because permits are contingent upon the approval of

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[119] *See* 450 F.3d 1022, 1042 (9th Cir. 2006) (holding part of Santa Monica's community event ordinance was not narrowly tailored).

[120] *See id.* at 1027 (listing the permit requirements enacted by the city to manage its public parks).

[121] *See id.* at 1052–53 (explaining the court's conclusion regarding Santa Monica's ordinance).

[122] *See id.* at 1036–37 (asserting Santa Monica's ordinance was similar to the ordinance in *Thomas v. Chicago Park District* because it adjusted the rights of citizens to preserve free speech instead of denying speech).

[123] *See* CHEMERINSKY, *supra* note 80, at 1194 (noting why governments rely on time, place, and manner restrictions to regulate public space).

[124] Heffron v. Int'l Soc'y for Krishna Consciousness, 452 U.S. 640, 648 (1981). This test is essentially identical to the *O'Brien* test. *See* James M. McGoldrick, Jr., *Symbolic Speech: A Message from Mind to Mind*, 61 OKLA. L. REV. 1, 31 (2008) (asserting that *O'Brien* and the time, place, and manner analysis both receive intermediate scrutiny and carefully balance competing interests). When comparing the *O'Brien* test to the time, place, and manner analysis used in *Clark v. Community for Creative Non-Violence*, McGoldrick explained that *Clark* used the word 'significant' instead of the synonymous alternative 'important or substantial' that was used in *O'Brien*. *Id.* at 29–30. Even though the *Clark* test looked to alternative channels for communication, which *O'Brien* does not use, it is not inconsistent with *O'Brien*. *Id.* at 30 n.129. According to another scholar, the Court decided not to enforce the "ample alternative channels of communication" element, which is why it "never upholds free speech claims." Ashutosh Bhagwat, *The Test That Ate Everything: Intermediate Scrutiny in First Amendment Jurisprudence*, 2007 U. ILL. L. REV. 783, 792 (2007).

[125] *See* CHEMERINSKY, *supra* note 80, at 1011 (detailing the reasons for enacting permit schemes even though they risk functioning as a prior restraint).

governmental officials.[126] Thus, cities carry a heavy burden because prior restraints have a presumption against their validity.[127] Even so, governments view permit schemes as a necessary means to order and safety within the public domain.[128]

Permit schemes must serve important government interests and meet several procedural limitations.[129] The Supreme Court has held that permit schemes must incorporate clear review standards, prompt response times, and judicial access to review denials.[130] Furthermore, opportunities for spontaneous speech must be protected.[131] For example, a permit scheme must apply to large groups because regulating small groups precludes

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126 *See* Baby Tam & Co. v. City of Las Vegas, 154 F.3d 1097, 1100 (9th Cir. 1998) ("A prior restraint exists when the enjoyment of protected expression is contingent upon the approval of government officials."); *see also* CHEMERINSKY, *supra* note 80, at 1196 (articulating the nature of permit schemes and their tendency to preclude speech from occurring); Near v. Minnesota, 283 U.S. 697, 713 (1931) (asserting to "the extent of the constitutional protection, it has been generally, if not universally, considered that it is the chief purpose of the guaranty to prevent previous restraints upon publication").

127 *See* Se. Promotions, Ltd. v. Conrad, 420 U.S. 546, 558–59 (1975) (stating there is a heavy presumption against a prior restraint's constitutional validity). Content-based restrictions receive strict scrutiny while intermediate scrutiny applies to content-neutral laws. Edward L. Carter & Brad Clark, *Death of Procedural Safeguards: Prior Restraint, Due Process, and the Elusive First Amendment Value of Content Neutrality*, 11 COMM. L. & POL'Y 225, 233-34 (2006). The government must show a compelling government interest to satisfy strict scrutiny and a substantial interest for intermediate scrutiny. *Id.* at 233-34.

128 *See* Nathan W. Kellum, *Permit Schemes: Under Current Jurisprudence, What Permits Are Permitted?*, 56 DRAKE L. REV. 381, 389 (2008) (pointing out the proposed goal of permit schemes by government officials). Prior restraint jurisprudence was adopted from "English common law[,] [which] expressly condemned the concept of pre-emptive restrictions on speech, particularly within the context of publications." *Id.* at 386. "Being keenly aware of this concern, courts in the United States have had a 'historic antipathy toward prior restraints.'" *Id*. Permits became especially popular during the 1880s when the Salvation Army actively engaged communities by hosting large parades and gatherings. *Id*. at 387. City police targeted the Salvation army in some cities, while others only allowed silent marches on Sundays. *See* RICHARD COLLIER, THE GENERAL NEXT TO GOD: THE STORY OF WILLIAM BOOTH AND THE SALVATION ARMY 167 (1965) (portraying efforts to stifle the Salvation Army).

129 *See* Kellum, *supra* note 128, at 405 (explaining the procedural safeguards and constitutional protections outlined by the Supreme Court for prior restraints).

130 *See id.* at 414, 417 (portraying current jurisprudence regarding permits and speech restrictions). Additionally, petitioners are entitled to prompt judicial review for denied permits. *See* CHEMERINSKY, *supra* note 80, at 1011–14 (noting the requirements of permit schemes under Supreme Court jurisprudence). Furthermore, an appropriate fee, reasonable notice, and anonymity are important requirements. *See* Kellum, *supra* note 128, at 408–14 (listing additional constitutional requirements). These additional requirements are beyond the scope of this Note.

131 *See* Kellum, *supra* note 128, at 410 (opining the Court has protected spontaneous speech, so cities must protect it when regulating through permit schemes).

spontaneous speech.[132] Additionally, permit schemes must not give unfettered discretion to government officials.[133] Last, permits must stipulate a prompt response time for both the agency and judicial review.[134]

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[132] *See, e.g.*, Watchtower Bible and Tract Soc'y of N. Y., Inc. v. Vill. of Stratton, 536 U.S. 150, 167 (2002) (finding an ordinance unconstitutional because it precluded spontaneous speech); Forsyth Cty. v. Nationalist Movement, 505 U.S. 123, 130 (1992) ("[I]n order to regulate competing uses of public forums, [governments] may impose a permit requirement on those wishing to hold a march, parade, or rally"); *see also* Cox. v. City of Charleston, 416 F.3d 281, 285 (4th Cir. 2005) (regulating groups as small as two or three is unconstitutional); Grossman v. City of Portland, 33 F.3d 1200, 1207–08 (9th Cir. 1994) (holding an ordinance that applied to individuals was invalid); Cmty. for Creative Non-Violence v. Turner, 893 F.2d 1387, 1392 (D.C. Cir. 1990) (holding an ordinance impacting groups as small as two people was unconstitutional).

[133] *See* City of Lakewood v. Plain Dealer Publ'g Co., 486 U.S. 750, 772 (1988) (holding "those portions of the Lakewood ordinance giving the mayor unfettered discretion to deny a permit application and unbounded authority to condition the permit on any additional terms he deems 'necessary and reasonable,' to be unconstitutional"); Shuttlesworth v. City of Birmingham, 394 U.S. 147, 150–51 (1969) (articulating unbridled discretion in one official to approve or disapprove a permit is unconstitutional); *see also* Se. Promotions, Ltd. v. Conrad, 420 U.S. 546, 553 (1975) ("[T]he Court has felt obliged to condemn systems in which the exercise of such authority was not bounded by precise and clear standards."); Kunz v. New York, 340 U.S. 290, 295 (1951) (emphasizing an administrative official must have review standards). Relying on objective review standards is a good way to overcome discretion that carries a presumption of unconstitutionality. *See* Kellum, *supra* note 128, at 415 (asserting permit schemes must have "well-defined and sufficiently narrow guidelines" to pass constitutional muster).

[134] *See* Freedman v. Maryland, 380 U.S. 51, 58–59 (1965) ("[T]he exhibitor must be assured, by statute or authoritative judicial construction, that the censor will, within a specified brief period, either issue a license or go to court to restrain showing the film . . . ."). However, a more recent Supreme Court case stated that the prompt response time is not a mandatory component. *See* Thomas v. Chi. Park Dist., 534 U.S. 316, 322, 325 (2002) (holding that a "content-neutral permit scheme regulating speech in a public forum [has never been required to] adhere to the procedural requirements set forth in *Freedman*," which required a prompt determination by the government and an opportunity for prompt judicial review); *but see* Kellum, *supra* note 128, at 422 (interpreting *Thomas* to mean that some procedural safeguards are not required undercuts "the long-standing constitutional protections against unfettered discretion"). According to Kellum:

> Just like the Court condemns vague or non-existent standards for awarding a permit in the first place, and just like the Court condemns vague or non-existent standards for imposing a fee for a permit, the Court most assuredly condemns vague or non-existent standards for determining when to decide about a permit.

Kellum, *supra* note 128, at 422.

III. ANALYSIS

Current laws that criminalize the homeless are part of an ongoing narrative of mistreatment and exploitation.[135] Even when the homeless populations served a vital role in developing cities' infrastructure, societal laws and policies negatively targeted them when their presence was inconvenient.[136] Enacting laws that affect food distribution in public parks is another example of this perennial problem.[137] Utilizing First Amendment freedoms to ensure cities are enacting constitutional ordinances is the best path to protect the rights of the homeless and groups engaged in advocacy.[138] However, the First Amendment does not apply to all types of conduct.[139] Thus, Part III.A argues that feeding the homeless in public parks is a form of symbolic speech that must receive First Amendment protection.[140] Next, Part III.B acknowledges that cities have the ability to place incidental burdens on the speech of food advocates while regulating their conduct, but argues that Fort Lauderdale's ordinance does not pass constitutional muster.[141] Last, Part III.C asserts that ordinances serving as prior restraints fail to incorporate necessary

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135 *See supra* Part II.A.1 (characterizing the history of homelessness in the United States and the laws cities have enacted in response to homelessness).

136 *See supra* Part II.A.1 (describing laws that negatively impacted the homeless despite their contribution to the industrial movement of the nineteenth century). Interestingly, many cities did provide housing for the homeless. *See* OCOBOCK, *supra* note 31, at 20 (discussing the number of transients housed in cities such as San Francisco and Chicago by World War I to support the demand for cheap labor). It was not uncommon for local police departments to offer housing in prisons for these workers. *Cf.* ROSSI, *supra* note 22, at 19 (describing New York City's police station that lodged 150,000 transients annually). "[A]nyone could approach a New York City police station and be given lodging for the night without being arrested and booked for any offense. . . . making it the largest lodging supplier in the city." *Id.*

Subsequently, the Great Depression forced cities like New York to provide even more housing for the homeless. *See* DOROTHY LAAGER MILLER, NEW YORK CITY IN THE GREAT DEPRESSION: SHELTERING THE HOMELESS 11 (2009) (stating that high unemployment during the 1920s and 1930s made it necessary for New York City "to provide more commodious quarters for the homeless"). Accordingly, "the New York City Department of Welfare provided two annexes to the original main lodging house . . . [which was] proper for men, women, and children . . . ." *Id.*

137 *See supra* Part II.A.1 (portraying efforts to criminalize the homeless throughout history).

138 *See infra* Part IV (arguing the First Amendment protects speech rights of homeless advocates).

139 *See supra* Parts II.B–C (recognizing governments may regulate conduct that is not inherently expressive and channel speech using time, place, and manner restrictions).

140 *See infra* Part III.A (asserting that feeding the homeless in public parks is inherently expressive conduct that must receive First Amendment protections).

141 *See infra* Part III.B (contending Fort Lauderdale's food-sharing ordinance is unconstitutional under the *O'Brien* test).

safeguards mandated by the Supreme Court, which infringes upon the rights of homeless advocates.[142]

A. Food Distribution in Public Parks Is Protected Symbolic Speech

Groups that distribute food to the homeless in public parks intend to convey a particular public message.[143] Public parks are a forum that have been traditionally used as a platform for communicating ideas between citizens to discuss public ideas and concerns.[144] Many activists and protestors use public space to advance their claims and rights; it is a place where political activity flows and where movements may challenge pertinent issues about democracy and citizenship.[145] Furthermore, organized conduct in a specific geographical space is a means to convey a public message.[146] For example, Food Not Bombs is a well-known group that feeds the homeless throughout the country, and it relies on highly visible locations such as parks to communicate its messages about the right to food.[147] Because groups like Food Not Bombs organize gatherings

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[142] *See infra* Part III.C (claiming cities throughout the United States that use permit schemes to deter groups from feeding the homeless are unconstitutional because they lack requisite safeguards).

[143] *See* Vogel, *supra* note 64, at 560 (explaining homeless advocates such as Food Not Bombs use expressive conduct and explanatory speech to make political statements).

[144] *See* Part II (describing the role of parks in the public sphere as a place for public assembly and discussion); *see also* Hague v. Cmty. for Indus. Org., 307 U.S. 496, 515 (1939) (describing parks as a place for public gathering and discourse).

[145] *See* MITCHELL, *supra* note 45, at 134 (observing activists use public property to advocate for issues and change in their communities).

[146] *See* Rhodes, *supra* note 91, at 438 (stating case law demonstrates that organized gathering in a particular, confined place can be just as expressive as a parade, march, or other movement). According to Rhodes:

> First Amendment coverage, then, is not limited to historical forms of predominantly expressive conduct, but also includes analogous contemporary forms of expressive conduct or modern symbolism conveying a particularized message that is likely to be understood by observers. As with the exceptions to presumptive constitutional coverage for linguistic communications highlighted previously, contemporary perspectives regarding the relative utility of the communicative thought conveyed thereby supplement historical expressive traditions. These oft-considered distinct inquiries—determining when words are not covered by the First Amendment and when expressive conduct is—thus share common underpinnings.

Id. at 438–39.

[147] *See* FAQ, FOODNOTBOMBS.NET, http://foodnotbombs.net/new_site/faq.php [https://perma.cc/V2K3-7655] (describing the mission and purpose for engaging in public protests in parks). Food Not Bombs had its first food-sharing event in 1981 when a group of activists set up a soup kitchen outside the Federal Reserve Bank to protest its policies. *See id.* (describing the advent of Food Not Bombs). The night before the protest, they were worried about having too much soup, so they invited the homeless from a local shelter to join them,

in specific geographical spaces to reach the public eye, they intend to convey a message.[148]

Critics will argue that intent alone does not make food distribution inherently expressive, and the Court has not classified all expressive conduct as speech.[149] Furthermore, labeling food distribution as inherently expressive conduct merely misidentifies speech for a philanthropic gesture in a convenient location, and the message is not generally understood by viewers.[150] Moreover, food sharing is not a traditional form of expression recognized by the Court because it is a contemporary form of advocacy for the homeless.[151]

However, food sharing must be viewed within the historical and current societal context of criminalization to understand its potential communicative value.[152] The historical perception and treatment of the homeless by cities and citizens alike demonstrates that the homeless have never integrated into mainstream society.[153] Although they contributed to the sprawl and development of cities, they lived in shantytowns associated with urban blight.[154] They have wrongly been seen as a problem that should be cleaned up.[155] The resurging anti-homeless laws

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which "[t]o [their] surprise, nearly [seventy] people arrived." *Id.* Business people passing by the protest stopped as well to eat food with the homeless and discuss investment policies. *Id.*

148 *See supra* Part II.B.1 (stating symbolic speech must intend to convey a particularized message to receive First Amendment protection).

149 *See supra* Part II.B.1 (describing the role of intent when approaching a First Amendment issue and articulating that the Court does not grant all expressive conduct First Amendment protection).

150 *See supra* Part II.B.1 (noting the requirements that must be satisfied before the Court grants First Amendment protections to expressive conduct).

151 *See Timeline – The First 35 Years of Food Not Bombs*, FOODNOTBOMBS.NET, http://foodnotbombs.net/new_site/timeline.php [https://perma.cc/N96A-BEQB] (stating Food Not Bombs used food-sharing in a park on March 26, 1981, to protest a bank and the nuclear industry); *see also* Couch, *supra* note 4 (stating Arnold Abbott has served the homeless for two decades).

152 *See* Spence v. Washington, 418 U.S. 405, 410–11 (1974) (portraying how mere bizarre behavior of hanging a flag outside a window could convey a message given the societal context).

153 *See supra* Part II.A.1 (explaining the negative perceptions of the homeless throughout history and their inability to gain acceptance by the mainstream society).

154 *See supra* Part II.A.1 (describing the living conditions of the homeless).

155 *See supra* Parts II.A.1–2 (noting the destruction of shanty towns and utilization of police to criminalize the homeless so they leave certain areas). These laws not only saddle the homeless with a criminal history, but they impact the taxpayers as well because tax money spent on law enforcement and emergency health care cost three times as much as giving the homeless shelter and supportive services. *See* Scott Keyes, *Criminalizing Homelessness Can Now Cost Cities Federal Money*, THINKPROGRESS (Sep. 22, 2015), http://thinkprogress.org/economy/2015/09/22/3704274/hud-homelessness-criminalization-funding/

spreading across the nation carry the same goal of cleansing new forms of urban blight and public nuisances.[156] Thus, society's harsh attitude towards the homeless creates a vivid context that allows food sharing to imbue a particular message to the lawmakers, citizens, and businesses who desire these harsh laws.[157]

Under the test outlined in *Spence v. Washington*, the ostensibly benign conduct of feeding people moves beyond a mere picnic or philanthropic gesture; it makes a vivid public statement that the homeless are legitimate members of society and have a right to public space.[158] When the interests of the homeless get pushed aside, and people are prevented from publicly advocating for them, society does not view the homeless as legitimate members of their community.[159] In this sense, using public space to advocate for their rights is essential.[160] Even if onlookers fail to grasp this particular message, watching the homeless line up and wait for food causes observers to contemplate the plight of the homeless.[161] Critics will argue that groups can advocate for the homeless without feeding the homeless or including them.[162] However, failing to include the homeless would merely keep them invisible to the public, and their presence is essential to remind society that they matter and have a right to use public

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[https://perma.cc/ZQT6-K6JE] (reporting on how criminalizing the homeless negatively impacts taxpayers in addition to the homeless).

156 *See supra* Part II.A.1 (discussing the role of laws that seek to cleanse downtown areas of the homeless).

157 *See supra* Part II.A.1 (offering a context of the criminalization of the homeless that allows advocates to demonstrate the importance of advocating for the homeless).

158 *See* 418 U.S. 405, 410–11 (1974) (stating there must be a likelihood that the message would be understood by viewers given the societal context); *see also* MITCHELL, *supra* note 45, at 128 (asserting the value of using public space for communicative purposes). Mitchell states:

> Public space often, though not always, originates as a representation of space, as for example a courthouse square, a monumental plaza, a public park, or a pedestrian shopping district. But as people use these spaces, they also become representational spaces, appropriated in use. Public space is thus socially *produced* through its use *as* public space.

MITCHELL, *supra* note 45, at 129 (internal citations omitted).

159 *See* MITCHELL, *supra* note 45, at 129 (arguing society fails to legitimize the homeless when they remain invisible to the broader community).

160 *See id.* (noting the importance of public space as a forum for social change).

161 *See* Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 291–92 (1984) (assuming without deciding that protestors sleeping in tents could cast light on the plight of the homeless); *see also* Vogel, *supra* note 64, at 560 (explaining onlookers who see the homeless lined up will likely contemplate their situation).

162 *See* CHEMERINSKY, *supra* note 80, at 1189 (summarizing public forums and the ability to present a message to the public on public property). If groups decide not to use food at protests, they could avoid the safety requirements and have an easier time satisfying an event ordinance. *See supra* notes 65–73 and accompanying text (listing city ordinances and their requirements for sharing food in public parks).

space despite their economic situation.[163] In addition, offering food ensures that people will show up given their primary concern for meeting basic needs.[164] Last, characterizing food distribution as expressive conduct is not a new concept for the courts.[165] As groups continue to challenge the proliferation of food-sharing laws, more opportunities will arise to solidify its expressiveness through the courts.[166]

A final criticism is that the homeless may require some explanatory speech because not everyone who passes by a park will instantly understand the group's particular message.[167] However, inherently expressive conduct can rely on some explanation so long as it is not a *necessary* component.[168] In *Rumsfeld*, the Court stated that observers could not glean from the context the law schools' disapproval of the military's stance on homosexuality.[169] The Court opined that observers might conclude that recruiters selected another location out of convenience or that the law schools' interview rooms were full; thus, explanatory speech

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[163] *See supra* notes 67–69 and accompanying text (emphasizing the importance of placing the homeless in the public eye and allowing them to use public property); *see also* Baron, *supra* note 57, at 1022–23 (positing that the "no property" legal situation of the homeless explains why some advocates seek to protect the rights of the homeless through the courts even though success in relation to panhandling, sleeping in public places, and sitting in libraries only creates a "right to be homeless").

[164] *See* Watson, *supra* note 42, at 523 (stating the homeless are primarily concerned with meeting their basic needs, which prevents them from focusing on other interests).

[165] *See supra* Part II.B.1 (distinguishing between the approaches taken by the Ninth and Eleventh Circuit regarding food sharing as inherently expressive conduct).

[166] *See* Vogel, *supra* note 64, at 561 (calling for advocates to encourage courts to follow the Ninth Circuit's approach because it provided a more rigorous analysis while the *O'Brien* test used by the Eleventh Circuit is too deferential; using the latter approach would drastically limit an advocate's ability to successfully protect the rights of homeless advocates).

[167] *See* Rumsfeld v. Forum for Acad. and Institutional Rights, Inc., 547 U.S. 47, 66 (2006) (expressing speech cannot be dependent on supplemental speech to explain the speaker's message).

[168] *See id.* (reasoning that because it was necessary to explain the communicative value of the law school's conduct, there was "strong evidence that the conduct at issue . . . [was] not so inherently expressive that it warrant[ed] protection under *O'Brien*"). The court explained further:

> If combining speech and conduct were enough to create expressive conduct, a regulated party could always transform conduct into "speech" simply by talking about it. For instance, if an individual announces that he intends to express his disapproval of the Internal Revenue Service by refusing to pay his income taxes, we would have to apply *O'Brien* to determine whether the Tax Code violates the First Amendment. Neither *O'Brien* nor its progeny supports such a result.

Id.

[169] *See id.* (stating the law schools' actions were expressive only because they used explanatory speech to supplement their conduct).

was necessary to communicate their message.[170] In contrast, society has historically viewed the homeless as outcasts and a nuisance to society.[171] Thus, the homeless' presence in a particular location triggers a more visceral, communicative response than military personal recruiting from different parts of a university campus, and it is not *necessary* to accompany the food distribution with explanatory speech to convey a particular message of inclusion.[172] Because distributing food to the homeless in a public park is inherently expressive, the next step is to determine whether the cities that have placed restrictions on food sharing in public space comply with the First Amendment.[173]

B. Laws Regulating the Manner of Food Distribution

Fort Lauderdale, Florida's outdoor food distribution ordinance is one example of an ordinance attempting to regulate conduct while incidentally impacting speech.[174] Even though intermediate scrutiny applies and *O'Brien* is usually deferential to the government, the ordinance must be carefully reviewed.[175]

Assuming the ordinance is within the constitutional power of the government, Fort Lauderdale likely clears the second hurdle of an

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[170] *See id.* (noting objective observers could not comprehend the significance of their actions).

[171] *See supra* Part II.A.1 (depicting how society has viewed the homeless throughout history, and that in many situations, they were cast in a negative light).

[172] *See* SHARE NO MORE, *supra* note 7, at 16 (describing complaints that resulted in cities proposing food-sharing ordinances: homeless go to the bathroom outside, there is an increase in crime, their mental state is uncertain, and the homeless pose a threat to the community's security). However, various homeless advocates claim that myths and illicit motivations perpetuate these ordinances, and sharing food with the homeless does not encourage homelessness. *See* Lindsey Bever, *Fort Lauderdale Cracks Down on Feeding Homeless in Public, Arrests 90-year-old Man Who Did It Anyway*, WASH. POST (Nov. 5, 2014), https://www.washingtonpost.com/news/morning-mix/wp/2014/11/05/fort-lauderdale-cracks-down-on-feeding-homeless-in-public-arrests-90-year-old-man/ [https://perma.cc/Z8AM-TUXJ] (portraying the perceptions of homeless advocates who disagree with Fort Lauderdale's food-sharing ordinance).

[173] *See infra* Part II.B.2 (explaining the constitutional requirements governments must comply with to regulate expressive conduct).

[174] *See* FT. LAUDERDALE, FLA. MUN. CODE §§ 47-18.31(b)(ii), (vii) (2015) (requiring groups engaging in food sharing to remain 500 feet away from residential property, provide handwashing equipment, and provide restrooms). This ordinance was one of five passed within six months in Fort Lauderdale that affected the homeless. *See* Bever, *supra* note 172 (reporting about the aftermath of Fort Lauderdale's food distribution ordinance). The other laws allowed authorities to seize the property of the homeless until they could pay a fine; another banned camping in public. *Id.*

[175] *See* FARBER, *supra* note 77, at 39 (asserting the *O'Brien* test is very deferential towards government regulations).

important government interest.[176] Although misguided, Fort Lauderdale determined that providing social services to people has "serious objectionable characteristics" that create adverse "secondary effects on adjacent properties."[177] Homeless advocates will rightly argue that the law is aimed at concerns that are not legitimate because the city's bias rings clear.[178] However, protecting neighborhoods from superficial negative consequences is legitimate because a pernicious legislative motive will not preclude courts from upholding a law.[179] Also, managing the secondary effects that interfere with other residents and businesses is similar to regulating competing interests on public property, which is a legitimate purpose.[180]

Second, the ordinance does not suppress free expression.[181] The ordinance applies broadly to numerous social service entities, so Fort Lauderdale is not specifically targeting the speech of homeless advocates who use food sharing to advocate for the poor.[182] Similar to the city in *O'Brien*, Fort Lauderdale can offer numerous justifications for requiring regulations such as food safety, proper sanitation, and property usage.[183] Homeless advocates may argue that the restriction still adversely impacts groups who intentionally use social services to bring awareness to the plight of the homeless, but Fort Lauderdale may take the position that it

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176 *See* United States v. O'Brien, 391 U.S. 367, 376 (1968) (listing the four elements of the *O'Brien* test).

177 *See* § 47-18.31(A) (explaining the purpose for Fort Lauderdale's food ordinance). City officials claimed the law allowed groups to distribute food legally, they just simply had to satisfy the requirements of the ordinance. *See* Bever, *supra* note 172 (reporting on the response from the city officials when they were asked about the law). Opponents of the law fervently disagreed and chanted outside the Fort Lauderdale Commission's chamber: "Hey, Jack, what do you say? How many homeless did you starve today?" *Id.*

178 *See* § 47-18.31(A) (referring to the homeless and social services in general as having "objectionable characteristics" and having "adverse secondary effects on adjacent properties").

179 *See O'Brien*, 391 U.S. at 383 ("Inquiries into congressional motives or purposes are a hazardous matter.").

180 *See* Santa Monica Food Not Bombs v. City of Santa Monica, 450 F.3d 1022, 1038 (9th Cir. 2006) (emphasizing that regulating competing interests of a public property by local governments is a substantial interest).

181 *See Obrien*, 391 U.S. at 377 (listing the second element of the *O'Brien* test which requires a regulation to be "unrelated to the suppression of free expression").

182 *See* §§ 47-18.31(A), (B)(6) (explaining the ordinance impacts all social service facilities and not just Outdoor Food Distribution Centers).

183 *See* §§ 47-18.31(C)(2)(c)(i), (iv), (vi), (viii) (requiring groups to comply with county food-service laws, mandating groups to provide restroom facilities or portable toilets for patrons and servers, obligating one food server to be certified, and compelling groups to provide hand-washing stations with free-flowing water).

is not opposed to groups advocating for the poor because it merely wants groups to conduct their behavior in a sanitary and harmless fashion.[184]

Some authors have stated that the last element of the *O'Brien* test is inconsequential.[185] Despite the Court's deferential treatment, Fort Lauderdale's ordinance goes beyond mere restrictions on conduct because it grants property owners the ability to arbitrarily deny access to their property when groups desire to feed the homeless outside.[186] The ordinance does not specifically say a permit is required, but this section seems to move into the realm of a prior restraint.[187] The government may argue that this subsection protects the rights of private property owners, but it does not narrowly construe permission to only private property, so public property falls within the scope of the ordinance.[188] Therefore, this requirement is problematic because groups could face capricious denials from people and public entities that dislike the symbolic conduct of homeless advocates.[189]

The 500-foot halo requirement between food sharing and other social service facilities, residential areas, or food distribution centers is also problematic.[190] For example, in *McCullen v. Coakley*, the Court correctly acknowledged that cities may not regulate expression when the burden impacting the speech fails to further a city's goals.[191] Although this section may intend to spread social services throughout the city, some parks are more convenient for the homeless due to limited transportation.[192] Also,

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184 *See* Barnes v. Glen Theatre, Inc., 501 U.S. 560, 571 (1991) (reasoning an Indiana statute that prohibited nude dancing was not prohibiting dancing outright, but simply restricted people from dancing offensively in the nude); *O'Brien*, 391 U.S. at 381–82 (stating the court allowed a law to impact the non-communicative element instead of the speech aspect of flag burning).

185 *See supra* Part II.B.2 (explaining the last element in the *O'Brien* test is not routinely enforced by the courts); *see also* Bhagwat, *supra* note 124, at 792 (arguing when applying *O'Brien*, the Court does not enforce the last prong, and thus rarely upholds First Amendment free speech claims).

186 *See* § 47-18.2(C)(2)(c)(vii) ("Shall provide written consent from the property owner to conduct that activity on the property.").

187 *See supra* Part II.C (articulating the role of prior restraints, in that they require prior notice and permission before speaking).

188 *See* § 47-18.2(C)(2)(c)(vii) (failing to narrowly define "property owner" as a private entity).

189 *See supra* Part II.C (explaining that prior restraints may preclude speech because authorities may capriciously deny permits without good cause).

190 *See* §§ 47-18.31(C)(2)(c)(ii)–(iii) (preventing outdoor food distribution to be within 500 feet of other social service facilities or food distribution centers).

191 *See* 134 S. Ct. 2518, 2535 (2014) (quoting Ward v. Rock Against Racism, 491 U.S. 781, 799 (1989)) (requiring ordinances to further the government's goals when the ordinance impacts speech)).

192 *See* SHARE NO MORE, *supra* note 7, at 7, 10 (highlighting several key problems when cities force groups to relocate because the homeless do not have transportation that allows

homeless advocates may want to use specific parks because they provide a better forum for reaching a particular audience.[193] If a park that is convenient and optimal for speech is near the area of a Salvation Army, the group would be forced to select a less desirable location.[194] Fort Lauderdale may argue that groups can picket instead of distributing food, but involving the homeless is an integral component of their message because it causes people to truly reflect on the situation of the homeless.[195] Moreover, the city defines outdoor food distribution centers as providing food without cost "as a social service," which means that a church group feeding its members or a company picnic is not subject to the 500-foot requirement.[196] These large groups are just as likely to cause disturbances, and omitting them from the ordinance unfairly burdens the speech of one particular group.[197]

C. Food-Sharing Laws That Impose Prior Restraints

Cities have regulated the conduct of individuals and groups, which has incidentally impacted people who use food-sharing as a form of speech in public fora.[198] As previously mentioned, these regulations must

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them to crisscross the city to attend a group feeding). The limited mobility that accompanies homelessness has caused some counties to provide free public transportation to qualifying individuals. *See* Cord Jefferson, *Idea: Free Public Transportation for Homeless People*, GOOD (Feb. 6, 2011), https://www.good.is/articles/idea-free-public-transportation-for-homeless-people [https://perma.cc/64M5-EVWM] (reporting on Santa Clara County's initiative to offer free public transportation to the homeless). The law allows the homeless to attend medical appointments, job interviews, or other services. *Id.*

193 *See* SHARE NO MORE, *supra* note 7, at 4 (noting some groups intentionally strive to drive the homeless away from their communities). Moreover, the homeless have difficulty finding work because jobs are not always conveniently located near the homeless, and an inability to afford transportation prevents them from securing a job. *See* Julia Acuna & Bob Erlenbusch, *Homeless Employment Report: Findings and Recommendations*, NAT'L COAL. FOR THE HOMELESS (Aug. 2009), http://www.nationalhomeless.org/publications/homelessemploymentreport/ [https://perma.cc/2GVH-35GQ] (explaining that lack of transportation is a major preclusion to finding work for the homeless).

194 *See* § 47-18.31(C)(2)(d)(i) (preventing a social service facility from being within 500 feet of another social service facility).

195 *See* Vogel, *supra* note 64, at 560 (stating that by watching the homeless line up, onlookers can see a vivid picture of the current circumstances of the homeless and their demeanor).

196 *See* §§ 47-18.31(B)(4), (B)(6) (defining "social service" as providing food to address the welfare of the public or offering food in combination with other services).

197 *See* Santa Monica Food Not Bombs v. City of Santa Monica, 450 F.3d 1022, 1043 (9th Cir. 2006) (claiming large groups, whether demonstrating or engaged in athletics, could have a significant impact on public space).

198 *See* §§ 47-18.31(A), (B)(4), (C)(2)(b)(i)–(vii) (codifying Fort Lauderdale's attempt to regulate conduct, which incidentally impacts the speech of groups that feed the homeless).

be analyzed under *O'Brien* to verify their constitutionality.[199] Although these laws may prevent people from engaging in food sharing, the most egregious forms of preclusion take shape as prior restraints.[200] This Part addresses city ordinances that create prior restraints by requiring groups and individuals to obtain permits before engaging in food-sharing activities with the homeless on public property.[201] Also prior restraints are one of the worst forms of regulations, so it is imperative that cities comply with constitutional requirements, especially because permit schemes have deterred groups from feeding the homeless.[202] However, before turning to the constitutional requirements of prior restraints, Part III.C.1 argues that food-sharing ordinances are typically content-neutral.[203] Last, Part III.C.2 asserts that the ordinances fail to comply with constitutional requirements.[204]

1. Food-Sharing Ordinances Are Content-Neutral Regulations

Drawing clear distinctions between content-based and content-neutral regulations that impact food sharing is not an easy task.[205] Oftentimes, understanding the impact regulations have on speech is challenging and courts must examine the legislative history to ascertain the legislative body's intent.[206] Some cities, such as Houston, plainly articulate the reasons behind their ordinances.[207] Houston does not ban

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[199] *See supra* Part II.B.2 (describing how the Court relies on *O'Brien* to determine whether regulations that incidentally impact speech are constitutional).

[200] *See supra* Part II.C (describing the pernicious nature of prior restraints because they can easily preclude speech from the marketplace of ideas).

[201] *See infra* Parts III.C.1–2 (analyzing content-neutral permit schemes and their failure to protect the speech rights of groups that feed the homeless because they lack mandatory safeguards).

[202] *See* SHARE NO MORE, *supra* note 7, at 9 (noting several groups have stopped feeding the homeless in public parks because their applications get arbitrarily denied).

[203] *See infra* Part III.C.1 (arguing that the majority of prior restraints impacting food sharing are content-neutral); CHEMERINSKY, *supra* note 80, at 978 (describing the implications of content-based and content-neutral laws).

[204] *See infra* Part III.C.2 (asserting that prior restraints that impact food sharing in public parks are unconstitutional because they fail to incorporate mandatory safeguards).

[205] *See* Turner Broad. Sys., Inc. v. Fed. Commc'ns Comm'n, 512 U.S. 622, 642 (1994) ("Deciding whether a particular regulation is content based or content neutral is not always a simple task.").

[206] *See* Carter & Clark, *supra* note 127, at 238 (2006) (explaining courts typically must examine the legislative history to identify intent because the effect on speech caused by regulations is oftentimes unclear).

[207] *See* O'Hara, *supra* note 67 (citing the Houston's mayor: "making it easier for people to stay on the streets is not humane . . . [giving food to the homeless] keep[s] them on the street longer, which is what happens when you feed them."). However, determining "legislative intent is often subjective and speculative." Clay Calvert, *Free Speech and Content-Neutrality: Inconsistent Applications of an Increasingly Malleable Doctrine*, 29 MCGEORGE L. REV. 69, 108

feeding the homeless outright, but its ordinance specifically limits opportunities for speech by groups and individuals using food distribution to advocate for the homeless.[208] Although the city may be concerned about coordinating social services, it singles out giving food to the homeless instead of regulating social services more generally.[209] However, other cities made an effort to ensure that ordinances apply to everyone and not just charitable organizations.[210]

Despite that these laws unfairly stop people from feeding the homeless, classifying these ordinances as content-based is unlikely because they seem primarily concerned with the secondary effects on public property created by public feedings, such as interfering with other activities and regulating space.[211] Even if a court decides that the

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(1997). In many situations, content-neutral and content-based objectives will be intertwined and inseparable, which seems to be case in the food-sharing context because the regulations can arguably be placed on conduct instead of the message itself. *See id.* at 107 (questioning whether it is "really possible for a court rationally to extricate one purpose from another"). "In some cases there simply will be *both* content-based and content-neutral objectives that cannot be separated." *Id.*

[208] *See* United States v. Playboy Entm't Grp., Inc., 529 U.S. 803, 811 (2000) (finding regulations that impacted only cable channels with sexual speech instead of all cable channels content-based because the regulations focused on the content and its direct impact on listeners).

[209] *See* HOUSTON, TEX., MUN. CODE § 20-252 (2015) (prohibiting food service events on public property without permits).

[210] *See* SANTA MONICA, CAL., MUN. CODE § 4.68.040 (2015) (incorporating its food distribution laws into its special events ordinance).

[211] *See* Renton v. Playtime Theatres, Inc. 475 U.S. 41, 51–52 (1986) (concluding an ordinance was content-neutral because it was primarily concerned with secondary effects of adult video theatres on the broader community); s*ee also* Bhagwat, *supra* note 124, at 804 (articulating the secondary effects analysis has been extended to areas of the law outside the context of sexually oriented businesses and conduct). The Sixth Circuit used the secondary effects doctrine when analyzing a school rule that forbade schools from using undue influence when recruiting students. *See id.* (providing examples of how courts have applied the secondary effects doctrine in areas of the law not pertaining to sexually oriented contexts).

Renton has been highly criticized by scholars because it "seems to confuse whether a law is content-based or content-neutral with the question of whether a law is justified by a sufficient purpose." CHEMERINSKY, *supra* note 80, at 981. According to Chemerinsky, the law was content-based because it applied only to theaters showing adult films. *See id.* (critiquing *Renton* even though the law was intended to combat crime surrounding adult theaters); *see also* FARBER, *supra* note 77, at 138 (defining a "secondary effect" as a type of "side-effect of speech that happens to be associated with particular types of content, but which could in principle derive from other forms of speech"). Farber provided the following example:

> Suppose computer programmers were notorious for their use of drugs, and that bookstores carrying computer-related books attracted drug dealers to the area, increased neighborhood drug use, caused property values to decline, and harmed the quality of urban life. Observing these effects, a city council might desire to control the location of stores with

secondary effects doctrine does not apply to this context because it does not concern sexually explicit conduct, cities can argue that they help manage limited public space, which the Ninth Circuit noted was a critical reason for classifying the City of Santa Monica's permit scheme as content-neutral.[212]

Although each ordinance would receive a case-by-case analysis, the content-neutral permit schemes impacting food sharing will not be subject to the prompt response requirement outlined in *Freedman v. Maryland*.[213] Because a majority of these ordinances appear to fall within the content-neutral classification, the following Part analyzes the remaining procedural requirements of prior restraints.[214]

2. Food-Sharing Ordinances Fail to Comply with Prior Restraint Requirements on Free Speech

The interests behind food sharing laws serve an important government interest because the Court has upheld regulations that seek to promote convenience and safeguard order within the public domain.[215]

> books "Depicting Specified Computer Activities", without in any way disapproving of the books themselves or endorsing the views of Luddites who disapprove of computers.

FARBER, *supra* note 77, at 138.

[212] *See* Santa Monica Food Not Bombs v. City of Santa Monica, 450 F.3d 1022, 1036 (9th Cir. 2006) (explaining the purpose of the ordinance was to coordinate use of the park instead of precluding a particular expression). The Ninth Circuit also relied on the Supreme Court's decision in *Thomas v. Chicago Park District* to label the ordinance as content-neutral. *See id.* (noting the decision was based on the "marked parallels between the Events Ordinance and the ordinance at issue in *Thomas*"). The Ninth Circuit focused on three similar characteristics:

> (1) "[n]one of the grounds for denying a permit has anything to do with what a speaker might say"; (2) "the ordinance (unlike the classic censorship scheme) is not even directed to communicative activity as such, but rather to *all* activity conducted in a public park"; and (3) the object of the permitting scheme was "to coordinate multiple uses of limited space, to assure preservation of the park facilities, to prevent uses that are dangerous, unlawful, or impermissible under the Park District's rules, and to assure financial accountability for damage caused by the event" rather than to exclude expression based on any particular content.

Id.

[213] *See* Thomas v. Chi. Park Dist., 534 U.S. 316, 322, 325 (2002) (holding a "content-neutral permit scheme regulating speech in a public forum [has never been required to] adhere to the procedural requirements set forth in *Freedman*," which required a prompt determination by the government and an opportunity for prompt judicial review).

[214] *See infra* Part III.C.2 (arguing prior restraints impacting food-sharing laws are unconstitutional).

[215] *See Thomas*, 534 U.S. at 322 (explaining content-neutral regulations that coordinate use instead of precluding speech are acceptable prior restraints); *see also* Poulos v. New Hampshire, 345 U.S. 395, 403 (1953) (upholding an ordinance that was a "ministerial, police

Accordingly, the City of Raleigh's decision to withhold permits from groups that interfere with other activities or create a nuisance within the park is an important interest.[216] Additionally, the City of Medford appropriately uses permits to coordinate park behavior because events and parades cannot impede traffic, create unreasonable hazards, or create a nuisance through noise or any other violation.[217] Last, other ordinances are more vague and fail to state a purpose within the text of the ordinance.[218] Even so, courts could plausibly determine that these ordinances are legitimate so long as cities can prove that the interest is important.[219]

Despite having an important interest, many ordinances are problematic because they lack clear objective criteria or grant considerable discretion to one individual.[220] Ambiguous terminology, non-existent standards, and unguided discretion are characteristics of ordinances that lack adequate review standards.[221] A similar problem has occurred where cities understandably require permits, but the code fails to disclose the decision making process.[222] In contrast, the food-sharing ordinance

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routine for adjusting the rights of citizens so that the opportunity for effective freedom of speech may be preserved."); Cox v. New Hampshire, 312 U.S. 569, 574 (1941) (regulating a public forum to ensure convenience and to "safeguard[] the good order upon which [civil liberties] ultimately depend" because such is a legitimate interest).

216 *See* RALEIGH, N.C., MUN. CODE § 9-2022(d) (2015) (explaining the Chief of Police has the discretion to deny submitted applications for permits).

217 *See* MEDFORD, OR, MUN. CODE § 2.185(1)–(9) (2015) (describing the criteria that City Managers may use when deciding to approve or decline a permit).

218 *See* MYRTLE BEACH, S.C., MUN. CODE § 14-316(f)(3) (2015) ("Not more than one large group feeding facility use permits may be issued to a person, or persons acting in cooperation through joint purpose however loosely associated within a 12-month period.").

219 *See* CHEMERINSKY, *supra* note 80, at 1011 (explaining the necessary requirements of licensing schemes that make them constitutional).

220 *See, e.g.*, RALEIGH, N.C., MUN. CODE § 9-2022(d) (2015) (granting sole discretion to the Chief of Police to approve or deny permits); MEDFORD, OR, MUN. CODE § 2.185(1) (2015) (allowing the City Manager to deny or approve permits); COLUMBIA, S.C., MUN. CODE § 15-2(a) (2015) (giving discretion to the Director of the Parks and Recreation Department to deny permits when protecting "the public health, safety, security, peace, order, welfare and convenience"); MANCHESTER, N.H., MUN. CODE § 117.17 (2015) (requiring a written application for a permit without specifying applicable review standards); *see supra* Part II.C (discussing the importance of having objective review standards in city ordinances to avoid giving an administrative official sole discretion over permits);.

221 *See* City of Lakewood v. Plain Dealer Publ'g Co., 486 U.S. 750, 770 (1988) (explaining standards must be included in the text of city laws); *see also* City of Houston v. Hill, 482 U.S. 451, 468 (1987) (holding an ordinance was not subject to a limiting construction because the text was unambiguous); Shuttlesworth v. City of Birmingham, 394 U.S. 147, 150–51 (1969) (articulating that unbridled discretion in one official to approve or disapprove a permit is unconstitutional).

222 *See* MYRTLE BEACH, S.C., MUN. CODE § 14-316(f)(2) (2015) (requiring a department of health and environmental control permit without stipulating application requirements); *see*

upheld by the Ninth Circuit undoubtedly articulated when the city denies a permit.[223] More cities should follow the City of Santa Monica's lead because the government "cannot vest restraining control over the right to speak . . . in an administrative official where there are no appropriate standards to guide his action."[224]

Similarly, other cities' ordinances are problematic. For example, in Houston, Texas the private or public property owner must give permission to groups hoping to distribute food, and in Medford, the city allows the city manager to decide whether food sharing will become a nuisance or cause a hazardous condition.[225] These requirements appear to grant too much unfettered discretion to one individual because the decisions are prone to the individual tastes and preferences of the decision makers.[226]

Last, numerous ordinances failed to effectively identify the size of the group that the ordinances impact.[227] The City of Houston's permit scheme affects groups of five or more people, the City of Columbia's ordinance applies to groups of twenty-five or more people, and other ordinances

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also MANCHESTER, N.H., MUN. CODE § 117.17 (2015) (obligating individuals to submit a permit application to the requisite Health Authority without providing information about how decisions are made when approving or denying permits).

223 SANTA MONICA, CAL., MUN. CODE § 4.68.070 (listing several reasons for denying a permit: making a misleading or fraudulent statement, failing to include all necessary information, failing to satisfy all requirements, leaving out a payment, damaging city property, failing to show proof of insurance or sign an indemnification paper before using public property).

224 Kunz v. New York, 340 U.S. 290, 295 (1951). *See* Forsyth Cty. v. Nationalist Movement, 505 U.S. 123, 133 (1992) (finding a law unconstitutional because it lacked "articulated standards either in the ordinance or the county's established practice").

225 *See* HOUSTON, TEX., MUN. CODE § 20-252 (2015) (mandating permission to use private or public property from the owners); *see also* MEDFORD, OR, MUN. CODE § 2.185(1) (2015) (giving the City Manager discretion to deny permit applications).

226 *See Shuttlesworth*, 394 U.S. at 151 (allowing governmental authorities to approve or deny permits without universal standards lends itself to subjectivity). According to Kellum, "A system of prior restraints must possess well-defined and sufficiently narrow guidelines to direct the governing body's decision[-]making. Such guidelines must be truly objective in order to prevent . . . [making decisions] based on tastes, preferences, or biases." Kellum, *supra* note 128, at 415.

227 *See supra* Part II.C. (providing an overview of permit scheme requirements and noting the importance of regulating large groups instead of small groups); *see also* Grossman v. City of Portland, 33 F.3d 1200, 1206–07 (9th Cir. 1994) (emphasizing some groups could not engage in spontaneous speech). Although the Court has not defined a specific group size, circuit courts have upheld group sizes ranging from twenty-five to one hundred and fifty people. *See* First Vagabonds Church of God v. City of Orlando, 638 F.3d 756, 759, 761–62 (11th Cir. 2011) (holding a group-size of twenty-five people was narrowly tailored); Santa Monica Food Not Bombs v. City of Santa Monica, 450 F.3d 1022, 1043 (9th Cir. 2006) (holding a group-size of 150 people was narrowly tailored).

blatantly omitted a definition of group size.[228] Moreover, other ordinances do not even allow one person to distribute food spontaneously.[229] Even though larger groups likely organize and plan these food-sharing events, these ordinances lack this important requirement.[230]

IV. CONTRIBUTION

Laws targeting the homeless have a long tradition in the United States.[231] These laws have fluctuated throughout the centuries, but recently regained steam in the wake of the Great Recession.[232] Although some of these laws pass constitutional muster, others do not and have precluded groups from using group feedings to advocate for the homeless by using permit schemes and other onerous regulations to create unfair barriers.[233] Cities must draft reasonable ordinances because "many [content-neutral] prior restraints [in the context of licensing] are now presumed constitutional and may be immediately effected unless and until the speech proponent goes to court and carries the burden to show that speech should be protected."[234] Therefore, cities must modify their

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[228] *See, e.g.*, MEDFORD, OR, MUN. CODE § 2.185(1) (noting the ordinance applies to events or parades); COLUMBIA, S.C., MUN. CODE § 15-2(a) (2015) (characterizing the size of impacted groups); HOUSTON, TEX., MUN. CODE § 20-251 (asserting permit requirements apply to groups of five or more people).

[229] *See, e.g.*, MANCHESTER, N.H., MUN. CODE § 117.15 (2015) (proscribing food distribution by any person).

[230] *See* O'Hara, *supra* note 67 (reporting some people have stopped giving their food to the homeless in response to the food-sharing ordinance passed by the city because it prohibits individuals from distributing food).

[231] *See supra* Part II.A (portraying the history of the homeless in the United States).

[232] *See supra* Part II.A (explaining the increase in homelessness during the Great Recession).

[233] *See supra* Part II.A.2 (describing the barriers that the homeless face when cities enact laws used to criminalize them).

[234] Carter & Clark, *supra* note 127, at 226. According to Carter and Clark, the Supreme Court has slowly carved away procedural safeguards outlined in *Freedman* because many of the dangers associated with prior restraints are diminished when prior restraint laws are content-neutral. *See id.* (explaining Supreme Court decisions since 2002 regarding content-neutral prior restraints). According to one scholar, content-neutral laws are less harmful because speech is reduced "equally across the full range of ideas and topics . . . rather than entailing selective government regulation of particular messages." Calvert, *supra* note 207, at 75. However, there are two major implications of content-neutral laws and the court's evisceration of requisite procedural safeguards:

> First, courts sometimes have not required procedural safeguards even when prior restraints were content-based. Second, federal courts of appeals uniformly have interpreted two Supreme Court opinions since 2002 to mean that the First Amendment no longer requires a time limit on the initial administrative decision about whether to allow speech in a content-neutral prior restraint licensing scheme. Elimination of the time-limit requirement, which constituted the essence of *Freedman*'s concern for ensuring due process in case of threatened speech

ordinances that manage public space to ensure full compliance with constitutional safeguards. By doing so, cities can appropriately regulate public space without stripping groups and individuals of their First Amendment rights. Part IV.A proposes a model ordinance for cities to adopt, and Part IV.B explains why these changes are necessary.

A. Proposed Ordinance

This Part proposes an amended ordinance for cities to adopt.[235]

> Except as otherwise provided by this Chapter or other applicable law, rule or regulation or any permit or license issued hereunder or pursuant to the terms of a permit, lease, or contract which has been specifically authorized by the City Council, a community event permit shall be required to be obtained from the *Parks and Recreation Committee* ~~Community Event Committee~~ for the following activities:
>
> (a) A parade, procession, march or assembly consisting of persons, animals, vehicles, or any other combination thereof, which is to assemble or travel in unison on any public street, highway, alley, sidewalk or other City-designated public way and which either: (1) may impede, obstruct, impair or interfere with free use of such public street, highway, alley, sidewalk, or other public way owned, controlled, or maintained by the City; or (2) does not comply with normal or usual traffic regulations or controls.
>
> (b) Any activity or event on City owned, controlled, or maintained property not subject to the requirements of subsection (a) of this Section, involving ~~one hundred fifty or more persons~~, *one hundred (100) or more persons*. ~~involving seventy-five or more persons on the Santa Monica Third Street Promenade.~~

deprivation, *may allow government to suppress speech it disfavors even while maintaining the appearance of content neutrality*.

Carter & Clark, *supra* note 127, at 226 (emphasis added).

235 The ordinance uses language from sections 4.68.040 and 4.68.060 of the Santa Monica Municipal Code, which was reviewed by the Ninth Circuit. Amendments are italicized and deleted content has been struck.

(c) Spontaneous events which are occasioned by news or affairs coming into public knowledge less than forty-eight hours prior to such event may be conducted on the lawn of City Hall without the organizers first having to obtain a community event permit. If practicable, the organizers should give notice to the City's Community Events Office at least four hours prior to the event informing the City of the date and time of the event and providing an estimate of the approximate number of persons who will be participating.

(d) *To apply for a permit, groups and individuals must:*
   (i) Submit an application forty-eight hours before an event, and the Board will issue a prompt response; and
   (ii) The applicable fee must be paid unless offering services to indigent populations
      a. *Waiver of the fee requires groups to pick up their own trash.*

(e) *All applications are reviewed by the Committee and no individual member has sole discretion. The Parks and Recreation Committee* shall issue a community event permit, if it is determined that all of the following criteria have been met:
   (i) *The event does not* unreasonably or unfeasibly burden City resources necessary to preserve the public's use of the street or other property.
   (ii) *The event does* not unduly impede, obstruct, or interfere with the operation of emergency vehicles or equipment in or through the particular permit area.
   (iii) The proposed use, event, or activity does not otherwise present a substantial or unwarranted safety, noise, or traffic hazard.
   (iv) ~~The proposed event will not cause other adverse impacts on health or safety to surrounding residential or commercial uses, which cannot be effectively mitigated.~~
   (iv) Consideration may not be given to: the event's message, the content of speech, the identity or associational relationship of the

> applicant, or the assumptions regarding the amount of hostility towards the message or speech conveyed by the group or event.

B. Commentary

This ordinance is the best solution for two main reasons. First, the proposed ordinance corrects deficiencies found in existing city ordinances.[236] One important restriction requires ordinances to allow spontaneous speech.[237] This ordinance applies to large groups, which is defined as one hundred people, so groups smaller than one hundred can spontaneously engage in food distribution without facing arrest or harsh fines for violating a statute.[238] Critics may argue that the Ninth Circuit stated that anything less than 150 persons could be unconstitutional.[239] However, the Supreme Court has not established a particular number, and 100 is a reasonable compromise because the Ninth Circuit warned that a group of 150 people could interfere with park activities.[240]

Additionally, this ordinance incorporates objective review standards.[241] The ordinance specifically assures applicants that objective review standards are used to grant or deny an application.[242] Also, the review process is conducted by a committee instead of individuals, which satisfies the Supreme Court's requirement of not granting too much discretion to individuals.[243] Furthermore, the proposed ordinance plainly articulates that the message, content, association, or popularity of the speech are not factors used by the Board to grant or deny permission to engage in a public demonstration, which should help prevent arbitrary

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[236] *See supra* Parts III.B–C (analyzing various city ordinances and identifying their deficiencies).

[237] *See supra* Part II.C (describing the necessary requirements of prior restraints).

[238] *See supra* Part IV.A (stating the ordinance applies to groups of one-hundred or more people).

[239] *See* Santa Monica Food Not Bombs v. City of Santa Monica, 450 F.3d 1022, 1043 n.17 (9th Cir. 2006) (opining that anything less than 150 people may be unconstitutional).

[240] *See* Kellum, *supra* note 128, at 406–08 (arguing even though the Supreme Court looks to the size of the group to determine the constitutionality of an ordinance, no concrete number has been provided by the Court); *see also Santa Monica Food Not Bombs*, 450 F.3d at 1043 (quoting that "[g]roups of 150 or more people, whether demonstrating or playing soccer, are by any measure sufficiently large enough to affect or 'have an impact on'" park use).

[241] *See supra* Part II.C (explaining permit schemes must have objective review standards).

[242] *See supra* Part IV.A (including objective criteria the city must use when reviewing applications for permits).

[243] *See supra* Part II.C (noting cities may not give sole discretion to one person when reviewing applications for a permit).

denials for groups and individual that apply for permits to use food-sharing as symbolic speech.[244]

Last, the proposed ordinance assures applicants receive a prompt response.[245] The ordinance distinctly articulates that applications are subject to prompt review, which prevents prolonged consideration that could potentially preclude speech.[246] Removing the portion that requires consent from neighbors also helps avoid speech preclusion or unnecessary delays.[247]

Many city ordinances include fees for permits.[248] In the interest of city management and economy, the ordinance also added a fee clause to help with upkeep of the property.[249] But, the ordinance provides an exception for services offered to indigent populations because food advocates complain that permits are cost prohibitive.[250]

Critics will argue that because a prior restraint is the worst restraint on speech, it should not be recommended as a means to regulate free speech.[251] However, even though the Court is cautious about permit schemes, it requires several safeguards to protect the interests of speakers if a permit scheme is used.[252] Given the deferential nature of the *O'Brien* test and the time, place, and manner analyses, having more protections in place through a prior restraint is more preferable, and prior restraints are more prone to receive strict scrutiny analysis given their presumption of invalidity.[253]

Homeless advocates will also argue that these ordinances should be removed, and cities should concentrate resources on the alleviation of

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244 *See* SHARE NO MORE, *supra* note 7, at 9 (noting several groups have stopped feeding the homeless due to arbitrary denials by governing officials).

245 *See supra* Part II.C (noting permit schemes must ensure a prompt response from city officials).

246 *See supra* Part IV.A (including language that requires a prompt response for applicants to rely on when submitting applications for a permit).

247 *See supra* Part IV.A (striking out language that gives private property owners the ability to preclude speech by declining to give consent to a food-sharing event on their property).

248 *See e.g.*, SHARE NO MORE, *supra* note 7, at 12 (explaining some cities charge $800 per permit).

249 *See supra* Part IV.A (including a fee for events on public property).

250 *See* SHARE NO MORE, *supra* note 7, at 12 (asserting permit schemes have stopped groups from feeding the homeless because they are cost-prohibitive).

251 *See supra* Part II.C (describing the danger of prior restraints due to their potential to preclude speech).

252 *See supra* Part II.C (discussing the requirements of prior restraints and necessary safeguards).

253 *See supra* Part II.C (describing the type of scrutiny and necessary requirements for permit schemes).

homelessness.[254] Cities should take a multifaceted approach to addressing homelessness because a regulation alone will not address the complex issues related to homelessness.[255] However, as cities seek to address homelessness, groups will continue to feed the homeless in public parks until additional programs and efforts provide sufficient resources to the homeless.[256] Therefore, this ordinance is the best option for managing public space in the interim, and it helps protect the interests of all users while simultaneously protecting the rights of homeless advocates.

V. CONCLUSION

Throughout history, the homeless have been subject to harsh laws and negative perceptions.[257] Laws that cities are enacting to discourage people today, like Mr. Abbott, from feeding the homeless are merely an extension of this historical framework.[258] Even though opinions of the homeless and their contributions to society has vacillated, they should retain the right to promote their interests to the public.[259] Otherwise, more "prominent" interests dominate the political landscape, and their interests remain in the dark.[260] To ensure protection of these rights, relying on the First Amendment is an important step for advocates to take.[261]

Homeless advocates, such as Mr. Abbott, should be able to rely on carefully drafted ordinances that protect their First Amendment rights.[262] Cities have a right to regulate public space, but they also must abide by

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254 *See supra* note 26 and accompanying text (explaining the policy recommendations for cities related to collaboration with food providers, encouraging restaurants to accept food stamps, and working with state and federal advocates to ensure that the homeless receive basic needs such as housing and healthcare).

255 *See* Watson, *supra* note 42, at 527 (noting mental illness, lack of housing, societal structures, and economic realities contribute to homelessness).

256 *See* Bever, *supra* note 172 (reporting people feel compelled to feed the homeless because of their faith, and many willfully violate the ordinances because they do not want to turn the homeless away).

257 *See supra* Part II.A.1 (portraying the public's perception of the homeless since Colonial times).

258 *See supra* Part II.A.2 (expounding upon new efforts to criminalize the homeless and chronicling the history of laws that have negatively targeted the homeless).

259 *See supra* Part II.B (outlining the rights of homeless advocates when feeding the homeless on public property).

260 *See supra* note 158 and accompanying text (articulating public space is essential for groups to advocate on behalf of the homeless and for the homeless to be legitimate members of society).

261 *See supra* Part II.B.2 (describing First Amendment protections regarding speech and public space).

262 *See supra* Part IV.A (proposing an ordinance that protects the speech rights of groups that feed the homeless in public parks).

constitutional requirements.[263] These unconstitutional ordinances have caused groups to refrain from feeding the homeless or to incur unnecessary fines and charges from engaging in such behavior.[264] In conjunction with other efforts, cities should adopt the proposed ordinance because it strikes a balance between the interests of cities, advocates, and the homeless.[265] Moreover, it incorporates necessary safeguards outlined by the Supreme Court, which protects First Amendment rights and grants advocates like Mr. Abbott reasonable opportunities to break bread with those in need.[266]

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[263] *See supra* Part II.B.2 (elaborating on when cities may regulate conduct on public property).

[264] *See supra* Part I (narrating Mr. Abbott's charges after he willfully violated a city ordinance).

[265] *See supra* Part IV.A (proposing a model ordinance that balances the interests of cities and homeless advocates).

[266] *See supra* Part IV.A (listing safeguards such as objective review standards, a review board, and protections for spontaneous speech).

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