AMERICAN CONSTITUTIONALISM

VOLUME II: RIGHTS AND LIBERTIES

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Supplementary Material

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

**United States v. Kokinda, 497 U.S. 720** (1990)

*A federal statute prohibits soliciting on postal premises (though the post office had previously made an exception for nonprofit groups). Marsha Kokinda was a volunteer for the National Democratic Policy Committee and set up a table to sell books and distribute political literature on the sidewalk at the entrance to the post office in Bowie, Maryland. After receiving a large number of complaints from post office customers, the postmaster asked Kokinda to leave. When she refused to do so, she was arrested. She was convicted and given a small fine and short jail time. On appeal, a divided circuit court reversed that conviction. In a 5-4 decision, the Supreme Court reversed and upheld the statute as consistent with the First Amendment. Four of the justices thought the sidewalk leading to the post office was not a public forum, and thus could be subjected to reasonable regulations. A fifth justice thought the ban on solicitations was an appropriate time, place and manner regulation.*

JUSTICE O’CONNOR announced the judgment of the Court and delivered an opinion, in which CHIEF JUSTICE REHNQUIST, JUSTICE WHITE, and JUSTICE SCALIA join.

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Solicitation is a recognized form of speech protected by the First Amendment. Under our First Amendment jurisprudence, we must determine the level of scrutiny that applies to the regulation of protected speech at issue.

The Government's ownership of property does not automatically open that property to the public. It is a long-settled principle that governmental actions are subject to a lower level of First Amendment scrutiny when "the governmental function operating. . . [is] not the power to regulate or license, as lawmaker, . . . but, rather, as proprietor, to manage [its] internal operation[s] . . . ." *Cafeteria & Restaurant Workers* v. *McElroy* (1961). . . .

The Government, even when acting in its proprietary capacity, does not enjoy absolute freedom from First Amendment constraints, as does a private business, but its action is valid in these circumstances unless it is unreasonable, or . . . "arbitrary, capricious, or invidious." . . .

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Respondents contend that although the sidewalk is on Postal Service property, because it is not distinguishable from the municipal sidewalk across the parking lot from the post office's entrance, it must be a traditional public forum and therefore subject to strict scrutiny. This argument is unpersuasive. The mere physical characteristics of the property cannot dictate forum analysis. If they did, then *Greer* v. *Spock* (1976), would have been decided differently. In that case, we held that even though a military base permitted free civilian access to certain unrestricted areas, the base was a nonpublic forum. The presence of sidewalks and streets within the base did not require a finding that it was a public forum.

The postal sidewalk at issue does not have the characteristics of public sidewalks traditionally open to expressive activity. The municipal sidewalk that runs parallel to the road in this case is a public passageway. The Postal Service's sidewalk is not such a thoroughfare. Rather, it leads only from the parking area to the front door of the post office. . . .

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Thus, the regulation at issue must be analyzed under the standards set forth for nonpublic fora: It must be reasonable and "not an effort to suppress expression merely because public officials oppose the speaker's view." . . .

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The dissent avoids determining whether the sidewalk is a public forum because it believes the regulation, does not pass muster even under the reasonableness standard applicable to nonpublic fora. In concluding that § 232.1(h) is unreasonable, the dissent relies heavily on the fact that the Service permits other types of potentially disruptive speech on a case-by-case basis. The dissent's criticism in this regard seems to be that solicitation is not receiving the same treatment by the Postal Service that other forms of speech receive. That claim, however, is more properly addressed under the equal protection component of the Fifth Amendment. In any event, it is anomalous that the Service's allowance of some avenues of speech would be relied upon as evidence that it is impermissibly suppressing other speech. If anything, the Service's generous accommodation of some types of speech testifies to its willingness to provide as broad a forum as possible, consistent with its postal mission. The dissent would create, in the name of the First Amendment, a disincentive for the Government to dedicate its property to any speech activities at all. In the end, its approach permits it to sidestep the single issue before us: Is the Government's prohibition of *solicitation* on postal sidewalks *unreasonable?*

Whether or not the Service permits other forms of speech, which may or may not be disruptive, it is not unreasonable to prohibit solicitation on the ground that it is unquestionably a particular form of speech that is disruptive of business. Solicitation impedes the normal flow of traffic. . . .

The Postal Service's judgment is based on its long experience with solicitation. It has learned from this experience that because of a continual demand from a wide range of groups for permission to conduct fundraising or vending on postal premises, postal facility managers were distracted from their primary jobs by the need to expend considerable time and energy fielding competing demands for space and administering a program of permits and approvals. . . . In short, the Postal Service has prohibited the use of its property and resources where the intrusion creates significant interference with Congress' mandate to ensure the most effective and efficient distribution of the mails. This is hardly unreasonable.

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Clearly, the regulation does not discriminate on the basis of content or viewpoint. Indeed, "[n]othing suggests the Postal Service intended to discourage one viewpoint and advance another. . . . By excluding all . . . groups from engaging in [solicitation] the Postal Service is not granting to `one side of a debatable public question . . . a monopoly in expressing its views.'" . . .

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*Reversed*.

JUSTICE KENNEDY, concurring.

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It is not necessary . . . to make a precise determination whether this sidewalk and others like it are public or nonpublic forums; in my view, the postal regulation at issue meets the traditional standards we have applied to time, place, and manner restrictions of protected expression. *Clark v. Community for Creative Non-Violence* (1984).

. . . . The regulation, in its only part challenged here, goes no further than to prohibit personal solicitations on postal property for the immediate payment of money. The regulation, as the United States concedes, expressly permits the respondents and all others to engage in political speech on topics of their choice and to distribute literature soliciting support, including money contributions, provided there is no in-person solicitation for payments on the premises.

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The Postal Service regulation, narrow in its purpose, design, and effect, does not discriminate on the basis of content or viewpoint, is narrowly drawn to serve an important governmental interest, and permits respondents to engage in a broad range of activity to express their views, including the solicitation of financial support. . . .

JUSTICE BRENNAN, with whom JUSTICE MARSHALL, JUSTICE STEVENS, and JUSTICE BLACKMUN join, dissenting.

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Today's decision confirms my doubts about the manner in which we have been using public forum analysis. Although the plurality recognizes that public sidewalks are, as a general matter, public forums, the plurality insists, with logic that is both strained and formalistic, that the specific sidewalk at issue is not a public forum. This conclusion is unsupportable. . . . It is only common sense that a public sidewalk adjacent to a public building to which citizens are freely admitted is a natural location for speech to occur, whether that speech is critical of government generally, aimed at the particular governmental agency housed in the building, or focused upon issues unrelated to the government. . . .

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It is irrelevant that the sidewalk at issue may have been constructed only to provide access to the Bowie Post Office. Public sidewalks, parks, and streets have been reserved for public use as forums for speech even though government has not constructed them for expressive purposes. Parks are usually constructed to beautify a city and to provide opportunities for recreation, rather than to afford a forum for soapbox orators or leafleteers; streets are built to facilitate transportation, not to enable protesters to conduct marches; and sidewalks are created with pedestrians in mind, not solicitors. Hence, *why* the sidewalk was built is not salient.

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The architectural idiosyncrasies of the Bowie Post Office are thus not determinative of the question whether the public area around it constitutes a public forum. Rather, that the walkway at issue is a sidewalk open and accessible to the general public is alone sufficient to identify it as a public forum. . . .

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Content-based restrictions on speech occurring in either a public forum or in a limited-purpose public forum are invalid unless they are narrowly drawn to serve a compelling interest. . . . Although I agree that the Government has an interest in preventing the obstruction of post office entrances and the disruption of postal functions, there is no indication that respondents interfered with postal business in any way. . . .

Justice Kennedy contends that the postal regulation may be upheld as a content-neutral time, place, or manner regulation. But the regulation is not content neutral; indeed, it is tied explicitly to the content of speech. If a person on postal premises says to members of the public, "Please support my political advocacy group," he cannot be punished. If he says, "Please contribute $10," he is subject to criminal prosecution. His punishment depends entirely on what he says.

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. . . . In any event, the Government interest in this case is related to the suppression of expression because the evil at which the postal regulation is aimed . . . is the danger that solicitors might annoy postal customers and discourage them from patronizing postal offices. But solicitors do not purportedly irk customers by speaking unusually loudly or uncomfortably close to their subjects. Rather, the fear is that solicitation is bothersome because of its *content:* The post office is concerned that being asked for money may be embarrassing or annoying to some people, particularly when the speaker is a member of a disfavored or unpopular political advocacy group. . . .

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When government seeks to prohibit categorically an entire class of expression, it bears, at the very least, a heavy burden of justification. . . . I find that the Postal Service has not met this burden and that the postal regulation prohibiting an entire category of expression based on a broad assessment of its likely effects cannot qualify as a valid time, place, or manner regulation because such a prohibition "burden[s] substantially more speech than is necessary to further the government's legitimate interests." . . .

. . . . There is no reason why the rules prohibiting disruptive conduct cannot be used to address the governmental interest in this case, and hence there is no need for a categorical exclusion of solicitation from sidewalks on postal property.

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