AMERICAN CONSTITUTIONALISM

VOLUME II: RIGHTS AND LIBERTIES

Howard Gillman • Mark A. Graber • Keith E. Whittington

Supplementary Material

Chapter 9: Liberalism Divided – Democratic Rights/Free Speech

**Lehman v. City of Shaker Heights, 418 U.S. 298** (1974)

*The City of Shaker Heights, Ohio, operated a mass transit system. They contracted with Metromedia, Inc. to sell advertising space within the system, but the contract specified that no “political advertising” could be placed in the system. In 1970, Harry Lehman was running for a seat in the state legislature and wanted to purchase advertising space in the Shaker Heights transit system but was refused by Metromedia.*

*Lehman filed suit in the Ohio state courts seeking an order to force Shaker Heights to lift the restrictions on advertising in its transit system, but was rebuffed. In a 5-4 decision, the U.S. Supreme Court affirmed the state court decision. The majority concluded that the government-operated mass transit system was not a public form like a government-owned park, and thus the city could make non-discriminatory decisions to exclude some forms of advertising in the system.*

JUSTICE BLACKMUN announced the judgment and delivered an opinion.

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It is urged that the car cards here constitute a public forum protected by the First Amendment, and that there is a guarantee of nondiscriminatory access to such publicly owned and controlled areas of communication "regardless of the primary purpose for which the area is dedicated."

We disagree. In Packer Corp. v. Utah (1932), Justice Brandeis, in speaking for a unanimous Court, recognized that "there is a difference which justifies the classification between display advertising and that, in periodicals or newspapers." . . . It reasoned that viewers of billboards and streetcar signs had no "choice or volition" to observe such advertising and had the message "thrust upon them by all the arts and devices that skill can produce. . . . The radio can be turned off, but not so the billboard or street car placard." "The streetcar audience is a captive audience. It is there as a matter of necessity, not of choice." . . .

These situations are different from the traditional settings where First Amendment values inalterably prevail. . . .

Here, we have no open spaces, no meeting hall, park, street corner, or other public thoroughfare. Instead, the city is engaged in commerce. It must provide rapid, convenient, pleasant, and inexpensive service to the commuters of Shaker Heights. The car card space, although incidental to the provision of public transportation, is a part of the commercial venture. In much the same way that a newspaper or periodical, or even a radio or television station, need not accept every proffer of advertising from the general public, a city transit system has discretion to develop and make reasonable choices concerning the type of advertising that may be displayed in its vehicles. . . .

Because state action exists, however, the policies and practices governing access to the transit system's advertising space must not be arbitrary, capricious, or invidious. *Public Utilities Commission v. Pollak* (1952). . . . Users would be subjected to the blare of political propaganda. There could be lurking doubts about favoritism, and sticky administrative problems might arise in parceling out limited space to eager politicians. In these circumstances, the managerial decision to limit car card space to innocuous and less controversial commercial and service-oriented advertising does not rise to the dignity of a First Amendment violation. Were we to hold to the contrary, display cases in public hospitals, libraries, office buildings, military compounds, and other public facilities immediately would become Hyde Parks open to every would-be pamphleteer and politician. This the Constitution does not require.

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*Affirmed*.

JUSTICE DOUGLAS, concurring.

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. . . . If the streetcar or bus were a forum for communication akin to that of streets or public parks, considerable problems would be presented. . . . But a streetcar or bus is plainly not a park or sidewalk or other meeting place for discussion, any more than is a highway. It is only a way to get to work or back home. The fact that it is owned and operated by the city does not, without more, make it a forum.

Bus and streetcar placards are in the category of highway billboards, which have long been used to display an array of commercial and political messages. But this particular form of communication has been significantly curtailed by state regulation adopted pursuant to the Highway Beautification Act of 1965, which conditions certain federal highway funds upon strict regulation of highway advertising. Ohio is among the States which have sought to protect the interests of their motorists by enacting regulations pursuant to the Act. The fact that land on which a billboard rests is municipal land does not curtail or enhance such regulatory schemes.

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In asking us to force the system to accept his message as a vindication of his constitutional rights, the petitioner overlooks the constitutional rights of the commuters. While petitioner clearly has a right to express his views to those who wish to listen, he has no right to force his message upon an audience incapable of declining to receive it. In my view, the right of the commuters to be free from forced intrusions on their privacy precludes the city from transforming its vehicles of public transportation into forums for the dissemination of ideas upon this captive audience.

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JUSTICE BRENNAN, with whom JUSTICE STEWART, JUSTICE MARSHALL, and JUSTICE POWELL join, dissenting.

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The message Lehman sought to convey concerning his candidacy for public office was unquestionably protected by the First Amendment. That constitutional safeguard was fashioned to encourage and nurture "uninhibited, robust, and wide-open" self-expression, particularly in matters of governing importance. . . . The fact that the message is proposed as a paid advertisement does not diminish the impregnable shelter afforded by the First Amendment. *New York Times v. Sullivan* (1964).

Of course, not even the right of political self-expression is completely unfettered. As we stated in Cox v. Louisiana (1965):

"The rights of free speech and assembly, while fundamental in our democratic society, still do not mean that everyone with opinions or beliefs to express may address a group at any public place and at any time. The constitutional guarantee of liberty implies the existence of an organized society maintaining public order, without which liberty itself would be lost in the excesses of anarchy."

Accordingly, we have repeatedly recognized the constitutionality of reasonable "time, place and manner" regulations which are applied in an evenhanded fashion. . . .

Focusing upon the propriety of regulating "place," the city of Shaker Heights attempts to justify its ban against political advertising by arguing that the interior advertising space of a transit car is an inappropriate forum for political expression and debate. To be sure, there are some public places which are so clearly committed to other purposes that their use as public forums for communication is anomalous. . . . The determination of whether a particular type of public property or facility constitutes a "public forum" requires the Court to strike a balance between the competing interests of the government, on the one hand, and the speaker and his audience, on the other. Thus, the Court must assess the importance of the primary use to which the public property or facility is committed and the extent to which that use will be disrupted if access for free expression is permitted. Applying these principles, the Court has long recognized the public's right of access to public streets and parks for expressive activity. . . . More recently, the Court has added state capitol grounds to the list of public forums compatible with free speech, free assembly, and the freedom to petition for redress of grievances, but denied similar status to the curtilage of a jailhouse, on the ground that jails are built for security, and thus need not be opened to the general public. *Adderley v. Florida* (1966).

In the circumstances of this case, however, we need not decide whether public transit cars must be made available as forums for the exercise of First Amendment rights. By accepting commercial and public service advertising, the city effectively waived any argument that advertising in its transit cars is incompatible with the rapid transit system's primary function of providing transportation. A forum for communication was voluntarily established when the city installed the physical facilities for the advertisements and, by contract with Metromedia, created the necessary administrative machinery for regulating access to that forum.

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Once a public forum for communication has been established, both free speech and equal protection principles prohibit discrimination based solely upon subject matter or content. . . . That the discrimination is among entire classes of ideas, rather than among points of view within a particular class, does not render it any less odious. Subject matter or content censorship in any form is forbidden.

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The line between ideological and nonideological speech is impossible to draw with accuracy. By accepting commercial and public service advertisements, the city opened the door to "sometimes controversial or unsettling speech," and determined that such speech does not unduly interfere with the rapid transit system's primary purpose of transporting passengers. In the eyes of many passengers, certain commercial or public service messages are as profoundly disturbing as some political advertisements might be to other passengers. There is certainly no evidence in the record of this case indicating that political advertisements, as a class, are so disturbing when displayed that they are more likely than commercial or public service advertisements to impair the rapid transit system's primary function of transportation. . . .

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