CONTROLLING LEGAL PRINCIPLES

Free Exercise Clause Decision – The "Contemplation of Justice"

Cornelius v. NAACP Leg. Def. Fund, 473 U.S. 788 (1985)

The Court, of course, has recognized that the

"First Amendment prohibits Congress from 'abridging freedom of speech, or of the press,' and its ramifications are not confined to the 'public forum.'"

Although, as an initial matter, a speaker must seek access to public property or to private property devoted to public use to evoke First Amendment

Page 473 U. S. 789

concerns, forum analysis is not completed merely by identifying the Government property at issue. **Rather, in defining the forum, the focus should be on the access sought by the speaker.**

In Village of Schaumburg v. Citizens for a Better Environment, 444 U. S. 620 (1980), the Court observed:

"[S]oliciting funds involves interests protected by the First Amendment's guarantee of freedom of speech. Virginia Pharmacy Board v. Virginia Citizens Consumer Council, 425 U. S. 748, 425 U. S. 761 (1976). . . ."

Id. at 444 U. S. 629.

"Soliciting financial support is undoubtedly subject to reasonable regulation, but the latter must be undertaken with due regard for **the reality that solicitation is characteristically intertwined with informative and perhaps**

Page 473 U. S. 798

persuasive speech seeking support for particular causes or for particular views . . . and for the reality that, without solicitation, the flow of such information and advocacy would likely cease.

. . . Furthermore, . . . it has not been dealt with in our cases as a variety of purely commercial speech."

Id. at 444 U. S. 632. See also Bates v. State Bar of Arizona, 433 U. S. 350, 433 U. S. 363 (1977).

Accordingly, the extent to which the Government can control access depends on the nature of the relevant forum.

Similarly, when the Government has intentionally designated a place or means of communication as a public forum, speakers cannot be excluded without a compelling governmental interest. Access to a nonpublic forum, however, can be restricted as long as the restrictions are "reasonable, and [are] not an effort to suppress expression merely because public officials oppose the speaker's view." Id. at 460 U. S. 46.

In addition to traditional public fora, a public forum may be created by government designation of a place or channel of communication for use by the public at large for assembly and speech, for use by certain speakers, or for the discussion of certain subjects. Perry Education Assn., supra, at 460 U. S. 45 and 460 U. S. 46, n. 7. Of course, the government "is not required to indefinitely retain the open character of the facility." Id. at 460 U. S. 46.

The government does not create a public forum by inaction or by permitting limited discourse, but only by intentionally opening a nontraditional forum for public discourse. Ibid. Accordingly, the Court has looked to the policy and practice of the government to ascertain whether it intended to designate a place not traditionally open to assembly and debate as a public forum. Ibid. The Court has also examined the nature of the property and its compatibility with expressive activity to discern the government's intent.

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. Perry Education Assn., supra, at 460 U. S. 49. Although a speaker may be excluded from a nonpublic forum if he wishes to address a topic not encompassed within the purpose of the forum, see Lehman v. City of Shaker Heights, 418 U. S. 298 (1974), or if he is not a member of the class of speakers for whose especial benefit the forum was created, see Perry Education Assn., supra, the government violates the First Amendment when it denies access to a speaker solely to suppress the point of view he espouses on an otherwise includible subject.

The Court recognizes that its decisions regarding the right of a citizen to engage in expressive activity on public property generally have divided public property into three categories -- public forums, limited public forums, and nonpublic forums. The Court also concedes, as it must, that

"a public forum . . . created by government designation of a place or channel of communication for use by the public at large for assembly and speech, for use by certain speakers, or for the discussion of certain subjects"

is a limited public forum. Ante at 473 U. S. 802 (emphasis added).

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. See, e.g., Perry Education Assn. v. Perry Local Educators' Assn., 460 U. S. 37 (1983); Widmar v. Vincent, 454 U. S. 263 (1981); Southeastern Promotions, Ltd. v. Conrad, 420 U. S. 546 (1975); Tinker v. Des Moines Independent Community School District, 393 U. S. 503 (1969); Brown v. Louisiana, 383 U. S. 131 (1966); Hague v. CIO, 307 U. S. 496 (1939).

Access to government property can be crucially important to those who wish to exercise their First Amendment rights. Government property often provides the only space suitable for large gatherings, and it often attracts audiences that are otherwise difficult to reach. Access to government property permits the use of the less costly means of communication so "essential to the poorly financed causes of little people," Martin v. Struthers, 319 U. S. 141, 319 U. S. 146 (1943), and "allow[s] challenge to governmental action at its locus." Cass, First Amendment Access to Government Facilities, 65 Va.L.Rev. 1287, 1288 (1979).

In addition to furthering the First Amendment rights of individuals, the use of government property for expressive activity helps further the interests that freedom of speech serves for society as a whole: it allows the "uninhibited, robust, and wide-open" debate about matters of public importance that secures an informed citizenry, New York Times Co. v. Sullivan, 376 U. S. 254, 376 U. S. 270 (1964); it permits "the

Page 473 U. S. 816

continued building of our politics and culture," Police Department of Chicago v. Mosley, 408 U. S. 92, 408 U. S. 95-96 (1972); it facilitates political and societal changes through peaceful and lawful means, see Carey v. Brown, 447 U. S. 455, 447 U. S. 467 (1980); and it helps to ensure that government is "responsive to the will of the people," Stromberg v. California, 283 U. S. 359, 283 U. S. 369 (1931).

The second category, which we have referred to as "limited public forums," consists primarily of government property which the government has opened for use as a place for expressive activity for a limited amount of time, Heffron v. International Society for Krishna Consciousness, Inc., 452 U. S. 640, 452 U. S. 655 (1981), or for a limited class of speakers, Widmar v. Vincent, supra, or for a limited number of topics, Madison Joint School District v. Wisconsin Employment Relations Comm'n, 429 U. S. 167, 429 U. S. 175, n. 8 (1976). See Perry, 460 U.S. at 460 U. S. 45-46, and n. 7. In a limited public forum, it is not history or tradition, but the government's own acquiescence in the use of the property as a forum for expressive activity, that tells us that such activity is compatible with the uses to which the place is normally put.

In a limited public forum, on the other hand, the need to confine expressive activity on the property to that which is compatible with the intended uses of the property will be a compelling interest that may justify distinctions made between speakers.

The Court, of course, has recognized that the

"First Amendment prohibits Congress from 'abridging freedom of speech, or of the press,' and its ramifications are not confined to the 'public forum.'"

United States Postal Service v. Greenburgh Civic Assns., 453 U.S. at 453 U. S. 131, n. 7.

The guarantees of the First Amendment should not turn entirely on either an accident of history or the grace of the Government. Thus, the fact that the Government "owns" the property to which a citizen seeks access for expressive activity does not dispose of the First Amendment claim; it requires that we balance the First Amendment interests of those who seek access for expressive activity against the interests of the other users of the property and the interests served by reserving the property for its intended uses. The Court's analysis forsakes that balancing, and abandons the compatibility test that always has served as a threshold indicator of the proper balance.

Page 473 U. S. 823

The constraints the First Amendment imposes upon the government's definition of the boundaries of a limited public forum follow from the principles underlying the public and limited-public-forum doctrine. As noted, the government's acquiescence in the use of property for expressive activity indicates that at least some expressive activity is compatible with the intended uses of the public property. If the government draws the boundaries of the forum to exclude expressive activity that is incompatible with the property, and to

Page 473 U. S. 827

include that which is compatible, the boundaries will reflect precisely the balancing of interests the public forum doctrine was meant to encapsulate. If the government draws the line at a point which excludes speech that would be compatible with the intended uses of the property, however, then the government must explain how its exclusion of compatible speech is necessary to serve, and is narrowly tailored to serve, some compelling governmental interest other than preserving the property for its intended uses.

Rather, the Court in Tinker held that, in order to justify the exclusion of particular expressive activity, the government

"must be able to show that its action was caused by something more than a mere desire to avoid the discomfort

Page 473 U. S. 830

and unpleasantness that always accompany an unpopular viewpoint."

393 U.S. at 393 U. S. 509. The government instead must show that the excluded speech would "materially and substantially interfere'" with the other activities for which the public property was intended. Ibid., quoting Burnside v. Byars, 363 F.2d 744, 749 (CA5 1966); see also Cox v. Louisiana, 379 U. S. 536, 379 U. S. 551 (1965); Terminiello v. Chicago, 337 U. S. 1, 337 U. S. 4 (1949).