AMERICAN CONSTITUTIONALISM

VOLUME II: RIGHTS AND LIBERTIES

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Supplementary Material

Chapter 11: The Contemporary Era – Democratic Rights/Free Speech

**Grider v. Abramson, 180 F.3d 739** (6th Cir., 1999)

*In March 1996, the Grand Klaliff of the Knights of the Ku Klux Klan called the Louisville Police Department and informed that that the Klan would be holding a “public speaking forum” at the courthouse in downtown Louisville on a Saturday afternoon in April. The Klan expected a couple of dozen participants in their rally. Gathering in that space did not ordinarily require a permit, but the Klan wanted the police to be aware that there might be counter-demonstrations. A “Unity Rally” was quickly scheduled for a park across the street from the courthouse. Assembling in the park did require a permit, and one was granted. A student group also obtained a parade permit to march from the University of Louisville to the park for the Unity Rally. Meanwhile, the police became aware that various radical groups with a history of violence planned to join the Unity Rally and that a local street gang was planning to use the Klan rally as a site of initiation rituals for new members.*

*In consultation with other law enforcement agencies in the region, the Louisville Police Department organized a “KKK Rally Detail” to preserve order during the day of the competing rallies. The plan included the deployment of several hundred officers, the establishment of a “restricted area” surrounding each of the rally sites in which only police would be allowed, the establishment of security barricades to block intermingling of the rallies (though it would be possible to move from one rally to the other by crossing through the security areas), and a magnetometer search of everyone entering the immediate rally areas. The Klan requested that an additional barrier be set up in their rally area to separate the speakers from the audience. The police may also have informed the rally organizers that no unscheduled speakers would be allowed at either event. As it happens, the weather on the appointed day was cold and rainy and turnout was relatively small. There were no violent incidents, and no arrests were made.*

*Jonathan Grider was a Louisville attorney whose office was located within the restricted zone and wanted to attend and deliver unscheduled speeches at both rallies. He filed suit against Louisville mayor Jerry Abramson in federal district court seeking an injunction against the deployment of the KKK Rally Detail as a violation of his First Amendment rights. That motion was denied, as well as a subsequent motion seeking to have the city’s actions declared unconstitutional. On appeal, a circuit court affirmed that ruling, holding that the security measures were narrowly drawn to advance an important governmental interest and left adequate channels for free expression available.*

JUDGE KRUPANSKY.

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[T]he plaintiffs have asserted that the authorities, by subjecting them to mandatory magnetometer searches as a prerequisite to admission to either rally situs, impermissibly chilled their exercise of First Amendment free expression and association rights. Governmental *content-based* regulation (that is, a restriction triggered by the speaker's message) of the time, place, and manner of speech and associational activities conducted within a "traditional public forum" is typically subject to the highest degree of constitutional scrutiny, namely the "strict scrutiny" test, whereby the subject regulation may withstand constitutional review only if it was *necessary* and *narrowly* tailored to achieve a *compelling* public interest. By contrast, *content neutral* regulation of the time, place, and manner of speech and associational activities conducted in a traditional public forum is evaluated with reference to the relaxed "intermediate scrutiny" standard, whereby a public restriction will survive constitutional assessment if the implicated measure was narrowly fashioned to further a *significant* governmental interest, and it leaves open ample alternate channels of communication. *Perry Education Association v. Perry Local Educators’ Association* (1983).

At a superficial glance, the assaulted magnetometer searches appear to constitute content-neutral time, place, and manner restrictions narrowly crafted to serve significant public interests in the maintenance of public safety, security, and order, including the physical protection of rally participants, spectators, passers-by, and law enforcement personnel; as well as preservation of the free speech and assembly rights of rally institutors and participants. Neither plaintiff was selectively searched by reason of his or her statements, political affinity, personal appearance, or any other arguably ideological content-driven criteria; rather, every person entering the restricted area was searched in the same manner for the same facially content-neutral reason (the detection of dangerous implements). *Potts v. City of Lafayette* (7th Cir., 1997). Nevertheless, the Supreme Court has dictated that government regulation of speech or assembly activities by speakers, motivated by anticipated *listener reaction* to the *content* of the implicated communication, is *not* content-neutral. *Forsyth County v. Nationalist Movement* (1992). Similarly, government regulation of the speech, assembly, or association activities of members of a public speaker's audience, when triggered by fears of hostile listener response to the content of that speech, is not content neutral.

Construing the predicate magnetometer search of each rally attendee mandated by the KKK Rally Detail as a *content-based* speech and association limitation designed to defuse a riot or other hazards related to unruly responses to speech content, it nonetheless patently constituted a necessary constraint narrowly fashioned to further a compelling governmental interest in public safety and order. Based upon the information known to the defendants during the drafting and execution of the KKK Rally Detail, which evidenced a significant risk of serious violence in the absence of extraordinary crowd management measures, magnetometer searches of all persons attempting to enter the restricted area for weapons was among the least restrictive available means of preserving social order and safeguarding the physical security of all persons while concurrently minimizing burdens upon the exercise of any citizen's First Amendment privileges.

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The plaintiffs have also urged that their free association rights were violated by the physical segregation of the two rallies by bike-rack fencing and law enforcement officers which prevented their simultaneous discourse with the attendees at both events. However, the KKK Rally Detail did not preclude the plaintiffs from *sequentially* associating with the members of both gatherings. Although the plaintiffs' trans-rally mobility may have been moderately restrained by their inability to walk directly from one rally situs to the other without first exiting the initial restricted area of attendance and then being required to pass through the magnetometer station a second time, any resultant imposition upon their free association rights was trivial when juxtaposed against the compelling state interest in separating the two mutually antagonist and potentially hostile congregations. Indeed, as developed herein, the sequestering of the counter-demonstrators encouraged, rather than impeded, free speech and assembly rights, in that it safeguarded rally participants from expression-stifling intimidation and threatened injuries.

The plaintiffs have further averred that they suffered a constitutional tort by reason of their alleged inability to orate within the restricted area. Initially, this appeal will consider the exclusion of all private citizens from the police-occupied buffer zone within the inner perimeter, which *a fortiori* also foreclosed public speech by any civilian. . . . Beyond contradiction, however, that circumscription constituted a necessary and narrowly tailored means of promoting the compelling public interest in preserving community peace and safety, especially in the face of threatened violence which might impede free expression by the rally participants. Hence, that restriction satisfied controlling constitutional "strict scrutiny" standards.

Turning to police limitations upon public speech imposed elsewhere within the restricted area, the plaintiffs have asserted that the authorities prohibited *all public speech by non-scheduled speakers* in both insulated rally districts *irrespective of content;* they did not allege that the police silenced only speakers whose speech content threatened to incite a hostile response. . . .

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That restriction was narrowly focused upon promoting the City's and County's significant public interests in fostering the privileges of free expression and assembly of all participants who wished to see and hear the formally sanctioned presenters. . . . In all events, the rally organizers were entitled to select and schedule public speakers, which entailed the power to exclude from their rostrum any unapproved would-be speaker.

Moreover, the formally slated speakers possessed a protected interest in addressing their audience under orderly and audible conditions. *Gleason v. City of Louisville* (6th Cir., 1975). They had a right to be free from interruption by disorderly outside elements intent upon disruption and inciting possible physical conflict. Accordingly, even if the defendants had prevented the plaintiffs from attempting to speak out of turn at either of the scheduled rallies, no First Amendment breach would have resulted.

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*Affirmed*.