AMERICAN CONSTITUTIONALISM

VOLUME II: RIGHTS AND LIBERTIES

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

Supplementary Material

Chapter 10: The Reagan Era – Democratic Rights/Free Speech

**International Society for Krishna Consciousness, Inc. v. Lee, 505 U.S. 672** (1992)

*The Port Authority of New York and New Jersey, a governmental entity, owns and operates three major airports in the New York City area. At the time, the airport terminals were generally accessible to the public and were to be operated for a regulated profit. The Port Authority had adopted a regulation prohibiting the “continuous” sale or distribution of goods or printed materials or solicitation of funds from passers-by within the terminals, while allowing permitted solicitations on the exterior sidewalks and sales in the commercial storefronts inside the terminals. The International Society for Krishna Consciousness (ISKCON), a nonprofit religious corporation, performed a ritual known as* sankirtan*, which involved going into public places and distributing literature and soliciting funds.*

*In 1975, the society filed suit in federal district court against Walter Lee, the police superintendent of the Port Authority, seeking an injunction blocking him from enforcing the regulation against the Krishna. Eventually, the district court issued the injunction, finding that the airport terminals were the functional equivalent of public streets. A divided circuit court reversed that ruling in regard to solicitations. The U.S. Supreme Court affirmed in regard to solicitations. The justices disagreed among themselves on how best to think about airport terminals in relation to public forum analysis, but a majority agreed that solicitations were incompatible with the function of airports. They thought that a ban on the mere distribution of literature in an airport terminal could not be justified, however.*

CHIEF JUSTICE REHNQUIST delivered the opinion of the Court.

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It is uncontested that the solicitation at issue in this case is a form of speech protected under the First Amendment. But it is also well settled that the government need not permit all forms of speech on property that it owns and controls. Where the government is acting as a proprietor, managing its internal operations, rather than acting as lawmaker with the power to regulate or license, its action will not be subjected to the heightened review to which its actions as a lawmaker may be subject. *United States v. Kokinda* (1990). . . .

These cases reflect, either implicitly or explicitly, a "forum-based" approach for assessing restrictions that the government seeks to place on the use of its property. *Cornelius v. NAACP Legal Defense and Educational Fund, Inc.* (1985). Under this approach, regulation of speech on government property that has traditionally been available for public expression is subject to the highest scrutiny. Such regulations survive only if they are narrowly drawn to achieve a compelling state interest. The second category of public property is the designated public forum, whether of a limited or unlimited character -- property that the state has opened for expressive activity by part or all of the public. Regulation of such property is subject to the same limitations as that governing a traditional public forum. Finally, there is all remaining public property. Limitations on expressive activity conducted on this last category of property must survive only a much more limited review. The challenged regulation need only be reasonable, as long as the regulation is not an effort to suppress the speaker's activity due to disagreement with the speaker's view.

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Like the Court of Appeals, we conclude that the terminals are nonpublic fora, and that the regulation reasonably limits solicitation.

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In Cornelius, we noted that a traditional public forum is property that has as "a principal purpose . . . the free exchange of ideas." Moreover, consistent with the notion that the government -- like other property owners -- "has power to preserve the property under its control for the use to which it is lawfully dedicated," Greer v. Spock (1976), the government does not create a public forum by inaction. Nor is a public forum created "whenever members of the public are permitted freely to visit a place owned or operated by the Government." The decision to create a public forum must instead be made "by intentionally opening a nontraditional forum for public discourse." Finally, we have recognized that the location of property also has bearing, because separation from acknowledged public areas may serve to indicate that the separated property is a special enclave, subject to greater restriction. United States v. Grace (1983).

These precedents foreclose the conclusion that airport terminals are public fora. Reflecting the general growth of the air travel industry, airport terminals have only recently achieved their contemporary size and character. But given the lateness with which the modern air terminal has made its appearance, it hardly qualifies for the description of having "immemorially . . . time out of mind" been held in the public trust and used for purposes of expressive activity. . . . Nor can we say that these particular terminals, or airport terminals generally, have been intentionally opened by their operators to such activity; the frequent and continuing litigation evidencing the operators' objections belies any such claim. In short, there can be no argument that society's time-tested judgment, expressed through acquiescence in a continuing practice, has resolved the issue in petitioner's favor.

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[T]he relevant unit for our inquiry is an airport, not "transportation nodes" generally. When new methods of transportation develop, new methods for accommodating that transportation are also likely to be needed. And with each new step, it therefore will be a new inquiry whether the transportation necessities are compatible with various kinds of expressive activity. . . . [P]ublic access to air terminals is also not infrequently restricted -- just last year the Federal Aviation Administration required airports for a 4-month period to limit access to areas normally publicly accessible. . . .

. . . . As commercial enterprises, airports must provide services attractive to the marketplace. In light of this, it cannot fairly be said that an airport terminal has as a principal purpose "promoting the free exchange of ideas." To the contrary, the record demonstrates that Port Authority management considers the purpose of the terminals to be the facilitation of passenger air travel, not the promotion of expression. . . .

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We have on many prior occasions noted the disruptive effect that solicitation may have on business. . . . The result is that the normal flow of traffic is impeded. This is especially so in an airport, where air travelers, who are often weighted down by cumbersome baggage . . . may be hurrying to catch a plane or to arrange ground transportation. Delays may be particularly costly in this setting, as a flight missed by only a few minutes can result in hours' worth of subsequent inconvenience.

. . . . This sidewalk area is frequented by an overwhelming percentage of airport users. Thus the resulting access of those who would solicit the general public is quite complete. In turn, we think it would be odd to conclude that the Port Authority's terminal regulation is unreasonable despite the Port Authority having otherwise assured access to an area universally traveled. . . .

The inconveniences to passengers and the burdens on Port Authority officials flowing from solicitation activity may seem small, but, viewed against the fact that "pedestrian congestion is one of the greatest problems facing the three terminals," the Port Authority could reasonably worry that even such incremental effects would prove quite disruptive. Moreover, the justification for the Rule should not be measured by the disorder that would result from granting an exemption solely to ISKCON. For if petitioner is given access, so too must other groups. Obviously, there would be a much larger threat to the State's interest in crowd control if all other religious, nonreligious, and noncommercial organizations could likewise move freely. As a result, we conclude that the solicitation ban is reasonable.

*Affirmed*.

JUSTICE O’CONNOR, concurring.

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. . . . Although most airports do not ordinarily restrict public access, "[p]ublicly owned or operated property does not become a 'public forum' simply because members of the public are permitted to come and go at will." "[W]hen government property is not dedicated to open communication the government may without further justification-restrict use to those who participate in the forum's official business." *Perry Education Association v. Perry Local Educators’ Association* (1983). There is little doubt that airports are among those publicly owned facilities that could be closed to all except those who have legitimate business there. Public access to airports is thus not "inherent in the open nature of the locations," as it is for most streets and parks, but is rather a "matter of grace by government officials." I also agree with the Court that the Port Authority has not expressly opened its airports to the types of expression at issue here, and therefore has not created a "limited" or "designated" public forum relevant to this case.

For these reasons, the Port Authority's restrictions on solicitation and leafletting within the airport terminals do not qualify for the strict scrutiny that applies to restriction of speech in public fora. That airports are not public fora, however, does not mean that the government can restrict speech in whatever way it likes. . . .

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. . . . In my view, the Port Authority is operating a shopping mall as well as an airport. The reasonableness inquiry, therefore, is not whether the restrictions on speech are "consistent with ... preserving the property" for air travel, but whether they are reasonably related to maintaining the multipurpose environment that the Port Authority has deliberately created.

Applying that standard, I agree with the Court that the ban on solicitation is reasonable. Face-to-face solicitation is incompatible with the airport's functioning in a way that the other, permitted activities are not. . . .

In my view, however, the regulation banning leaflettingor, in the Port Authority's words, the "continuous or repetitive . . . distribution of . . . printed or written material" cannot be upheld as reasonable on this record. . . . [W]e have expressly noted that leafletting does not entail the same kinds of problems presented by face-to-face solicitation. Specifically, "[o]ne need not ponder the contents of a leaflet or pamphlet in order mechanically to take it out of someone's hand. . . . 'The distribution of literature does not require that the recipient stop in order to receive the message the speaker wishes to convey; instead the recipient is free to read the message at a later time.'" . . .

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Of course, it is still open for the Port Authority to promulgate regulations of the time, place, and manner of leafletting which are "content-neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication." For example, during the many years that this litigation has been in progress, the Port Authority has not banned *sankirtan* completely from JFK International Airport, but has restricted it to a relatively uncongested part of the airport terminals, the same part that houses the airport chapel. . . .

JUSTICE KENNEDY, concurring.

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[The majority’s public forum] analysis is flawed at its very beginning. It leaves the government with almost unlimited authority to restrict speech on its property by doing nothing more than articulating a non-speech-related purpose for the area, and it leaves almost no scope for the development of new public forums absent the rare approval of the government. The Court's error lies in its conclusion that the public forum status of public property depends on the government's defined purpose for the property, or on an explicit decision by the government to dedicate the property to expressive activity. In my view, the inquiry must be an objective one, based on the actual, physical characteristics and uses of the property. The fact that in our public forum cases we discuss and analyze these precise characteristics tends to support my position.

The First Amendment is a limitation on government, not a grant of power. Its design is to prevent the government from controlling speech. Yet under the Court's view the authority of the government to control speech on its property is paramount. . . .

. . . . Public places are of necessity the locus for discussion of public issues, as well as protest against arbitrary government action. At the heart of our jurisprudence lies the principle that in a free nation citizens must have the right to gather and speak with other persons in public places. The recognition that certain government-owned property is a public forum provides open notice to citizens that their freedoms may be exercised there without fear of a censorial government, adding tangible reinforcement to the idea that we are a free people.

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The notion that traditional public forums are properties that have public discourse as their principal purpose is a most doubtful fiction. The types of property that we have recognized as the quintessential public forums are streets, parks, and sidewalks. It would seem apparent that the principal purpose of streets and sidewalks, like airports, is to facilitate transportation, not public discourse, and we have recognized as much. Similarly, the purpose for the creation of public parks may be as much for beauty and open space as for discourse. Thus under the Court's analysis, even the quintessential public forums would appear to lack the necessary elements of what the Court defines as a public forum.

The effect of the Court's narrow view of the first category of public forums is compounded by its description of the second purported category, the so-called "designated" forum. The requirements for such a designation are so stringent that I cannot be certain whether the category has any content left at all. In any event, it seems evident that under the Court's analysis today few, if any, types of property other than those already recognized as public forums will be accorded that status.

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. . . . [T]he public spaces in the airports are broad, public thoroughfares full of people and lined with stores and other commercial activities. An airport corridor is of course not a street, but that is not the proper inquiry. The question is one of physical similarities, sufficient to suggest that the airport corridor should be a public forum for the same reasons that streets and sidewalks have been treated as public forums by the people who use them.

[T]he airport areas involved here are open to the public without restriction. *Ibid.* Plaintiffs do not seek access to the secured areas of the airports, nor do I suggest that these areas would be public forums. And while most people who come to the Port Authority's airports do so for a reason related to air travel, either because they are passengers or because they are picking up or dropping off passengers, this does not distinguish an airport from streets or sidewalks, which most people use for travel. . . .

[I]t is apparent from the record, and from the recent history of airports, that when adequate time, place, and manner regulations are in place, expressive activity is quite compatible with the uses of major airports. The Port Authority's primary argument to the contrary is that the problem of congestion in its airports' corridors makes expressive activity inconsistent with the airports' primary purpose, which is to facilitate air travel. The First Amendment is often inconvenient. But that is beside the point. Inconvenience does not absolve the government of its obligation to tolerate speech. The Authority makes no showing that any real impediments to the smooth functioning of the airports cannot be cured with reasonable time, place, and manner regulations. In fact, the history of the Authority's own airports, as well as other major airports in this country, leaves little doubt that such a solution is quite feasible. . . .

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It is my view, however, that the Port Authority's ban on the "solicitation and receipt of funds" within its airport terminals should be upheld under the standards applicable to speech regulations in public forums. The regulation may be upheld as either a reasonable time, place, and manner restriction, or as a regulation directed at the nonspeech element of expressive conduct. The two standards have considerable overlap in a case like this one.

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. . . . The Port Authority's fiat ban on the distribution or sale of printed material must, in my view, fall in its entirety. The application of our time, place, and manner test to the ban on sales leads to a result quite different from the solicitation ban. For one, the government interest in regulating the sales of literature is not as powerful as in the case of solicitation. The danger of a fraud arising from such sales is much more limited than from pure solicitation, because in the case of a sale the nature of the exchange tends to be clearer to both parties. Also, the Port Authority's sale regulation is not as narrowly drawn as the solicitation rule, since it does not specify the receipt of money as a critical element of a violation. And perhaps most important, the fiat ban on sales of literature leaves open fewer alternative channels of communication than the Port Authority's more limited prohibition on the solicitation and receipt of funds. . . .

Against all of this must be balanced the great need, recognized by our precedents, to give the sale of literature full First Amendment protection. We have long recognized that to prohibit distribution of literature for the mere reason that it is sold would leave organizations seeking to spread their message without funds to operate. "It should be remembered that the pamphlets of Thomas Paine were not distributed free of charge." The effect of a rule of law distinguishing between sales and distribution would be to close the marketplace of ideas to less affluent organizations and speakers, leaving speech as the preserve of those who are able to fund themselves. One of the primary purposes of the public forum is to provide persons who lack access to more sophisticated media the opportunity to speak. A prohibition on sales forecloses that opportunity for the very persons who need it most. And while the same arguments might be made regarding solicitation of funds, the answer is that the Port Authority has not prohibited all solicitation, but only a narrow class of conduct associated with a particular manner of solicitation.

JUSTICE SOUTER, with whom JUSTICE BLACKMUN and JUSTICE STEVENS join, concurring in part.

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. . . . Public forum analysis is stultified not only by treating its archetypes as closed categories, but by treating its candidates so categorically as to defeat their identification with the archetypes. We need not say that all "transportation nodes" or all airports are public forums in order to find that certain metropolitan airports are. Thus, the enquiry may and must relate to the particular property at issue and not necessarily to the "precise classification of the property." . . . One can imagine a public airport of a size or design or need for extraordinary security that would render expressive activity incompatible with its normal use. But that would be no reason to conclude that one of the more usual variety of metropolitan airports is not a public forum.

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Even if I assume, *arguendo,* that the ban on the petitioners' activity [of soliciting for money] is both content neutral and merely a restriction on the manner of communication, the regulation must be struck down for its failure to satisfy the requirements of narrow tailoring to further a significant state interest. . .

The claim to be preventing coercion is weak to start with. While a solicitor can be insistent, a pedestrian on the street or airport concourse can simply walk away or walk on. In any event, we have held in a far more coercive context than this one, that of a black boycott of white stores in Claiborne County, Mississippi, that "[s]peech does not lose its protected character ... simply because it may embarrass others or coerce them into action." *NAACP v. Claiborne Hardware Co*. (1982). . . .

As for fraud, our cases do not provide government with plenary authority to ban solicitation just because it could be fraudulent. "Broad prophylactic rules in the area of free expression are suspect." . . .

I do not think the Port Authority's solicitation ban leaves open the "ample" channels of communication required of a valid content-neutral time, place, and manner restriction. A distribution of preaddressed envelopes is unlikely to be much of an alternative. The practical reality of the regulation, which this Court can never ignore, is that it shuts off a uniquely powerful avenue of communication for organizations like the International Society for Krishna Consciousness, and may, in effect, completely prohibit unpopular and poorly funded groups from receiving funds in response to protected solicitation. . . .