AMERICAN CONSTITUTIONALISM

VOLUME II: RIGHTS AND LIBERTIES

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Supplementary Material

Chapter 10: The Reagan Era – Democratic Rights/Freedom of Speech

**Cornelius v. NAACCP Legal Defense Fund, 473 U.S. 788** (1985)

*The federal government runs a voluntary Combined Federal Campaign (CFC), in which charitable donations are collected from federal employees and the funds are distributed to various nonprofits. The CFC grew out of an effort in the 1950s to better manage the large number of disorganized charity drives that were operating in federal workplaces. A number of nonprofit political advocacy groups sought access to the CFC but were denied by the federal Office of Personnel Management in 1980.*

*The groups filed suit in federal district court seeking to open up the CFC. In response, President Reagan issued a new executive order in 1982 aimed at clarifying the purposes of the CFC. The CFC was specified to be limited to “health and welfare agencies that provide or support direct health and welfare services to individuals or their families” and to exclude organizations that “seek to influence the outcomes of elections or the determination of public policy.” A district court struck down the new executive order as in violation of the First Amendment, and a divided circuit court agreed. In a 4-3 decision, the U.S. Supreme Court reversed the lower courts and upheld the executive order as a reasonable regulation of a nonpublic forum.*

JUSTICE O’CONNOR delivered the opinion of the Court.

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Charitable solicitation of funds has been recognized by this Court as a form of protected speech. . . .

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. . . . The brief statements in the CFC literature directly advance the speaker's interest in informing readers about its existence and its goals. Moreover, an employee's contribution in response to a request for funds functions as a general expression of support for the recipient and its views. . . .

The conclusion that the solicitation which occurs in the CFC is protected speech merely begins our inquiry. Even protected speech is not equally permissible in all places and at all times. Nothing in the Constitution requires the Government freely to grant access to all who wish to exercise their right to free speech on every type of Government property without regard to the nature of the property or to the disruption that might be caused by the speaker's activities. . . .

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We agree with respondents that the relevant forum for our purposes is the CFC. Although petitioner is correct that as an initial matter a speaker must seek access to public property or to private property dedicated to public use to evoke First Amendment concerns, forum analysis is not completed merely by identifying the government property at issue. Rather, in defining the forum we have focused on the access sought by the speaker. When speakers seek general access to public property, the forum encompasses that property. See, *e. g., Greer* v. *Spock* (1976)*.* In cases in which limited access is sought, our cases have taken a more tailored approach to ascertaining the perimeters of a forum within the confines of the government property. *Perry Education Association v. Perry Local Educators’ Association* (1983). . . .

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Here the parties agree that neither the CFC nor the federal workplace is a traditional public forum. Respondents argue, however, that the Government created a limited public forum for use by all charitable organizations to solicit funds from federal employees. Petitioner contends, and we agree, that neither its practice nor its policy is consistent with an intent to designate the CFC as a public forum open to all tax-exempt organizations. . . . The Government's consistent policy has been to limit participation in the CFC to "appropriate" voluntary agencies and to require agencies seeking admission to obtain permission from federal and local Campaign officials. . . .

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Control over access to a nonpublic forum can be based on subject matter and speaker identity so long as the distinctions drawn are reasonable in light of the purpose served by the forum and are viewpoint neutral. . . .

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. . . . The Government's decision to restrict access to a nonpublic forum need only be *reasonable;* it need not be the most reasonable or the only reasonable limitation. In contrast to a public forum, a finding of strict incompatibility between the nature of the speech or the identity of the speaker and the functioning of the nonpublic forum is not mandated. . . .

The reasonableness of the Government's restriction of access to a nonpublic forum must be assessed in the light of the purpose of the forum and all the surrounding circumstances. Here the President could reasonably conclude that a dollar directly spent on providing food or shelter to the needy is more beneficial than a dollar spent on litigation that might or might not result in aid to the needy. Moreover, avoiding the appearance of political favoritism is a valid justification for limiting speech in a nonpublic forum. . . .

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. . . . [T]he record adequately supported petitioner's position that respondents' continued participation in the Campaign would be detrimental to the Campaign and disruptive of the federal workplace. Although the avoidance of controversy is not a valid ground for restricting speech in a public forum, a nonpublic forum by definition is not dedicated to general debate or the free exchange of ideas. The First Amendment does not forbid a viewpoint-neutral exclusion of speakers who would disrupt a nonpublic forum and hinder its effectiveness for its intended purpose.

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. . . . Although there is no requirement that regulations limiting access to a nonpublic forum must be precisely tailored, the issue whether the Government excluded respondents because it disagreed with their viewpoints was neither decided below nor fully briefed before this Court. We decline to decide in the first instance whether the exclusion of respondents was impermissibly motivated by a desire to suppress a particular point of view. Respondents are free to pursue this contention on remand.

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*Reversed*.

JUSTICE MARSHALL and JUSTICE POWELL took no part in the decision of this case.

JUSTICE BLACKMUN, with whom JUSTICE BRENNAN joins, dissenting.

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The public forum doctrine arose out of the Court's efforts to address the recurring and troublesome issue of when the First Amendment gives an individual or group the right to engage in expressive activity on government property. . . .

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[T]he public forum, limited-public-forum, and nonpublic forum categories are but analytical shorthand for the principles that have guided the Court's decisions regarding claims to access to public property for expressive activity. The interests served by the expressive activity must be balanced against the interests served by the uses for which the property was intended and the interests of all citizens to enjoy the property. Where an examination of all the relevant interests indicates that certain expressive activity is not compatible with the normal uses of the property, the First Amendment does not require the government to allow that activity.

. . . . Rather than taking the nature of the property into account in balancing the First Amendment interests of the speaker and society's interests in freedom of speech against the interests served by reserving the property to its normal use, the Court simply labels the property and dispenses with the balancing.

. . . . The Court offers no explanation why attaching the label "nonpublic forum" to particular property frees the Government of the more stringent constraints imposed by the First Amendment in other contexts. The Government's interests in being able to use the property for the purposes for which it was intended obviously are important; that is why a compatibility requirement is imposed. But the Government's interests as property holder are hardly more important than its interests as the keeper of our military forces, as guardian of our federal elections, as administrator of our prisons, as educator, or as employer. When the Government acts in those capacities, we closely scrutinize its justifications for infringements upon expressive activity. . . .

Nor should tradition or governmental "designation" be completely determinative of the rights of a citizen to speak on public property. Many places that are natural sites for expressive activity have no long tradition of use for expressive activity. . . .

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. . . . The Court makes it *virtually* impossible to prove that a forum restricted to a particular class of speakers is a limited public forum. If the Government does not create a limited public forum unless it intends to provide an "open forum" for expressive activity, and if the exclusion of some speakers is evidence that the Government did not intend to create such a forum, no speaker challenging denial of access will ever be able to prove that the forum is a limited public forum. The very fact that the Government denied access to the speaker indicates that the Government did not intend to provide an open forum for expressive activity, and under the Court's analysis that fact alone would demonstrate that the forum is not a limited public forum.

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The Court would point to three "justifications" for the exclusion of respondents. First, the Court states that "the President could reasonably conclude that a dollar directly spent on providing food or shelter to the needy is more beneficial than a dollar spent on litigation that might or might not result in aid to the needy." I fail to see how the President's view of the relative benefits obtained by various charitable activities translates into a compelling governmental interest. The Government may have a compelling interest in increasing charitable contributions because charities provide services that the Government otherwise would have to provide. But that interest does not justify the exclusion of respondents, for respondents work to enforce the rights of minorities, women, and others through litigation, a task that various Government agencies otherwise might be called upon to undertake.

The Court next states that "avoiding the appearance of political favoritism is a valid justification for limiting speech in a nonpublic forum." The Court, however, flatly has rejected that justification in the context of limited public forums. In addition, petitioner's proffered justification again fails to explain why respondents are excluded when other groups, such as the National Right to Life Educational Trust Fund and Planned Parenthood, at least one of which the Government presumably would wish to avoid the appearance of supporting, are allowed to participate. . . .

Nor is the Government's "interest in avoiding controversy" a compelling state interest that would justify the exclusion of respondents. . . .

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[E]ven if the avoidance of controversy in the forum itself could ever serve as a legitimate governmental purpose, the record here does not support a finding that the inclusion of respondents in the CFC threatened a material and substantial disruption. . . .

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Even if I were to agree with the Court's determination that the CFC is a nonpublic forum, or even if I thought that the Government's exclusion of respondents from the CFC was necessary and narrowly tailored to serve a compelling governmental interest, I still would disagree with the Court's disposition, because I think the eligibility criteria, which exclude charities that "seek to influence . . . the determination of public policy," is on its face viewpoint based. Petitioner contends that the criteria are viewpoint neutral because they apply equally to all "advocacy" groups regardless of their "political or philosophical leanings." The relevant comparison, however, is not between the individual organizations that make up the group excluded, but between those organizations allowed access to the CFC and those denied such access.

By devoting its resources to a particular activity, a charity expresses a view about the manner in which charitable goals can best be achieved. Charities working toward the same broad goal, such as "improved health," may have a variety of views about the path to that goal. . . . Government employees may hear only from those charities that think that charitable goals can best be achieved within the confines of existing social policy and the status quo. The distinction is blatantly viewpoint based. . . .

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JUSTICE STEVENS, dissenting.

. . . . I do not find the precise characterization of the forum particularly helpful in reaching a decision.

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I am persuaded that each of the three reasons advanced in support of denying advocacy groups a right to participate in a request for *designated* contributions is wholly without merit. The Government's desire to have its workers contribute to charities that directly provide food and shelter rather than to those that do not surely cannot justify an exclusion of some but not other charities that do not do so. Moreover, any suggestion that the Government might be perceived as favoring every participant in the solicitation is belied by the diversity of the participants and by the fact that there has been no need to disclaim what must be perfectly obvious to the presumptively intelligent federal worker. Last, the supposed fear of controversy in the workplace is pure nonsense — one might as well prohibit discussions of politics, recent judicial decisions, or sporting events. . . .