CONTROLLING LEGAL PRINCIPLES

Free Exercise Clause Decision – The "Contemplation of Justice"

USPS v. Council of Greenburgh Civic Assns., 453 U.S. 114 (1981)

While Congress may not, by its own ipse dixit, destroy the "public forum" status of streets and parks, a letterbox may not properly be analogized to streets and parks. Pp. 453 U. S. 133-134.

The present case is a good example of Justice Holmes' aphorism that "a page of history is worth a volume of logic."

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New York Trust Co. v. Eisner, 256 U. S. 345, 256 U. S. 349 (1921). For only by review of the history of the postal system and its present statutory and regulatory scheme can the constitutional challenge to 1725 be placed in its proper context.

We do not think the First Amendment prohibits Congress from choosing to accomplish these purposes through legislation, as opposed to lock and key.

Indeed, it is difficult to conceive of any reason why this Court should treat a letterbox differently for First Amendment access purposes than it has in the past treated the military base in Greer v. Spock, 424 U. S. 828 (1976), the jail or prison in Adderley v. Florida, 385 U. S. 39 (1966), and Jones v. North Carolina Prisoners' Union, 433 U. S. 119 (1977), or the advertising space made available in city rapid transit cars in Lehman v. City of Shaker Heights, 418 U. S. 298 (1974). In all these cases, this Court recognized that the First Amendment does not guarantee access to property simply because it is owned or controlled by the government. In Greer v. Spock, supra, the Court cited approvingly from its earlier opinion in Adderley v. Florida, supra, wherein it explained that

"'[t]he State, no less than a private owner of

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property, has power to preserve the property under its control for the use to which it is lawfully dedicated.'"

424 U.S. at 424 U. S. 836. [Footnote 6] This Court has not hesitated in the past to hold invalid

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laws which it concluded granted too much discretion to public officials as to who might and who might not solicit individual homeowners, or which too broadly limited the access of persons to traditional First Amendment forums such as the public streets and parks. See, e.g., Village of Schaumburg v. Citizens for a Better Environment, 444 U. S. 620 (1980); Hague v. CIO, 307 U. S. 496 (1939); Schneider v. State, 308 U. S. 147 (1939); Martin v. City of Struthers, 319 U. S. 141 (1943); Lovell v. City of Griffin, 303 U. S. 444 (1938); and Police Department of Chicago v. Mosley, 408 U. S. 92 (1972). But it is a giant leap from the traditional "soapbox" to the letterbox designated as an authorized depository of the United States mails, and we do not believe the First Amendment requires us to make that leap. [Footnote 7]

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It is thus unnecessary for us to examine § 1725 in the context of a "time, place, and manner" restriction on the use of the traditional "public forums" referred to above. This Court has long recognized the validity of reasonable time, place, and manner regulations on such a forum, so long as the regulation is content-neutral, serves a significant governmental interest, and leaves open adequate alternative channels for communication. See, e.g., Consolidated Edison Co. v. Public Service Comm'n, 447 U. S. 530, 447 U. S. 535-536 (1980); Linmark Associates, Inc. v. Willingboro, 431 U. S. 85, 431 U. S. 93 (1977); Virginia Pharmacy Board v. Virginia Citizens Consumer Council, Inc., 425 U. S. 748, 425 U. S. 771 (1976); Grayned v. City of Rockford, 408 U. S. 104 (1972); Cox v. New Hampshire, 312 U. S. 569 (1941). But since a letterbox is not traditionally such a "public forum," the elaborate analysis engaged in by the District Court was, we think, unnecessary. To be sure, if a governmental regulation is based on the content of the speech or the message, that action must be scrutinized more carefully to ensure that communication has not been prohibited "merely because public officials disapprove the speaker's view.'" Consolidated Edison Co. v. Public Service Comm'n, supra, at 446 U. S. 536, quoting Niemotko v. Maryland, 340 U. S. 268, 340 U. S. 282 (1951) (Frankfurter, J., concurring in result). But in this case, there simply is no question that § 1725 does not regulate speech on the basis of content. While the analytical line between a regulation of the "time, place, and manner" in which First Amendment rights may be exercised in a traditional public forum, and the question of whether a particular piece of personal

or real property owned or controlled by the government is in fact a "public forum" may blur at the edges, we think the line is nonetheless a workable one. We likewise think that Congress may, in exercising its authority to develop and operate a national postal system, properly legislate with the generality of cases in mind, and

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should not be put to the test of defending in one township after another the constitutionality of a statute under the traditional "time place, and manner" analysis. This Court has previously acknowledged that the

"guarantees of the First Amendment have never meant 'that people who want to propagandize protests or views have a constitutional right to do so whenever and however and wherever they please.'"

Greer v. Spock, 424 U.S. at 424 U. S. 836, quoting Adderley v. Florida, 385 U.S. at 385 U. S. 48. If Congress and the Postal Service are to operate as efficiently as possible a system for the delivery of mail which serves a Nation extending from the Atlantic Ocean to the Pacific Ocean, from the Canadian boundary on the north to the Mexican boundary on the south, it must obviously adopt regulations of general character having uniform applicability throughout the more than three million square miles which the United States embraces. In so doing, the Postal Service's authority to impose regulations cannot be made to depend on all of the variations of climate, population, density, and other factors that may vary significantly within a distance of less than 100 miles.

From the time of the issuance of the first postage stamp in this country at Brattleboro, Vt., in the fifth decade of the last century, through the days of the governmentally subsidized "Pony Express" immediately before the Civil War, and through the less admirable era of the Star Route Mail Frauds in the latter part of that century, Congress has actively exercised the authority conferred upon it by the Constitution "to establish Post Offices and Post Roads" and "to make all laws which shall be necessary and proper" for executing this task. While Congress, no more than a suburban township, may not by its own ipse dixit destroy the "public forum" status of streets and parks which have historically been public forums, we think that, for the reasons stated, a letterbox may not properly be analogized to streets and parks.

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It is enough for our purposes that neither the enactment nor the enforcement of § 1725 was geared in any way to the content of the message sought to be placed in the letterbox. The judgment of the District Court is accordingly

[Footnote 6]

JUSTICE BRENNAN argues that a letterbox is a public forum because

"the mere deposit of mailable matter without postage is not 'basically incompatible' with the 'normal activity' for which a letterbox is used, i.e., deposit of mailable matter with proper postage or mail delivery by the Postal Service. On the contrary, the mails and the letterbox are specifically used for the communication of information and ideas, and thus surely constitute a public forum appropriate for the exercise of First Amendment rights subject to reasonable time, place, and manner restrictions such as those embodied in § 1725. . . ."

Post at 453 U. S. 137-138. JUSTICE BRENNAN's analysis assumes that, simply because an instrumentality "is used for the communication of ideas or information," it thereby becomes a public forum. Our cases provide no support for such a sweeping proposition. Certainly a bulletin board in a cafeteria at Fort Dix is "specifically used for the communication of information and ideas," but such a bulletin board is no more a "public forum" than are the street corners and parking lots found not to be so at the same military base. Greer v. Spock, 424 U. S. 828 (1976). Likewise, the advertising space made available in public transportation in the city of Shaker Heights is "specifically used for the communication of information and ideas," but that fact alone was not sufficient to transform that space into a "public forum" for First Amendment purposes. Lehman v. City of Shaker Heights, 418 U. S. 298 (1974). In fact, JUSTICE BLACKMUN recognized in Lehman that:

"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."

Id. at 418 U. S. 304.

For the reasons we have stated at length in our opinion, we think the appellees' First Amendment activities are wholly incompatible with the maintenance of a nationwide system for the safe and efficient delivery of mail. The history of the postal system and the role the letterbox serves within that system support this conclusion, and even JUSTICE BRENNAN acknowledges that a "significant governmental interest" is advanced by the restriction imposed by § 1725. Post at 453 U. S. 135.

[Footnote 7]

JUSTICE MARSHALL in his dissent, post at 453 U. S. 143, states that he disagrees

"with the Court's assumption that, if no public forum is involved, the only First Amendment challenges to be considered are whether the regulation is content-based . . . and reasonable. . . ."

The First Amendment prohibits Congress from "abridging freedom of speech, or of the press," **and its ramifications are not confined to the "public forum"** first noted in Hague v. CIO, 307 U. S. 496 (1939). What we hold is the principle reiterated by

cases such as Adderley v. Florida, 385 U. S. 39 (1966), and Greer v. Spock, supra, that property owned or controlled by the government which is not a public forum may be subject to a prohibition of speech, leafleting, picketing, or other forms of communication without running afoul of the First Amendment. Admittedly, the government must act reasonably in imposing such restrictions, Jones v. North Carolina Prisoners' Union, 433 U. S. 119, 433 U. S. 130-131 (1977), and the prohibition must be content-neutral. But, for the reasons stated in our opinion, we think it cannot be questioned that § 1725 is both a reasonable and content-neutral regulation.

Even JUSTICE MARSHALL's dissent recognizes that the Government may defend the regulation here on a ground other than simply a "time, place, and manner" basis. For example, he says in dissent, post at 453 U. S. 143:

"The question, then, is whether this statute burdens any First Amendment rights enjoyed by appellees. If so, it must be determined whether this burden is justified by a significant governmental interest substantially advanced by the statute."

A

For public forum analysis,

"[t]he crucial question is whether the manner of expression is basically incompatible with the normal activity of a particular place at a particular time."

Grayned v. City of Rockford, supra, at 408 U. S. 116. We have often quoted Justice Holmes' observation that the

"'United States may give up the Post Office when it sees fit, but while it carries it on, the use of the mails is almost as much a part of free speech as the right to use our tongues. . . .'"

Blount v. Rizzi, 400 U. S. 410, 400 U. S. 416 (1971), and Lamont v. Postmaster General, 381 U. S. 301, 381 U. S. 305 (1965), quoting United States ex

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rel. Milwaukee Social Democratic Pub. Co. v. Burleson, 255 U. S. 407, 255 U. S. 437 (1921) (Holmes, J. dissenting). [Footnote 2/1] Our cases have recognized generally that public properties are appropriate fora for exercise of First Amendment rights. See e.g., Tinker v. Des Moines School District, 393 U. S. 503, 393 U. S. 512 (1969); Brown v. Louisiana, 383 U. S. 131, 383 U. S. 139-140, 383 U. S. 142 (1966) (plurality opinion); Cox v. Louisiana, 379 U. S. 536, 379 U. S. 543 (1965); Edwards v. South Carolina, 372 U. S. 229 (1963). [Footnote 2/2] While First Amendment rights exercised on public property may be subject to reasonable time, place and manner restrictions, that is very different from saying that government-controlled property, such as a

letterbox, does not constitute a public forum. Only where the exercise of First Amendment rights is incompatible with the normal activity occurring on public property have we held that the property is not a public forum. See Greer v. Spock, 424 U. S. 828 (1976); Jones v. North Carolina Prisoners' Union, 433 U. S. 119 (1977); Adderley v. Florida, 385 U. S. 39 (1966). Thus, in answering

"[t]he crucial question . . . whether the manner of expression is basically incompatible with the normal activity of a particular place at a particular time,"

Grayned v. City of Rockford, supra, at 408 U. S. 116, I believe that the mere deposit of mailable matter without postage is not "basically incompatible" with the "normal activity" for which a letterbox is used, i.e., deposit of mailable matter with proper postage or mail delivery by the Postal Service. On the contrary, the mails and the letterbox are specifically used for the communication of information and ideas, and thus surely constitute a public

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forum appropriate for the exercise of First Amendment rights subject to reasonable time, place, and manner restrictions such as those embodied in § 1725 or in the requirement that postage be affixed to mailable matter to obtain access to the postal system.

The history of the mails as a vital national medium of expression confirms this conclusion. Just as

"streets and parks . . . have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions,"

Hague v. CIO, 307 U. S. 496, 307 U. S. 515 (1939), [Footnote 2/3] so too the mails from the early days of the Republic have played a crucial role in communication. The Court itself acknowledges the importance of the mails as a forum for communication:

"Government without communication is impossible, and until the invention of the telephone and telegraph, the mails were the principal means of communication. . . . In 1775, Franklin was named the first Postmaster General by the Continental Congress, and, because of the trend toward war, the Continental Congress undertook its first serious effort to establish a secure mail delivery organization in order to maintain communication between the States and to supply revenue for the Army."

Ante at 453 U. S. 121 (emphasis added). The Court further points out that "[t]he Post Office played a vital . . . role in the development of our new Nation," ibid. (emphasis added), and currently processes "106.3 billion pieces of mail each year," ante at 453 U. S. 122. The variety of communication transported by the Postal Service ranges from the sublime to the ridiculous, and includes newspapers, magazines, books, films and almost any type and form of expression imaginable. See Kappel Commission, Toward Postal Excellence,

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Report of the President's Commission on Postal Organization 478 (Comm.Print 1968). Given "the historic dependence of the Nation on the Postal Service," ante at 453 U. S. 123, it is extraordinary that the Court reaches the conclusion that the letterbox, a critical link in the mail system, is not a public forum.

Not only does the Court misapprehend the historic role that the mails have played in national communication, but it relies on inapposite cases to reach its result. Greer v. Spock, [Footnote 2/4] Adderley v. Florida, [Footnote 2/5] and Jones v. North Carolina Prisoners' Union, [Footnote 2/6] all rested on the inherent incompatibility between the

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rights sought to be exercised and the physical location in which the exercise was to occur. Lehman v. City of Shaker Heights [Footnote 2/7] rested in large measure on the captive audience doctrine, 418 U.S. at 418 U. S. 304, and in part on the transportation purpose of the city bus system, id. at 418 U. S. 303. These cases, therefore, provide no support for the Court's conclusion that a letterbox is not a public forum.

Having determined that a letterbox is not a public forum, the Court inexplicably terminates its analysis. Surely, however, the mere fact that property is not a public forum does not free government to impose unwarranted restrictions on First Amendment rights. The Court itself acknowledges that the postal power

"may not . . . be exercised by Congress in a manner that abridges the freedom of speech or of the press protected by the First Amendment to the Constitution."

Ante at 453 U. S. 126. Even where property does not constitute a public forum, government regulation that is content-neutral must still be reasonable as to time. place, and manner. See, e.g., Young v. American Mini Theatres, Inc., 427 U. S. 50, 427 U. S. 63, n. 18 (1976). Cf. Linmark Associates, Inc. v. Willingboro, 431 U.S. at 431 U. S. 92-93; Virginia Pharmacy Board v. Virginia Citizens Consumer Council, Inc., 425 U. S. 748, 425 U. S. 771 (1976). The

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restriction in § 1725 could have such an effect on First Amendment rights -- and does for JUSTICE MARSHALL -- that it should be struck down. The Court, therefore cannot avoid analyzing § 1725 as a time, place, and manner restriction. [Footnote 2/8]

III

I would conclude, contrary to the Court, that a letterbox is a public forum, but nevertheless concur in the judgment because I conclude that 18 U.S.C. § 1725 is a reasonable time, place, and manner restriction on appellees' exercise of their First Amendment rights.

[Footnote 2/1]

It would make no sense to conclude that the "mails" are a vital medium of expression, but that letterboxes are not. Inasmuch as the Postal Service, by regulation, requires postal customers to provide appropriate mail receptacles conforming to specified dimensions, the letterbox is an indispensable component of the mail system.

[Footnote 2/2]

Of course, the postal power must be exercised in a manner consistent with the First Amendment. See Blount v. Rizzi, 400 U. S. 410, 400 U. S. 416 (1971); Lamont v. Postmaster General, 381 U. S. 301, 381 U. S. 305-306 (1965).

[Footnote 2/3]

See generally Gibbons, Hague v. CIO: A Retrospective, 52 N.Y.U.L Rev. 731 (1977).