

Chick-fil-A and free speech

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Marc J. Randazza, Special to CNN

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Mayor Thomas Menino has objected to Chick-fil-A locating in Boston because of its CEO's views on same-sex marriage.

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CNN —

Dan Cathy, the CEO of Chick-fil-A, proudly proclaimed his opposition to marriage equality and drew flak from politicians and citizens nationwide, who said Cathy's position made the chain unwelcome on their turf. Some of the condemnation crossed the line, offending the First Amendment. Some did not. Many don't understand where the line is, and now a population already sharply divided over same-sex marriage is collectively less informed about the First Amendment.

The First Amendment protects you from government action suppressing your right to free speech. It does not protect you from private individuals' negative reaction to your speech. As an extreme example: In my younger and more impulsive days, I punched out a guy who

offended my then-girlfriend (now wife). He said he was exercising his First Amendment rights. I agreed and told him that I would defend him if the government messed with him, but the First Amendment didn't protect him from a private punch. I broke a few laws that day, but I didn't violate the First Amendment.

Similarly, the First Amendment does not protect you from criticism. Sarah Palin infamously took us all back a few steps by ignorantly criticizing the media for its negative commenting on her views. She said, "I don't know what the future of our country would be in terms of First Amendment rights and our ability to ask questions without fear of attacks by the mainstream media." This statement is utterly wrong. The First Amendment does not protect you from scrutiny or criticism by the media or others.

[Christian groups allege threats to religious freedom in anti-Chick-fil-A campaigns](#)



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Therefore, those claiming that the private calls to boycott Chick-fil-A have any First Amendment implications are wrong. Cathy put his thoughts into the marketplace of ideas, where they may be bought or rejected. He has no First Amendment right to our approval, or to our money for his sandwiches.

But can cities use zoning to combat unpopular speech?

Unfortunately, when we chip away at the First Amendment, unpleasant unintended consequences are not far behind. In Barnes v. Glen Theatre Inc., the Supreme Court allowed municipalities to use zoning to regulate strip clubs and adult bookstores to combat their “adverse secondary effects.”

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In other words, a city can't ban adult bookstores because it doesn't like the books it sells. The city can effectively ban them by claiming it is doing so to prevent litter, traffic, lowered property values or other secondary effects it claims the business may cause (and needs scant evidence to support the regulation).

Over the years, courts expanded the doctrine to be virtually limitless. Now a city need only mouth the words “adverse secondary effects” when enacting a regulation, and for the most part, courts will uphold it – even though everyone knows the real reason is that the city doesn't like the books and movies that the store sells.

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When municipalities are told for years they can make up zoning or other regulatory issues to make an end run around the First Amendment, is it any surprise that they would look to zoning obstacles to stop Chick-fil-A from coming into town because they don't like the CEO's views on same-sex marriage?

Some cities responded to Cathy's statements with proper deference to the First Amendment, but others have not. Boston Mayor Thomas Menino initially said, “If they need licenses in the city, it will be very difficult. ...” After considering the issue, though – and probably talking with his attorneys – Menino acknowledged he did not have the power to block the chain from operating in Boston.



In contrast, Chicago Alderman Joe Moreno went further, saying he would work to block any Chick-fil-A in his ward. Moreno defended his view by saying, “You have the right to say what you want to say, but zoning is not a right.” He then took a page out of the “adverse secondary effects” doctrine playbook by saying he had concerns about increased traffic in the area. So far, Moreno has not backed down.

Chick-fil-A wades into a fast-food fight over same-sex marriage rights

These statements clearly raise First Amendment issues. A city can’t deny permits because it disapproves of the owner’s exercise of his First Amendment rights. Both Menino and Moreno were dead wrong even to claim they would do so. That crosses the line between simply speaking out and abusing government power.

Menino’s critics are right about his initial misuse of zoning law being a violation of the First Amendment, but after backing down on his threats, the mayor maintained he did not welcome Chick-fil-A in Boston.

He was within his rights to do so – expressing his own opinion, both personally and as mayor. In a letter to the chain, he wrote: “When Massachusetts became the first state in the country to recognize equal marriage rights, I personally stood on City Hall Plaza to greet same-sex couples coming here to be married,” he added. “It would be an insult to them and to our city’s long history of expanding freedom to have a Chick-fil-A across the street from that spot.”

As mayor of Boston, Menino has a First Amendment right, and perhaps even a duty, to express his views, as all political figures do. They have a position that gives them a platform to speak out, and be heard, on matters of public concern. Rick Santorum had a right to say that a mosque shouldn’t be built in Lower Manhattan.

A mayor in a less enlightened city has a right to say that Chick-fil-A is especially welcome, just as he might want to say that Starbucks is not welcome because it gives benefits to same-sex couples. A city council member has a right to say that “my district doesn’t want an adult bookstore,” and Menino has a right to say that Boston does not welcome a business run by someone who is prejudiced. As long as they do not then try and give their views the force of law, they are within bounds.

And if their constituents disagree with their views, then they use the political process to cure the problem.

Politicians’ rights, however, do not bleed over into using their official power to deny a business its fair due because of its, or its CEO’s, exercise of our cherished First Amendment rights.

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