**Constitutional Law I**

**Professor Mike Ramsey**

**Spring 2022**

**Supplemental Reading #11 (*United States v. Kokinda*)**

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**Supreme Court of the United States**

**UNITED STATES, Petitioner**

**v.**

**Marsha B. KOKINDA et al.**

No. 88–2031.

Argued Feb. 26, 1990. Decided June 27, 1990.

### 110 S.Ct. 3115, 497 U.S. 720

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

We are called upon in this case to determine whether a United States Postal Service regulation that prohibits “[s]oliciting alms and contributions” on postal premises violates the First Amendment. We hold the regulation valid as applied.

I

The respondents in this case, Marsha B. Kokinda and Kevin E. Pearl, were volunteers for the National Democratic Policy Committee, who set up a table on the sidewalk near the entrance of the Bowie, Maryland, Post Office to solicit contributions, sell books and subscriptions to the organization's newspaper, and distribute literature addressing a variety of political issues. The postal sidewalk provides the sole means by which customers of the post office may travel from the parking lot to the post office building and lies entirely on Postal Service property. The District Court for the District of Maryland described the layout of the post office as follows:

[T]he Bowie post office is a freestanding building, with its own sidewalk and parking lot. It is located on a major highway, Route 197. A sidewalk runs along the edge of the highway, separating the post office property from the street. To enter the post office, cars enter a driveway that traverses the public sidewalk and enter a parking lot that surrounds the post office building. Another sidewalk runs adjacent to the building itself, separating the parking lot from the building. Postal patrons must use the sidewalk to enter the post office. The sidewalk belongs to the post office and is used for no other purpose.

During the several hours that respondents were at the post office, postal employees received between 40 and 50 complaints regarding their presence. … The Bowie postmaster asked respondents to leave, which they refused to do. Postal inspectors arrested respondents, seizing their table as well as their literature and other belongings.

… [On appeal], [a] divided panel of the United States Court of Appeals for the Fourth Circuit reversed [their convictions]. The Court of Appeals held that the postal sidewalk is a traditional public forum and analyzed the regulation as a time, place, and manner regulation. The court determined that the Government has no significant interest in banning solicitation and that the regulation is not narrowly tailored to accomplish the asserted governmental interest.

… [W]e granted certiorari.

II

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 operations. That distinction was reflected in the plurality opinion in *Lehman v. City of Shaker Heights,* 418 U.S. 298 (1974), which upheld a ban on political advertisements in city transit vehicles:

Here, we have no open spaces, no meeting hall, park, street corner, or other public thoroughfare. Instead, the city is engaged in commerce.... The car card space, although incidental to the provision of public transportation, is a part of the commercial venture. In much the same way that a newspaper or periodical, or even a radio or television station, need not accept every proffer of advertising from the general public, a city transit system has discretion to develop and make reasonable choices concerning the type of advertising that may be displayed in its vehicles.

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, as was said in *Lehman,* “arbitrary, capricious, or invidious.” *Ibid.* In *Lehman,* the plurality concluded that the ban on political advertisements (combined with the allowance of other advertisements) was permissible under this standard:

Users [of the transit system] would be subjected to the blare of political propaganda. There could be lurking doubts about favoritism, and sticky administrative problems might arise in parceling out limited space to eager politicians. In these circumstances, the managerial decision to limit car card space to innocuous and less controversial commercial and service oriented advertising does not rise to the dignity of a First Amendment violation. 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 304](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1974127232&pubNum=708&originatingDoc=I863452e79c9011d993e6d35cc61aab4a&refType=RP&fi=co_pp_sp_708_2718&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_sp_708_2718).

Since *Lehman,* the Court has adopted a forum analysis as a means of determining when the Government's interest in limiting the use of its property to its intended purpose outweighs the interest of those wishing to use the property for other purposes. Accordingly, the extent to which the Government can control access depends on the nature of the relevant forum. . . Regulation of speech activity on governmental property that has been traditionally open to the public for expressive activity, such as public streets and parks, is examined under strict scrutiny.

Regulation of speech on property that the Government has expressly dedicated to speech activity is also examined under strict scrutiny. But regulation of speech activity where the Government has not dedicated its property to First Amendment activity is examined only for reasonableness.

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,* 424 U.S. 828 (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. Unlike the public street described in *[Heffron v. International Society for Krishna Consciousness, Inc.,](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1981127605&pubNum=708&originatingDoc=I863452e79c9011d993e6d35cc61aab4a&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search))*[452 U.S. 640 (1981)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1981127605&pubNum=708&originatingDoc=I863452e79c9011d993e6d35cc61aab4a&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)), which was “continually open, often uncongested, and constitute[d] not only a necessary conduit in the daily affairs of a locality's citizens, but also a place where people [could] enjoy the open air or the company of friends and neighbors in a relaxed environment,” [*id.,* at 651](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1981127605&pubNum=708&originatingDoc=I863452e79c9011d993e6d35cc61aab4a&refType=RP&fi=co_pp_sp_708_2566&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_sp_708_2566), the postal sidewalk was constructed solely to provide for the passage of individuals engaged in postal business. …

In *United States v. Grace,* 461 U.S. 171 (1983), we did not merely identify the area of land covered by the regulation as a sidewalk open to the public and therefore conclude that it was a public forum:

The sidewalks comprising the outer boundaries of the Court grounds are indistinguishable from any other sidewalks in Washington, D.C., and we can discern no reason why they should be treated any differently. Sidewalks, of course, are among those areas of public property that traditionally have been held open to the public for expressive activities and are clearly within those areas of public property that may be considered, generally without further inquiry, to be public forum property. In this respect, the present case differs from *Greer v. Spock* .... In *Greer,* the streets and sidewalks at issue were located within an enclosed military reservation, Fort Dix, N.J., and were thus separated from the streets and sidewalks of any municipality. That is not true of the sidewalks surrounding the Court. There is no separation, no fence, and no indication whatever to persons stepping from the street to the curb and sidewalks that serve as the perimeter of the Court grounds that they have entered some special type of enclave.

*Id.,* at 179–180.

…

The Postal Service has not expressly dedicated its sidewalks to any expressive activity. Indeed, postal property is expressly dedicated to only one means of communication: the posting of public notices on designated bulletin boards. No Postal Service regulation opens postal sidewalks to any First Amendment activity. To be sure, individuals or groups have been permitted to leaflet, speak, and picket on postal premises, but a regulation prohibiting disruption, and a practice of allowing some speech activities on postal property do not add up to the dedication of postal property to speech activities. … Even conceding that the forum here has been dedicated to some First Amendment uses, and thus is not a purely non-public forum, …*,* regulation of the reserved non-public uses would still require application of the reasonableness test.

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. Indeed, 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. The Government's decision to restrict access to a nonpublic forum need only be *reasonable;* it need not be the most reasonable or the only reasonable limitation.

III

…

The purpose of the forum in this case is to accomplish the most efficient and effective postal delivery system. …

The Government asserts that it is reasonable to restrict access of postal premises to solicitation, because solicitation is inherently disruptive of the Postal Service's business. We agree. …

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. Solicitation requires action by those who would respond: The individual solicited must decide whether or not to contribute (which itself might involve reading the solicitor's literature or hearing his pitch), and then, having decided to do so, reach for a wallet, search it for money, write a check, or produce a credit card. As residents of metropolitan areas know from daily experience, confrontation by a person asking for money disrupts passage and is more intrusive and intimidating than an encounter with a person giving out information. One need not ponder the contents of a leaflet or pamphlet in order mechanically to take it out of someone's hand, but one must listen, comprehend, decide, and act in order to respond to a solicitation. Solicitors can achieve their goal only by stopping passersby momentarily or for longer periods as money is given or exchanged for literature or other items. …

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.

The dissent concludes that the Service's administrative concerns are unreasonable, largely because of the existence of less restrictive alternatives to the regulations at issue. Even if more narrowly tailored regulations could be promulgated, however, the Postal Service is only required to adopt *reasonable* regulations, not the most reasonable or the only reasonable regulation possible.

…

It is clear that this regulation passes constitutional muster under the Court's usual test for reasonableness. See *Lehman,* 418 U.S., at 303. …

The judgment of the Court of Appeals is

*Reversed.*

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Justice Kennedy concurred in the judgment. He concluded that because of the “wide range of activities that the Government permits to take place on this postal sidewalk” it might be a public forum. However, he found that even if it were a public forum, the regulation would be constitutional under the test of *Ward v. Rock against Racism* and *City Council v. Taxpayers for Vincent*.

Justice Brennan, joined in full by Justices Marshall and Stevens, and in part by Justice Blackman, dissented. He concluded:

I think it clear that the sidewalk in question is a “public forum” and that the Postal Service regulation does not qualify as a content-neutral time, place, or manner restriction. Moreover, even if I did not regard the sidewalk in question as a public forum, I could not subscribe to the plurality's position that respondents can validly be excluded from the sidewalk, because I believe that the distinction drawn by the postal regulation between solicitation and virtually all other kinds of speech is not a reasonable one.