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COMMENTS

POLITICAL SPEECH IN THE NONPUBLIC FORUM:

CAN PUBLIC HOUSING FACILITIES LIMIT ACCESS TO POLITICAL CANVASSERS?

The freedom to canvass a neighborhood with political leaflets or to stand in the middle of a public park to speak your mind is a right that most people cherish in America and a right that is generally protected by the First Amendment.¹ The Supreme Court stated more than half a century ago that “the authors of the First Amendment knew that novel and unconventional ideas might disturb the complacent, but they chose to encourage freedom . . . this freedom embraces the right to distribute literature, and necessarily protects the right to receive it.”²

Yet, there are limits to an individual’s right to free speech. For example, in *Miller v. California*,³ the Supreme Court declared that “obscene material is not protected by the First Amendment.”⁴ In *Brandenburg v. Ohio*,⁵ the Court formulated the incitement test, whereby speech that incited illegal conduct would not be protected by the First Amendment.⁶ In addition to limits on the kinds of speech, freedom of speech is limited by location. For instance, there is generally no right to freedom of speech on private property, including such places as a private residence or a shopping

¹ See *Martin v. City of Struthers*, 319 U.S. 141 (1943).

² *Id.* at 143 (quoting *Lovell v. Griffin*, 303 U.S. 444, 452 (1937)).

³ 413 U.S. 15 (1973).

⁴ *Id.* at 36.

⁵ 395 U.S. 444 (1969).

⁶ *Id.* at 447 (“[t]he constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action”).

mall.⁷ If an individual's presence is not welcome or his speech is not desired, generally he can be arrested for trespassing on private property, regardless of his First Amendment rights to free speech.⁸

Currently, many public housing facilities limit access to only residents, invited guests and those conducting official business.⁹ Anyone found in violation of this policy is excluded under "trespass after warning" statutes¹⁰ which prohibit persons from entering or remaining on property after receiving a trespass warning.¹¹ This exclusion effectively limits political activists' access to public housing because activists are neither residents nor invited guests, and they are not conducting official business for the housing authority.¹² Thus, political canvassers who wish to go door to door to distribute information about candidates or causes are turned away or arrested if they enter the housing facilities property and remain there after being asked to leave.

The extent of an individual's right to free speech in government owned public housing facilities has never been fully decided by the courts.¹³ The First Amendment does not guarantee access to property simply because it is owned by the government,¹⁴ yet the government "when acting in its proprietary capacity, does not enjoy absolute freedom from First Amendment constraints."¹⁵ Only two circuit courts of appeals have decided the issue of whether political activists can be excluded from public housing facilities; those courts have come to different conclusions. The Eleventh

⁷ The only cases discussing the right to use private property for speech purposes involved claims that private shopping centers were, in essence, public forums. For example, see *Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza*, 391 U.S. 308, 318 (1968), which held that the town shopping center was the functional equivalent of a business district. The Supreme Court has also held that privately owned shopping centers can exclude protesters from distributing leaflets. *Lloyd Corp. v. Tanner*, 407 U.S. 551, 569 (1972) (stating that property does not lose its private character merely because the public is generally invited to use it for designated purposes).

⁸ The Court held that there had not been such a dedication of Lloyd's private property to public use as to entitle persons to exercise their First Amendment rights. *Lloyd*, 407 U.S. at 570.

⁹ See, e.g., Hous. Auth., City of El Paso, Community and Resident Rules for Public Housing, Rule D2 (2000).

¹⁰ See FLA. STAT. ch. 810.09 (2000) (stating that those who enter property without authorization from the owner and remain on the property after being asked to leave are guilty of a misdemeanor).

¹¹ *Daniel v. City of Tampa*, 38 F.3d 546, 548 (11th Cir. 1994).

¹² See Hous. Auth., City of El Paso, Community Rules for Public Housing, Section 8 New Construction Program, Rule D (2000). The El Paso Housing Authority includes the following persons as performing "official" duties: law enforcement and other government personnel, utility service workers, HACEP contractors, and others authorized by HACEP. *Id.*

¹³ See *Vasquez v. Hous. Auth.*, 271 F.3d 198, 205-06 (5th Cir. 2001) (discussing the direct conflict between its decision and the Eleventh Circuit's decision in *Daniel*).

¹⁴ *United States Postal Serv. v. Greenburgh Civic Ass'ns*, 453 U.S. 114, 129 (1981).

¹⁵ *United States v. Kokinda*, 497 U.S. 720, 725 (1990).

Circuit Court of Appeals held that the exclusion of political canvassers under Florida's trespass after warning statute was content neutral and reasonable, and therefore did not violate the First Amendment.¹⁶ In contrast, the Fifth Circuit Court of Appeals recently held that such exclusion was an unreasonable restriction on the freedoms guaranteed by the First Amendment.¹⁷

This Comment argues that the wholesale exclusion of political canvassers from public housing facilities under trespass after warning statutes is not reasonable and thus violates the First Amendment. Part I reviews the Supreme Court's forum analysis to determine the constitutionality of a governmental regulation of speech within its own property. Part II examines the two cases that have decided whether the First Amendment protects the rights of political activists to distribute literature and information in public housing developments. Part III discusses whether the Supreme Court's decision in *Martin v. City of Struthers*¹⁸ provides guidance on this issue. Lastly, Part IV discusses other Supreme Court cases that have limited the free speech rights of individuals on government owned property and distinguishes public housing facilities from the government owned properties where regulation has taken place.

I. THE FIRST AMENDMENT AND THE SUPREME COURT'S FORUM ANALYSIS

A. *Historical Implications*

The right to use government property for speech purposes was not always a constitutionally protected right. The Supreme Court in 1897 upheld a Boston ordinance that prohibited any public address on publicly owned property.¹⁹ The Court concluded that the government had an absolute right to exclude, and that the right to exclude encompassed the right to determine under what circumstances government property could be used for speech purposes.²⁰

Forty years later, the Court recognized the right of individuals to use government property for speech purposes.²¹ In *Schneider v.*

¹⁶ *Daniel*, 38 F.3d at 550.

¹⁷ *Vasquez*, 271 F.3d at 206.

¹⁸ 319 U.S. 141 (1943).

¹⁹ *Davis v. Massachusetts*, 167 U.S. 43, 48 (1897).

²⁰ *Id.* ("The right to absolutely exclude all right to use, necessarily includes the authority to determine under what circumstances such use may be availed of, as the greater power contains the lesser.")

²¹ See *Hauge v. CIO*, 307 U.S. 496 (1939); *Schneider v. N.J.*, 308 U.S. 147 (1939).

New Jersey,²² the Court held that a city ordinance was unconstitutional because it prohibited the distribution of leaflets on city streets and alleys.²³ The Court stated that "streets are natural and proper places for the dissemination of information and opinion; and one is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place."²⁴ Thus, the Court ruled that cities must allow speech in public places like city streets.²⁵

B. *The Supreme Court's Forum Analysis*

Although *Schneider* held that city streets could not be closed to canvassers, it did not distinguish between the types of government property that would be available for speech purposes and those that could constitutionally be closed.²⁶ The Court, in *Perry Education Association v. Perry Local Educators' Association*,²⁷ ultimately classified the different types of government property that would be open for speech.²⁸ In *Perry*, teachers in a school district union had allowed their collective bargaining representative to use the school mail system. Another rival teachers' union wanted to use the mail system as well, claiming that since other groups had access to the system that it should be able to use it as well.²⁹ The Court upheld the exclusion of the rival teachers' union, and created a classification system that described the various "forums," and formulated tests for each forum to determine whether speech could be allowed or excluded.³⁰

The Court created three forums: public, designated public, and nonpublic.³¹ Public forums are government properties that the government must make available for speech.³² Traditional examples of public forums are parks and sidewalks.³³ The government

²² 308 U.S. at 147.

²³ *Id.* at 162 (stating that the purpose of keeping streets clean and in good appearance is insufficient to justify an ordinance which prohibits a person rightfully, on a public street, from distributing literature to one who wishes to receive it).

²⁴ *Id.* at 163.

²⁵ *Id.* at 165. The Court also held that "we are not to be taken as holding that commercial solicitation and canvassing may not be subjected to regulation as the ordinance requires." *Id.* Further, the decision stated that towns might fix reasonable hours when individuals may canvass. *Id.*

²⁶ *Id.*

²⁷ 460 U.S. 37 (1983).

²⁸ *Id.* at 45-46.

²⁹ *Id.* at 40-41.

³⁰ *Id.* at 45-47.

³¹ *Id.*

³² *Id.*

³³ *Id.* at 45. This type of land has "immemorially been held in trust for the use of the public." *Id.*

may regulate speech in public forums only in certain circumstances. For a state to enforce a content-based exclusion it must show that its regulation is necessary to serve a compelling state interest, and that it is narrowly drawn to achieve that end.³⁴ The state may also enforce regulations of time, place, and manner of expression that are content neutral, are narrowly tailored to serve a significant governmental interest, and leave open ample alternative channels of communication.³⁵

Designated public forums are places that the government could close to speech, but the government has voluntarily opened.³⁶ A school or university that opens itself in the evenings and on weekends to community groups is a designated public forum. Once the government or school district chooses to open the school to speech, it must comply with all of the same rules that govern public forums.³⁷

Nonpublic forums are government properties that the government can close to all speech activities, or “[p]ublic property which is not by tradition or designation a forum for public communication.”³⁸ The government may prohibit or restrict speech in nonpublic forums so long as the regulation is reasonable and is viewpoint neutral.³⁹ Examples of nonpublic forums include military bases, prisons, and post offices.

This Comment proceeds under the assumption that public housing complexes are nonpublic forums. Unlike a park, public housing was created to provide affordable housing for its residents.⁴⁰ Such facilities are not “by tradition or designation a forum for public communication.”⁴¹ Thus, under the Supreme Court’s forum analysis, any restriction on speech within nonpublic forums must be content neutral and reasonable.⁴²

³⁴ *Id.* (quoting *Carey v. Brown*, 447 U.S. 455, 461 (1980)).

³⁵ *Id.* at 46 (quoting *Widmar v. Vincent*, 454 U.S. 263, 269-70 (1981)). See *Clark v. Cmty. For Creative Non-Violence*, 468 U.S. 288 (1983). The Court stated that overnight sleeping in connection with a demonstration in a Washington park was expressive conduct protected by the First Amendment, yet it still upheld the Park Service’s regulation against overnight sleeping as a reasonable time, place, and manner restriction. *Id.*

³⁶ *Perry*, 460 U.S. at 45-46. The Court did state that reasonable time, place, and manner regulations would be permissible, and that a content based prohibition must be narrowly drawn to effectuate a compelling government purpose. *Id.*

³⁷ *Widmar*, 454 U.S. at 269-70.

³⁸ *Perry*, 460 U.S. at 46.

³⁹ *Id.*

⁴⁰ *Vasquez v. Hous. Auth.*, 271 F.3d 198, 202 (5th Cir. 2001).

⁴¹ *Daniel v. City of Tampa*, 38 F.3d 546, 549 (11th Cir. 1994) (quoting *Crowder v. Hous. Auth.*, 990 F.2d 586, 591 (11th Cir. 1993)).

⁴² *Perry*, 460 U.S. at 46.

II. CASES INTERPRETING WHETHER PUBLIC HOUSING AUTHORITIES CAN CONSTITUTIONALLY LIMIT HOUSING AUTHORITY RESIDENTS' ACCESS TO POLITICAL SPEECH

A. Daniel v. City of Tampa

Anthony Mark Daniel was issued a trespass warning in 1991 and was arrested for violating Florida's trespass after warning statute on three separate occasions.⁴³ On one occasion, Daniel was arrested after entering Housing Authority property in order to post a sign on a tree protesting the United State's involvement in the Persian Gulf War. On two other occasions Daniel was arrested for distributing leaflets to residents. He filed suit alleging that his arrests violated both his First Amendment rights to canvass door-to-door and the Housing Authority tenants' right to receive information.⁴⁴

The Eleventh Circuit Court of Appeals held that the statute did not violate Daniel's First Amendment rights.⁴⁵ The court concluded, in a short opinion, that enforcement of the statute was a reasonable means of combating crime because "enforcement of the statute has decreased the number of non-residents engaging in criminal activity on Housing Authority property."⁴⁶ Further, the *Daniel* court stated that political activists have unlimited access to city owned streets and sidewalks adjacent to the housing complex that provided alternative means for distributing information to residents.⁴⁷ Therefore, the appellate court held that Daniel's arrests for violating Florida's trespass after warning statute did not violate his First Amendment rights.⁴⁸

B. Vasquez v. Housing Authority

Robert Vasquez was a candidate for the El Paso County Democratic Chair in El Paso, Texas.⁴⁹ He sought to distribute literature and engage in door-to-door campaigning at Sherman Oaks, a housing unit owned by the Housing Authority of the City of El Paso ("HACEP").⁵⁰ HACEP informed Vasquez that he could not campaign on any housing authority property, citing a rule that lim-

⁴³ *Daniel*, 38 F.3d at 548-49.

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.* at 550. The Court stated that housing property was often used by non-residents as a place to sell and use drugs. *Id.* at 548.

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Vasquez v. Hous. Auth.*, 271 F.3d 198, 201-02 (5th Cir. 2001).

⁵⁰ *Id.*

ited access to “residents, members of their households, their guests and visitors, and such other persons who have a legitimate business on the premises.”⁵¹ Further regulations prohibited the distribution of notices and flyers without the prior approval of the development’s housing manager.⁵² Thus, the regulations allowed residents to distribute literature but prevented nonresidents from doing so.⁵³ Vasquez and Jesus De La O, a resident of HACEP, sued claiming the nonresident restriction or “trespass after warning” policy violated the First Amendment.⁵⁴

The Fifth Circuit Court of Appeals held that the regulations, as applied to political campaigners, constituted an unreasonable restriction on De La O’s First Amendment right to receive political information.⁵⁵ Focusing on reasonableness, the court stated that “door-to-door political volunteers provide the main or only link to the election process, especially with respect to local elections, where candidates may lack the resources for extensive media coverage.”⁵⁶ The *Vasquez* court concluded by stating that the wholesale exclusion of political candidates and their volunteers “unreasonably and unnecessarily interferes with what may well be the primary connection between many of HACEP’s residents and the democratic process.”⁵⁷

The dissent, agreeing with the Eleventh Circuit’s position in *Daniel*, concluded that the restrictions on nonresidents were a reasonable response to the problem of rampant crime in low-income housing.⁵⁸ Further, it stressed the fact that alternative channels of communication existed for residents to receive information, explaining that all HACEP properties were adjacent to public streets and sidewalks, and that De La O’s complex, Sun Plaza Apartments, was “completely bounded by city streets and sidewalks.”⁵⁹ In addition, the dissent believed that any resident was free to hear

⁵¹ Hous. Auth., Community and Resident Rules for Public Housing, Section 8 New Construction Program, Rule D2 (2000).

⁵² *Id.* Rule D5 allowed residents to distribute literature only between 9:00 AM and 8:00 PM and forbid the placing of leaflets on the doors of residents who did not answer.

⁵³ *Vasquez*, 271 F.3d at 201.

⁵⁴ Only De La O appealed the trial court’s decision to grant HACEP summary judgment, asserting that his constitutional right to receive information from political candidates was violated. *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.* at 204.

⁵⁷ *Id.* at 205.

⁵⁸ *Id.* at 207-08.

⁵⁹ *Id.* at 208. The dissent also argued that another factor in the evaluation of the overall reasonableness of a regulation is whether there are alternative channels of communication available, such as direct mail campaigns. *Id.*

the messages of various candidates outside of the complex and was then free to invite the candidate onto the property.⁶⁰

III. THE RIGHTS OF INDIVIDUALS TO RECEIVE AND DISTRIBUTE POLITICAL LEAFLETS

A. *Is it Reasonable to Restrict Political Canvassers' Access to Public Housing? A Look at Martin v. City of Struthers and its Impact Prior to the Supreme Court's Forum Analysis.*

The First Amendment protects the freedom of individuals to distribute literature and protects the right to receive it.⁶¹ In *Martin v. City of Struthers*,⁶² a case decided prior to the Supreme Court's forum analysis, the Supreme Court held that the "freedom to distribute information to every citizen wherever he desires to receive it is so clearly vital to the preservation of a free society that, putting aside reasonable police and health regulations of time and manner of distribution, it must be fully preserved."⁶³ In *Struthers*, Jehovah's Witnesses went to the homes of strangers to distribute leaflets advertising a religious meeting. For delivering leaflets, a woman was convicted of violating a local ordinance that stated:

It is unlawful for any person distributing handbills, circulars or other advertisements to ring the door bell, sound the door knocker, or otherwise summon the inmate or inmates of any residence to the door for the purpose of receiving such handbills, circulars, or other advertisements they or any person with them may be distributing.⁶⁴

The defendant admitted knocking at the door for the purposes of delivering the invitation but argued that the ordinance violated the First Amendment.⁶⁵ The city argued that burglars frequently posed as canvassers to discover whether a house was empty and therefore restricting door-to-door activity was constitutional.⁶⁶

Struthers ultimately held that the city could not, consistent with the First Amendment, ban the practice of door-to-door solicitation, and that allowing such a practice was up to "the master of each household, and not upon the determination of the commu-

⁶⁰ *Id.*

⁶¹ *Lovell v. Griffin*, 303 U.S. 444, 452 (1938).

⁶² 319 U.S. 141 (1943).

⁶³ *Id.* at 146-47.

⁶⁴ *Id.* at 142.

⁶⁵ *Id.*

⁶⁶ *Id.* at 144 (recognizing that crime prevention may be a valid purpose for regulatory ordinances).

nity.”⁶⁷ The Court stated that “while door-to-door distributors of literature may be either a nuisance or a blind for criminal activities, they may also be useful members of society engaged in the dissemination of ideas in accordance with the best tradition of free discussion.”⁶⁸ “Pamphlets have proved most effective instruments in the dissemination of opinion. And perhaps the most effective way of bringing them to the notice of individuals is their distribution at the homes of the people.”⁶⁹ The *Struthers* Court believed that the rights of political canvassers were equally significant, as the opinion stated that “door to door campaigning is one of the most accepted techniques of seeking popular support, while the circulation of nominating papers would be greatly handicapped if they could not be taken to the citizens in their homes.”⁷⁰ This right was “essential to the poorly financed causes of the little people.”⁷¹

In addition to supporting the rights of political canvassers, the *Struthers* decision provided further guidance concerning how to balance the constitutional protections afforded political canvassers with the protection and safety of residents in a particular community.⁷² The Court stated that identification devices could control the abuse of criminals posing as canvassers.⁷³ The *Vasquez* court struck a very similar balance in its decision, stating that requiring political campaigners to seek the same authorization as other individuals that have legitimate business on the premises would be reasonable in light of public housing facilities goals of preventing crime by nonresidents.⁷⁴ Logically, all housing authorities would have to do is check to make sure that the political canvassers credentials were valid. Presumably, this is the same type of identification check that is done with the cable repairman when he seeks entrance onto housing property. Thus, the only reasonable way to balance these two competing interests is to require public housing facilities to use identification methods as a way to protect the safety of residents, and not the exclusion of free speech. It does not seem reasonable, with such a workable solution, to exclude political canvassers.

⁶⁷ *Id.* at 141.

⁶⁸ *Id.* at 145.

⁶⁹ *Id.* (quoting *Schneider v. State*, 308 U.S. 147, 161 (1939)).

⁷⁰ *Id.* at 146.

⁷¹ *Id.*

⁷² The Court stated that in this case it was necessary to weigh the conflicting interests of the leafleter and the individual homeowner's right to receive information against the interests of the community in protecting residents. *Id.* at 143.

⁷³ *Id.* at 148. The Court left this problem of regulation for the communities to figure out. *Id.*

⁷⁴ *Vasquez v. Hous. Auth.*, 271 F.3d 198, 205 (5th Cir. 2001).

Yet, since *Struthers* was decided before the Court's forum analysis and concerned the role of the city in banning speech, its effect upon the rights of political activists is unclear. The Court, though, has never overruled *Struthers*; thus the opinion should be considered important in determining the level of constitutional protection that should be afforded to door-to-door canvassers. The *Struthers* opinion demonstrates the Court's general adherence to the protection of those persons who are "not specifically invited to go from home to home and knock on doors or ring doorbells to communicate ideas to the occupants or to invite them to political, religious, or other kinds of public meetings."⁷⁵

Struthers' general protection of the rights of political canvassers should be applied in the context of the rights of individuals to canvass and receive information in public housing. It is not reasonable to restrict access under the auspices of protecting the safety of the residents. This argument was rejected in *Struthers* and should be rejected in the context of public housing.⁷⁶ Further, *Struthers* provided an acceptable alternative to restricting access to all non-residents. By mandating that canvassers check in with the housing office, the fear of criminal activity, which is the primary justification for restriction, is virtually eliminated. Though this type of screening might require some effort on the part of public housing administration, it would be unreasonable to exclude all political activity because of the effort that such screening might require. Further, this same type of screening is already being done to identify utility workers and others who wish to "legitimately" enter public housing property.

B. The Supreme Court's Restriction of Speech in the Nonpublic Forum: Is the Restriction of Speech in Public Housing Reasonable in Light of Other Decisions?

Recognizing that *Struthers* was decided in a very different period in American history, it is important to look at the cases that have been decided under the nonpublic forum test to determine where public housing facilities fit those criteria. In general, the Supreme Court has limited the rights of individuals to disseminate and receive information in nonpublic forums.⁷⁷ The Court has held that restrictions limiting solicitation at airports to areas outside the

⁷⁵ *Struthers*, 319 U.S. at 141.

⁷⁶ *Id.* at 147 (believing that the dangers of distribution could easily be controlled by traditional legal methods, the Court left to each homeowner the full right to decide whether he will receive strangers as visitors).

⁷⁷ See *Cornelius v. NAACP Legal Def. & Educ. Fund*, 473 U.S. 788 (1995); *Lehman v. City of Shaker Heights*, 418 U.S. 298 (1974).

terminal are constitutional,⁷⁸ that restrictions on protesters on jailhouse grounds are constitutional,⁷⁹ and that since postal sidewalks are not a public forum, regulations prohibiting solicitors are constitutional.⁸⁰

Restrictions limiting solicitation at airports were found to be reasonable because of the delay and inconvenience involved; restrictions on speech on jailhouse property were found to be constitutional because of the need to maintain safety and order; and restrictions on solicitation at postal facilities were found to be reasonable because of the disrupted flow of postal business.⁸¹ In each of these cases, the operation of commerce was effected, or the operation and security of the prison system was involved.⁸² These restrictions seem reasonable. Airports and post offices are places where official business takes place. Prisons house America's dangerous and violent criminals. In contrast, public housing facilities are people's homes, places where families discuss political ideas at the dinner table. The wholesale exclusion of political canvassers from public housing is not reasonable in light of the Court's prior nonpublic forum cases. In addition, the Court has regulated solicitation, not distribution of literature.⁸³ Solicitation has been found to be more intrusive, and thus less protected than distributing literature.⁸⁴

Restricting an individual's right to solicit money at airport terminals does not violate the First Amendment and should be considered a reasonable restriction on free speech.⁸⁵ In *International Society for Krishna Consciousness v. Lee*, the Court held that airports were not traditional public forums and that regulations restricting solicitation were reasonable because they promoted the airport's interest in crowd control and efficient air travel by limiting solicitation to the areas outside of the airport terminals.⁸⁶ In *Krishna*, the Port Authority of New York adopted a regulation forbidding the repetitive solicitation of money within the airport terminals.⁸⁷ The Court noted the "disruptive effect that solicitation

⁷⁸ *Int'l Soc'y For Krishna Consciousness v. Lee*, 505 U.S. 672 (1992).

⁷⁹ *Adderley v. Florida*, 385 U.S. 39 (1966).

⁸⁰ *United States v. Kokinda*, 497 U.S. 720 (1990).

⁸¹ *See Krishna*, 505 U.S. at 685; *Kokinda*, 497 U.S. at 736-37; *Adderley*, 385 U.S. at 44-47.

⁸² *Krishna*, 505 U.S. at 674-75; *Kokinda*, 497 U.S. at 723-24; *Adderley*, 385 U.S. at 40.

⁸³ *Krishna*, 505 U.S. at 683-84.

⁸⁴ *Id.*

⁸⁵ *Id.* at 673.

⁸⁶ *Id.* at 685.

⁸⁷ *Id.* at 674-75.

may have on business.”⁸⁸ “The result is that the normal flow of traffic is impeded.”⁸⁹ It noted that pedestrian congestion was a major problem at Port Authority airports, and that the incremental effects would prove disruptive. Most importantly, the Court ruled that the ban on the distribution of leaflets alone was unconstitutional.⁹⁰ It concluded that the ban on leafleting was not reasonable and thus was impermissible even though the airport was a nonpublic forum.⁹¹

The Court’s rationale in *Krishna* seems reasonable. After all, the disruption in New York airports could potentially affect commerce. There is no similar disruption of commerce found in public housing facilities, but justifiable concerns do exist over the safety of residents of public housing. Though this safety concern is reasonable, the wholesale exclusion of political activity is not a reasonable means of combating this fear, whereas banning solicitors is a reasonable way to relieve the congestion of busy New York airports. Excluding people from the political process at a busy airport is different than excluding people from the political process at their home. At the airport, people are busy going from point A to point B. For centuries though, it has been a common practice for people to go door-to-door to communicate ideas.⁹² In addition, the Court in *Krishna* banned solicitation of money, not the distribution of literature at airports. The distribution of literature was found to be a constitutionally protected right.⁹³ It seems logical to argue then, that political volunteers who distribute literature in public housing and do not solicit campaign contributions should be protected in light of the Court’s decision in *Krishna*.

The Court has also held that it is a reasonable restriction of speech for prisons to exclude people from protesting on jailhouse grounds.⁹⁴ In *Adderley v. Florida*,⁹⁵ several students were convicted of trespassing on jailhouse grounds to protest the arrest of other students who were being held at the jail.⁹⁶ The Court held that the government could prohibit speech in the areas outside

⁸⁸ *Id.* at 683-84.

⁸⁹ *Id.*

⁹⁰ The Court reasoned that solicitation requires action by those who would respond and requires them to reach for a wallet, “search it for money, write a check, or produce a credit card.” *Id.* at 692.

⁹¹ *Id.* at 690 (noting that leafleting does not pose the same kinds of problems presented by face to face solicitation).

⁹² *Martin v. City of Struthers*, 319 U.S. 141, 141 (1943).

⁹³ *Krishna*, 505 U.S. at 692.

⁹⁴ *Adderley v. Florida*, 385 U.S. 39, 47 (1966).

⁹⁵ *Id.*

⁹⁶ *Id.* at 40.

prisons and jails, noting that the state has the power to preserve the property under its control for the use to which it is lawfully dedicated.⁹⁷ Rejecting the students' First Amendment claim, *Adderley* stated that there was no merit to the petitioners' argument that they had a constitutionally protected right to stay on the property, even though the students claimed that the area was chosen for a peaceful civil rights demonstration.⁹⁸ The dissent urged that:

The jailhouse, like an executive mansion, a legislative chamber, a courthouse, or the statehouse itself is one of the seats of government, whether it be the Tower of London, the Bastille, or a small county jail. And when it houses political prisoners or those who many think are unjustly held, it is an obvious center for protest.⁹⁹

Further, the dissent stated that "we do violence to the First Amendment when we permit this 'petition for redress of grievances' to be turned into a trespass action."¹⁰⁰ Though places like a Senate gallery may not be the proper place for protest, it should not simply be up to the custodian of public property to decide when public places shall be used for the communication of ideas. "For to place such discretion in any public official . . . is to place those who assert their First Amendment rights at his mercy."¹⁰¹

Though the dissent argued fervently that restrictions on freedom of speech on jailhouse grounds were unconstitutional, one could argue that restrictions on speech are reasonable on prison grounds because prisons are dangerous places and maintaining law and order is essential.¹⁰² Public housing, though sometimes rife with criminality, is still housing for thousands of citizens across the country. Restricting speech only serves to stifle the rights of those residents to learn and disseminate political ideas and activity.

The Court has also held that restrictions on speech in and around postal facilities is reasonable in light of the Postal Service's mission to provide the most efficient and effective distribution of the mails.¹⁰³ In *United States v. Kokinda*,¹⁰⁴ members of a

⁹⁷ *Id.* at 47.

⁹⁸ *Id.*

⁹⁹ *Id.* at 49.

¹⁰⁰ *Id.* at 52 (distinguishing between a petition for redress and picketing). The dissent believed that picketing was a form of protest directed at private interests, while a petition for redress was a form of protest directed at the state. *Id.*

¹⁰¹ *Id.* at 54.

¹⁰² The dissent noted that it was undisputed that the entrance to the jail was not blocked and that the sheriff was able to drive up the driveway of the prison. *Id.* at 51-52.

¹⁰³ *United States v. Kokinda*, 497 U.S. 720, 736 (1990).

political advocacy group set up a table on a sidewalk near the entrance to a United States Post Office to solicit contributions, sell books and subscriptions to the organization's newspaper, and to distribute literature on a variety of political issues.¹⁰⁵ The Court held that it was reasonable for the Postal Service to prohibit solicitation where it had determined that the intrusion creates a significant interference with the mail system, and that the Postal Service's concern about losing customers because of the potentially unpleasant situation created by solicitation was also reasonable.¹⁰⁶

The disruption of the efficient distribution of the mails and the loss of Postal Service customers due to people soliciting money in and around postal facilities is certainly a concern. Like *Krishna*, the Court in *Kokinda* clearly determined that disruption of commerce and its inherent effects are serious concerns that justify reasonable restriction of speech.¹⁰⁷ Yet, the political organization involved in the *Kokinda* case was soliciting money as well as distributing leaflets. The Court stated that "confrontation by a person asking for money disrupts passage and is more intrusive and intimidating than an encounter with a person giving out information."¹⁰⁸ *Kokinda* does not say whether distribution alone would disrupt passage and the mail system, but two years later in *Krishna* the Court held that the distribution of leaflets at an airport was a constitutionally protected right.¹⁰⁹ One might then infer that the distribution of leaflets alone at a postal facility would be a constitutionally protected right as well. After all, the posting of information on postal facilities is a common practice in many communities.¹¹⁰

Whether the Court would hold that the distribution of leaflets in a public housing facility is a constitutionally protected right is unclear. Though the Court has found restrictions on speech reasonable in nonpublic forums, it has held that the prohibitions on distributions of literature in airports to be unconstitutional. Since the primary concern of public housing facilities seems to be safety, the intrusion on the facilities property would seem to be the pri-

¹⁰⁴ *Id.* at 720.

¹⁰⁵ *Id.* at 723.

¹⁰⁶ *Id.* at 733-34.

¹⁰⁷ *Id.* at 732-33.

¹⁰⁸ *Id.* at 734.

¹⁰⁹ *Int'l Soc'y For Krishna Consciousness v. Lee*, 505 U.S. 672, 690 (1992).

¹¹⁰ See 39 C.F.R. § 232.1(i) (1998) ("The postal service has no intention to discontinue . . . that valuable service [of providing for the display of public notices and announcements] to local communities. The adopted regulation contains . . . language insuring that the authority of postmasters to allow the placement in post office of bulletin boards for the display of public notices and announcements will continue as before.").

mary concern, not whether political canvassers are soliciting money at a resident's door or are simply handing out flyers. Yet, when reviewing the Court's jurisprudence on nonpublic forums, it seems clear that in many circumstances there is a constitutional right to distribute literature in nonpublic forums. After all, both *Kokinda* and *Krishna* found that solicitation, but not distribution of literature, could be restricted.¹¹¹

CONCLUSION

The right to distribute and receive information is a fundamental right under the Constitution. Such a right is most important in people's homes, where Americans discuss politics and those seeking popular support canvass neighborhoods to circulate petitions or information. Such a right, in nonpublic forums, cannot be restricted absent a reasonable justification. Crime prevention, though an important goal in many public housing facilities, cannot take precedence over the First Amendment rights, especially when these facilities can easily restrict access to only those genuinely seeking to disseminate ideas and information. Thus, trespass after warning statutes, as applied in public housing facilities, should be held to violate the First Amendment.

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¹¹¹ *Krishna*, 505 U.S. at 690; *Kokinda*, 497 U.S. at 733-34.

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