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International Society for Krishna Consciousness, Inc. v. Lee: The Public Forum Doctrine Falls to a Government Intent Standard

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INTERNATIONAL SOCIETY FOR KRISHNA CONSCIOUSNESS, INC. v. LEE: THE PUBLIC FORUM DOCTRINE FALLS TO A GOVERNMENT INTENT STANDARD

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> The guarantees of the First Amendment should not turn entirely on . . . the grace of the Government.[1]

I. INTRODUCTION

Since its inception, the public forum doctrine has maintained a byzantine existence.[2] The Supreme Court has struggled to define the extent to which the First Amendment[3] protects expressive activities in public places.[4] Prior to developing a public forum doctrine, the Court used various means to limit government restrictions of expressive uses of public property.[5] Since

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1. Cornelius v. NAACP, 473 U.S. 788, 822 (1985) (Blackmun, J., dissenting).

2. *See* MICHAEL NIMMER, NIMMER ON FREEDOM OF SPEECH: A TREATISE ON THE THEORY OF THE FIRST AMENDMENT § 4.09[D], at 70-73 (2d ed. 1984) (describing the arcane categorization that takes place in public forum/nonpublic forum adjudication).

3. The first amendment free speech guarantee reads: "Congress shall make no law . . . abridging the freedom of speech." U.S. CONST. amend. I.

4. Barbara S. Gaal, Note, *A Unitary Approach to Claims of First Amendment Access to Publicly Owned Property*, 35 STAN. L. REV. 121, 121 (1982). The constitutional policy deficiencies surrounding the public forum doctrine have been well documented. *See* Frederick Schauer, *Categories and the First Amendment: A Play in Three Acts*, 34 VAND. L. REV. 265, 266-70 (1981) (outlining the constitutional defects of public forum analysis). Beyond constitutional inadequacies, however, the Court's application of the public forum doctrine has been patently inconsistent. JEREMY BARRON & C.T. DIENES, HANDBOOK OF FREE SPEECH AND FREE PRESS 127 (1979) (examining the wavering principles used in public forum cases).

5. *See, e.g.*, Cox v. New Hampshire, 312 U.S. 569, 572 (1941) (holding that the first amendment protects expressive use of public property from overly broad statutory re-

1972, however, the Court has increasingly relied on categorical approaches to determine when members of the general public can use government-controlled property for communicative purposes.[6]

Under the public forum doctrine, the Court examines the character of the property at issue and labels the property as either a public forum, a designated forum, or a nonpublic forum.[7] If property is a public forum, government regulation of speech on the property is guided by strict constitutional limitations.[8] A

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strictions); Cantwell v. Connecticut, 310 U.S. 296, 297 (1940) (rejecting flat bans of expression on public property); Hague v. C.I.O., 307 U.S. 496, 499 (1939) (discussing the importance of the free speech guarantee); Lovell v. City of Griffin, 303 U.S. 444, 447 (1938) (discussing the importance of free speech in contrast with government regulations of expression); Heffron v. International Soc'y for Krishna Consciousness, Inc., 452 U.S. 640, 642 (1981) (limiting the government's ability to regulate expression on state fairgrounds); Greer v. Spock, 424 U.S. 828, 829 (1976) (analyzing restrictions of free speech at a military base); Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 546 (1975) (limiting the government's ability to regulate expression in municipal theatres); Grayned v. City of Rockford, 408 U.S. 104, 107 (1972) (denouncing the government's regulation of expression on public school grounds); Brown v. Louisiana, 383 U.S. 131, 134 (1966) (restricting the government's ability to regulate free speech in public libraries).

6. C. Thomas Dienes, *The Trashing of the Public Forum: Problems in First Amendment Analysis*, 55 GEO. WASH. L. REV. 109, 110-15 (1986); Robert C. Post, *Between Governance and Management: The History and Theory of the Public Forum*, 34 UCLA L. REV. 1713, 1715-16 (1987); Gaal, *supra* note 4, at 121.

Justice Roberts' opinion in Hague v. C.I.O., 307 U.S. 496, 515-16 (1939), is often regarded as the origin of the public forum doctrine. The doctrine, however, was rarely used until the 1970s. By 1984, "public forum" appeared in only thirty-two Supreme Court cases; only two of these cases were decided before 1970, while thirteen were decided in the 1980s. Daniel A. Farber & John E. Nowak, *The Misleading Nature of Public Forum Analysis: Content and Context in First Amendment Adjudication*, 70 VA. L. REV. 1219, 1221-22 (1984). For a detailed analysis of the public forum doctrine's evolution, see Dienes, *supra*, and Post, *supra*. For a more current tracing of the public forum doctrine, see David S. Day, *The End of the Public Forum Doctrine*, 78 IOWA L. REV. (forthcoming March, 1993).

7. Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45-46 (1983).

8. Post, *supra* note 6, at 1715. As such, the traditional public forum is considered the most speech protective. *See* Cornelius v. NAACP, 473 U.S. 788, 800 (1985) (noting that the traditional forum, while limited to property having as "a principal purpose . . . the free exchange of ideas," nevertheless maintained the sanctity of free speech values). The traditional public forum doctrine generally means that:

> [T]he government may not prohibit all communicative activity. For the 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. The State may also enforce regulations of time, place, and manner of expression which are content-neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication.

designated public forum emerges from a nonpublic forum once the government affirmatively designates the property as open to speaker access.[9] Government regulation of speech in a designated forum, as in a public forum, receives strict judicial scrutiny.[10] If property is classified as a nonpublic forum, however,

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Perry Educ., 460 U.S. at 45 (citations omitted).

After classifying a government restriction as pertaining to a public forum, the Court further determines whether the restriction is content-based or content-neutral. LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 12-24, at 987 (2d ed. 1988) (distinguishing among restrictions focused on communication or communicative impact); Gerald Stone, *Restrictions of Speech Because of its Content: The Peculiar Case of Subject-Matter Restrictions*, 46 U. CHI. L. REV. 81, 81 (1978) (discussing content-based and content-neutral terminology).

Content-based restrictions discriminate against message content, permitting expression of some messages while prohibiting expression of others. *Id.* at 81 n.3. The Court employs heightened judicial review when examining content-based restrictions. *See* Widmar v. Vincent, 454 U.S. 263, 276 (1981). Thus, content-based restrictions will be upheld only where they serve a compelling state interest and are narrowly drawn to achieve that end. *Id.* at 270 (holding that certain state interests may be so compelling that, where no adequate alternative exists, a content-based distinction—if narrowly drawn—would be a permissible way of furthering those objectives).

Conversely, content-neutral government regulations generally receive a lower standard of review than content-based restrictions. *See* Consolidated Edison Co. v. Public Serv. Comm'n, 447 U.S. 530, 536 (1980) ("A restriction that regulates only the time, place, or manner of speech may be imposed so long as it is reasonable. But when the regulation is based on the content of speech, governmental action must be scrutinized more carefully . . . ."). A content-neutral regulation may limit expression irrespective of message content and focus on the time, place, or manner of the expression. TRIBE, *supra*, at 992-93; Post, *supra* note 6, at 1760. For example, in Heffron v. International Soc'y for Krishna Consciousness, Inc., 452 U.S. 640 (1981), the Court upheld a regulation making it unlawful to distribute literature on state fairgrounds from places other than a public booth. *Id.* at 654. Although the Court found the fairgrounds to be a public forum, it held that crowd control and concerns for public safety justified the rule. *Id.* at 649-54. The Court required that the content-neutral regulation need only serve a "significant," rather than a compelling, state interest. *Id.* at 647-48 (quoting Virginia Pharmacy Bd. v. Virginia Citizens Consumer Council, 425 U.S. 748, 771 (1976)).

Where laws completely ban expression in a public forum, the Court is usually more critical than it is in its approach toward content-neutral regulations. TRIBE, *supra*, at 992; Gaal, *supra* note 4, at 126. Indeed, in *Hague*, 307 U.S. at 515-16, the Court, in dicta, called for "guaranteed minimum access," where public fora were involved. Gaal, *supra* note 4, at 126. *See* United States Postal Serv. v. Council of Greenburgh Civic Ass'ns, 453 U.S. 114, 128 (1981) (reaffirming the guaranteed minimum access approach in declining to designate a letterbox as a public forum "to which the First Amendment guarantees access to all comers"); Gaal, *supra* note 4, at 126-27.

9. G. Sidney Buchanan, *The Case of the Vanishing Public Forum*, U. ILL. L. REV. 949, 956 (1991).

10. The continuing vitality of the designated forum is questionable. *See Cornelius*, 473 U.S. at 815 (Blackmun, J., dissenting) (describing the Court's current use of a designated public forum as so constrictive that it "empties the limited-public-forum concept of all its meaning"); *see generally* Buchanan, *supra* note 9, at 956-73 (tracing the decline of the designated forum).

the government is afforded greater latitude in regulating speech.[11]

In examining access-related First Amendment issues, the Court generally begins by classifying the specific type of forum involved in the case.[12] The Court then evaluates the government regulation, using a standard of review consistent with the classification.[13] The Court frequently will invalidate regulations of speech in traditional and designated fora,[14] and sustain regulations of nonpublic fora.[15] The public forum doctrine has historically protected expressive activity, particularly in public fora, which "occupies a special position in terms of First Amendment protection."[16] Last Term, however, the Supreme Court in *International Society for Krishna Consciousness, Inc. v. Lee (ISKCON)*[17] confirmed that the once speech-protective public forum

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Nonetheless, a designated forum generally means that:

> Although a State is not required to indefinitely retain the open character of the facility, as long as it does so it is bound by the same standards as apply in a traditional public forum. Reasonable time, place, and manner regulations are permissible, and a content-based prohibition must be narrowly drawn to effectuate a compelling state interest.

Perry Educ., 460 U.S. at 46 (citations omitted).

11. Great judicial deference is given to governmental regulation of nonpublic fora. As the Court has stated: "In addition to time, place, and manner regulations, the State may reserve the forum for its intended purposes, communicative or otherwise, as long as the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view." *Id.* (citations omitted). *See also* TRIBE, *supra* note 8, at 992. The Court has stated that "[c]ontrol 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." *Cornelius*, 473 U.S. at 806.

12. Richard B. Saphire, *Reconsidering the Public Forum Doctrine*, 59 U. CIN. L. REV. 739, 739-40 (1991). For example, before asking whether individuals have a right of access to a particular property for expressive purposes, the Court asks, "What kind of forum is the particular property?" *Id.* at 740, n5.

13. *Id.* at 740.

14. *Id.* at 740-41. *See, e.g.*, United States v. Grace, 461 U.S. 171 (1983); Widmar v. Vincent, 454 U.S. 263 (1981).

15. Saphire, *supra* note 12, at 741. *See, e.g.*, United States v. Kokinda, 497 U.S. 720 (1990) (plurality opinion); Hazlewood School Dist. v. Kuhlmeier, 484 U.S. 260 (1988).

16. *Grace*, 461 U.S. at 180. *See* Saphire, *supra* note 12, at 741 and n.10.

17. 112 S. Ct. 2701 (1992). In *ISKCON*, the Supreme Court issued three separate opinions. *See* International Soc'y for Krishna Consciousness, Inc. v. Lee (*ISKCON I*), 112 S. Ct. 2701 (1992) (discussing the public forum and solicitation issues); Lee v. International Soc'y for Krishna Consciousness, Inc. (*ISKCON II*), 112 S. Ct. 2709 (1992) (per curiam) (discussing the distribution issue); International Soc'y for Krishna Consciousness, Inc. v. Lee (*ISKCON III*), 112 S. Ct. 2711 (1992) (containing the collective opinions of Justices O'Connor, Kennedy, and Souter in response to *ISKCON I* and *ISKCON II*).

doctrine is now a speech-restrictive method used to sustain governmental restrictions of expression.[18]

Because the forum classification dictates the level of judicial review applied to government regulation, it is the critical inquiry. *ISKCON* drastically altered the scheme of the public forum by allowing the *government* officials to determine the forum status of its property, thereby controlling the scope of judicial review.[19] The primary significance of *ISKCON* may be in the Court's method, rather than the actual result. Throughout the evolution of the forum doctrine, the Court asserted a level of

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This article uses *ISKCON* to refer to all three opinions together. *See The Supreme Court, 1991 Leading Cases*, 106 Harv. L. Rev. 279, 279 n.3 (1992) [hereinafter *Leading Cases*].

18. *See ISKCON III*, 112 S. Ct. at 2716 (Kennedy, J., concurring in the judgment) (noting that the majority's "analysis is flawed at its very beginning. It leaves the government with almost unlimited authority to restrict speech on its property . . . and it leaves almost no scope for the development of new public forums absent the rare approval of the government."). *See also* Keith Werhan, *The Supreme Court's Public Forum Doctrine and the Return to Formalism*, 7 CARDOZO L. REV. 335, 394-95 (1986) (looking at the pro-government effect necessarily produced by the Court's tiered analysis); Farber & Nowak, *supra* note 6, at 1234 (discussing the confused application of the doctrine which ultimately ignores the people and focuses on the place).

Beyond the decay of the once-protective public forum doctrine lie the patently inconsistent decisions rendered by the Court under the rubric of the doctrine itself. Post, *supra* note 6, at 1715. As Professor Post points out:

> Although public forum doctrine has developed with extraordinary speed, it has done so in a manner heedless of its constitutional foundations. The Court has yet to articulate a defensible constitutional justification for its basic project of dividing government property into distinct categories, much less for the myriad of formal rules governing the regulation of speech within these categories . . . . The doctrine has in fact become a serious obstacle not only to sensitive First Amendment analysis, but also to a realistic appreciation of the government's requirements in controlling its own property.

Id.

19. *ISKCON I*, 112 S. Ct. at 2707-08 (limiting the historical inquiry under public forum analysis, then deciding the forum status of airport terminals based on the government's intended purpose for the property); *Leading Cases*, *supra* note 17, ct 288-89. ("In *ISKCON*, the Court held that the government can require those who would use any government property other than streets, sidewalks, and parks, to forsake First Amendment rights they would otherwise enjoy.").

The transformation of public forum analysis from concept to doctrine highlights its varied use and substantive effect. The public forum concept was once used only as a rebuttal to the government's assertion that the particular restriction was merely a time, place, or manner regulation. *Grace*, 461 U.S. at 177. In contrast, the modern public forum doctrine imposes a threshold which a challenger must surmount with an initial burden.

judicial scrutiny dependent upon the nature of the forum.[20] *ISKCON*, however, completes the process of divorcing public forum analysis from its historical roots and directs the focus of future cases away from a property's traditional use and toward the government's intent.[21]

Rather than focusing on the nature of the government's regulation, the Rehnquist Court is swayed by the intent of government officials who, in turn, dictate the forum status of public property.[22] The result has been a formalism that "yield[s] an inadequate jurisprudence of labels."[23] If government asserts that a particular location is intended to be a nonpublic forum, judicial deference is the result. This deferential position in free speech analysis is not the sole concern; rather, the arbitrary nature of the standards used to decide a property's forum classification, compounded by the Court's strict limitation of traditional public fora, poses a direct threat to First Amendment values.[24] In that regard, *ISKCON* dramatically reaffirms the Court's use of the public forum doctrine as a pro-government approach to regulations affecting expressive activity on publicly-owned property.

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20. Buchanan, *supra* note 9, at 953; Saphire, *supra* note 12, at 757. The Court's categorical approach may serve as a pretext for reliance on an independent factor. This factor, becoming less covert in recent decisions, is the intent of government officials. *See ISKCON I*, 112 S. Ct. at 2707 (determining the forum status of airports by noting that "the record demonstrates that the [government] considers the purpose of the terminals to be the facilitation of passenger air travel, not the promotion of expression"); Dienes, *supra* note 6, at 120 (noting that "the conceptualistic, nonpublic-forum doctrine predetermines the judicial answer through the labeling process").

21. *See ISKCON III*, 112 S. Ct. at 2716 (Kennedy, J., concurring in the judgment) (stating that "[t]he Court's approach is contrary to the underlying purposes of the public forum doctrine").

The Court's restriction of free speech using various doctrinal subtleties is not a new revelation. *See* CHARLES FRIED, ORDER AND LAW 17 (1991); Robin West, *Taking Rights Seriously*, 104 HARV. L. REV. 43, 44-45 (1990) (noting that "[t]he Court's illiberal decisions of the 1989 Term reflect a growing societal consensus that the traditionally liberal faith in the individual is somewhat misplaced and that the correlative liberal distrust of state and community authority is somewhat overdrawn"); Tom Rowland & Jeremy Todd, *Where You Sit Depends on Who Sits: Platform Promises and Judicial Gatekeeping in the Federal District Courts*, 53 J. POL. 175, 184 (1991).

22. Traditional free speech doctrine focused on the nature of the government's regulation when dictating a court's standard of review. *See* TRIBE, *supra* note 8, at 992-93; David S. Day, *The Incidental Regulation of Free Speech*, 42 U. MIAMI L. REV. 491, 492 (1988).

23. Dienes, *supra* note 6, at 110.

24. Gaal, *supra* note 4, at 135.

II. CASE OUTLINE

In 1991, petitioner International Society For Krishna Consciousness, Inc., a nonprofit religious corporation whose members solicit funds in public places to support their movement, brought suit against the Port Authority of New York and New Jersey.[25] The Port Authority owns and operates three major airports in the New York City area.[26] To control passenger disruption and facilitate convenience, the Port Authority adopted regulations forbidding the repetitive solicitation of money or distribution of literature.[27] The regulations applied to the interior areas of airport terminals, but not to the sidewalks within the airports.[28] In short, the Port Authority sought to restrict free speech within the terminals.

Petitioners brought suit seeking declaratory and injunctive relief under 42 U.S.C. § 1983, alleging that the regulations deprived its members of their First Amendment rights.[29] The federal district court determined that the airport terminals were traditional fora and struck down both regulations.[30] The Second

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25. *ISKCON I*, 112 S. Ct. 2701 (1992). Petitioner's members perform a ritual called *sankirtan* that involves "going into public places, disseminating religious literature and soliciting funds to support the religion." International Soc'y for Krishna Consciousness, Inc. v. Lee, 925 F.2d 576, 577 (2d Cir. 1991), *aff'd in part*, 112 S. Ct. 2701 (1992). The named defendant, Walter Lee, was the Superintendent of the Port Authority Police. *ISKCON I*, 112 S. Ct. at 2703.

26. *Id.* The three airports are John F. Kennedy International Airport (Kennedy), La Guardia Airport (La Guardia), and Newark International Airport (Newark). Collectively, the three airports form one of the world's busiest metropolitan airport complexes, serving approximately 8% of the United States domestic airline market and more than 50% of the trans-Atlantic market. *Id.* By the close of this decade, these airports are expected to serve at least 110 million passengers annually. *Id.*

27. *Id.* at 2704. The Port Authority regulation provided:

> 1. The following conduct is prohibited within the interior areas of buildings or structures at an air terminal if conducted by a person to or with passers-by in a continuous or repetitive manner:
> (a) The sale or distribution of any merchandise, including but not limited to jewelry, food stuffs, candles, flowers, badges and clothing.
> (b) The sale or distribution of flyers, brochures, pamphlets, books or any other printed or written material.
> (c) Solicitation and receipt of funds.

Id.

28. *Id.*

29. *Id.*

30. *Id.* citing International Soc'y for Krishna Consciousness, Inc. v. Lee, 721

Circuit reversed in part and affirmed in part.[31] Relying on *United States v. Kokinda*,[32] the court found that the airport terminals were nonpublic fora.[33] In applying the reasonableness standard for a nonpublic forum, the court concluded that the ban on solicitation was reasonable, but the ban on distribution was not.[34]

The United States Supreme Court granted certiorari[35] to determine the forum status of an airport terminal.[36] In three separate opinions, the Supreme Court affirmed the Circuit Court.[37] Reflecting the Court's divisiveness, the opinions ranged from Chief Justice Rehnquist's preference for government control of its property[38] to Justice Souter's plea for a return to the traditional forum doctrine's protection of expressive activity.[39] The separate opinions dealt with the solicitation and distribution regulations respectively. Given the nature of the fractured Court, this article will examine each regulation independently.

A. The Solicitation Issue

Chief Justice Rehnquist, writing for the majority on the solicitation issue,[40] framed the question narrowly: are airport terminals considered public fora?[41] He emphasized that although

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F. Supp. 572, 579 (S.D.N.Y. 1989). In finding the terminals to be public fora, the district court applied heightened scrutiny and concluded that the regulation banning solicitation failed because it was not narrowly tailored to support a compelling state interest. 721 F. Supp. at 579, *aff'd in part, rev'd in part*, 925 F.2d 576 (2d Cir. 1992), *aff'd in part*, 112 S. Ct. 2701 (1992).

In applying "traditional" public forum doctrine, the district court likened the airport terminals to quintessential fora: public streets. *Id.* at 577. Absent any justification that the blanket ban on distribution constituted narrow tailoring, the district court granted summary judgment against the Port Authority. *Id.* at 579.

31. 925 F.2d at 576.

32. 497 U.S. 720 (1990).

33. 925 F.2d at 580-82 (noting that "*Kokinda* has altered public forum analysis." *Id.* at 580.).

34. *Id.* at 582.

35. International Soc'y for Krishna Consciousness, Inc. v. Lee, 112 S. Ct. 855 (1992).

36. *ISKCON I*, 112 S. Ct. 2701, 2704-05 (1992).

37. *Id.* at 2701. *See supra* note 17.

38. *ISKCON I*, 112 S. Ct. at 2705-06.

39. *ISKCON III*, 112 S. Ct. 2711, 2724 (1992) (Souter, J., concurring in part and dissenting in part).

40. Justices White, O'Connor, Scalia, and Thomas joined Justice Rehnquist.

41. *ISKCON I*, 112 S. Ct. at 2705.

solicitation is a form of speech deserving First Amendment protection,[42] "it is well settled that the government need not permit all forms of speech on property that it owns and controls."[43] Justice Rehnquist, relying on the forum approach to assess governmental regulations, used a two-step analysis in upholding the anti-solicitation regulation. First, the Court must decide whether the regulation of free speech in airport terminals takes place on traditional, designated, or nonpublic forum property.[44] Second, the Court must determine whether the government regulation satisfies the level of judicial scrutiny required by the respective forum.[45]

1. *The Forum Status of Airports*

Justice Rehnquist, focusing on the property's history and purpose, rejected the notion that airport terminals are traditional public fora.[46] Although he agreed that the government faces a high burden in justifying restrictions relating to property that has been "immemorially been held in trust for the use of the public,"[47] Justice Rehnquist nevertheless argued that the recent appearance of airport terminals and the brief "tradition of airport [solicitation] activity [did] not demonstrate that airports have historically been made available for speech activity."[48]

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42. *Id.* The Court previously held that solicitation is protected under the rubric of the first amendment. *See* Riley v. National Fed'n of Blind, 487 U.S. 781 (1988); Heffron v. International Soc'y for Krishna Consciousness, Inc., 452 U.S. 640 (1981); Schaumberg v. Citizens for a Better Env't, 444 U.S. 620 (1980).

43. *ISKCON I*, 112 S. Ct. at 2705 (citing United Postal Serv. v. Council of Greenburgh Civic Ass'ns, 453 U.S. 114, 129 (1981)); Greer v. Spock, 424 U.S. 828 (1976)).

44. *ISKCON I*, 112 S. Ct. at 2705-06. Traditional public fora are those places that have historically been available for public expression. Regulations of public fora receive strict judicial review: they must be narrowly tailored to serve a compelling state interest. *Id.* Designated fora, whether limited or unlimited in character, are those areas that the state has opened to the public for expressive activity. Regulations of these fora also receive strict judicial scrutiny. *Id.* Nonpublic fora include all remaining public properties. Regulations are subject to rational basis review; they must be reasonable and not designed to suppress the speaker's activity based on the speaker's view. *Id. See* Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45-46 (1983).

45. *ISKCON I*, 112 S. Ct. at 2708-09 (1992).

46. *Id.* at 2706.

47. *Id.* The "historical" standard was established by Justice Roberts in Hague v. C.I.O., 307 U.S. 496, 515 (1939), and was reaffirmed in Frisby v. Schultz, 487 U.S. 474, 480-81 (1988) (holding that a residential street was a public forum).

48. *ISKCON I*, 112 S. Ct. at 2706 (citing *Hague*, 307 U.S. at 515). Petitioners argued that certain "transportation nodes," such as rail and bus stations, historically serve as locations of free speech activity; thus, airport terminals should fall within the protected

Once a property fails this historical inquiry, it may acquire traditional forum status only when its "principal purpose . . . is the free exchange of ideas,"[49] as shown by the government "intentionally opening a nontraditional forum for public discourse."[50]

2. *Deferential Review of Government Regulations Affecting Airport Terminals*

Justice Rehnquist looked to the alleged purpose of airports to suggest that the goal of these facilities was efficient air travel, not the promotion of expressive speech.[51] To him, the commercial nature of airports belie a purpose of "promoting the free exchange of ideas."[52] Furthermore, he argued that the Port Authority did not intend to promote free expression in the terminals, nor have terminals been dedicated for that purpose.[53] Justice Rehnquist concluded that based on tradition and purpose, the terminals do not satisfy the standards for public fora.[54]

Because the regulation dealt with a nonpublic forum, Justice Rehnquist then considered whether the regulation was reasonable.[55] Citing *United States v. Kokinda*,[56] he stated that a reasonable regulation "need not be the most reasonable or the only reasonable limitation."[57] To him, the disruptive nature of solicitation causes delay to airport passengers; additionally, the "unsavory solicitor" presents risks of duress and fraud.[58] Because airports had legitimate reasons to monitor solicitation ac-

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transportation node category. *Id.* at 2707. Justice Rehnquist rejected this comparison by stating that bus and rail stations traditionally have been privately owned and are thereby excluded from public forum analysis. *Id.* Furthermore, he argued that the relevant inquiry is airport terminals, not transportation nodes generally. *Id.* To Justice Rehnquist, when new methods of transportation develop, each must face an individual inquiry under forum analysis. *Id.* In effect, new transportation services will rarely, if ever, satisfy the requisite "historical" prong of the traditional public forum.

49. *Id.* at 2706 (quoting Cornelius v. NAACP, 473 U.S. 788, 800 (1985)).

50. *Id.* (quoting *Cornelius*, 473 U.S. at 802).

51. *Id.* at 2707.

52. *Id.* (quoting *Cornelius*, 473 U.S. at 788).

53. *Id.*

54. *Id.* at 2708.

55. *Id.*

56. 497 U.S. 720 (1990).

57. *ISKCON I*, 112 S. Ct. at 2708 (quoting Cornelius v. NAACP, 473 U.S. 788, 808 (1985)).

58. *Id.*

tivity and prevent undue interference with travelers, Justice Rehnquist concluded that the Port Authority's antisolicitation regulation was reasonable.[59]

In the companion case to the solicitation issue, Justice O'Connor concurred.[60] Focusing on the nature of the location, she agreed with the majority's conclusion that, given the history and purpose of airport terminals, they are not traditional fora.[61] Because publicly-owned airports might rightfully be closed to all except those who have legitimate business there, public access is not "inherent in the open nature of the locations;"[62] instead, access is a "matter of grace by government officials."[63]

In determining the reasonableness of the regulation, Justice O'Connor looked to the "surrounding circumstances" of the airports in question.[64] She reminded the majority that the issue was broader than questioning whether the restrictions on solicitation are consistent with preserving efficient air travel;[65] rather, the regulation must be reasonably related to preserving the "multipurpose environment" created by the Port Authority.[66] As the Court previously upheld antisolicitation regulations on postal sidewalks and fairgrounds,[67] and because airports face the same problems with solicitation, Justice O'Connor concluded that the antisolicitation regulation at issue was reasonable.[68]

Justice Kennedy also concurred in the judgment.[69] Although he rejected most of the majority's forum analysis,[70] arguing that

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59. *Id.* at 2709.

60. *ISKCON III*, 112 S. Ct. 2711, 2711 (1992) (O'Connor, J., concurring). *See supra* note 17.

61. *ISKCON III*, 112 S. Ct. at 2711.

62. *Id.* (citing United States v. Grace, 461 U.S. 171, 177 (1983)).

63. *Id.* (quoting United States v. Kokinda, 497 U.S. 720, 743 (1990) (plurality opinion)).

64. *Id.* at 2712.

65. *Id.* at 2713.

66. *Id.* The "multipurpose environment" relates to the abundant commercial establishments within the airport. *Id.* at 2712-13.

67. *See Kokinda*, 497 U.S. at 733-34; Heffron v. International Soc'y For Krishna Consciousness, Inc., 452 U.S. 640, 657 (1981).

68. *ISKCON III*, 112 S. Ct. at 2713.

69. *Id.* at 2715 (Kennedy, J., concurring).

70. *Id. See infra* notes 95-100 and accompanying text discussing Justice Kennedy's arguments against the Court's strict doctrinal forum approach.

airport terminals are public fora,[71] he nevertheless found the antisolicitation ordinance to be a valid time, place, and manner regulation.[72] The regulation did not provide a flat ban on solicitation; rather, it only prohibited solicitations for immediate receipt of funds.[73] Since it merely limited the manner of expression, the regulation passed the Court's standard for speech restrictions in the public forum.[74] As solicitation is associated with coercive and fraudulent conduct,[75] Justice Kennedy agreed that the Port Authority's content-neutral restriction served a significant government interest.[76]

Justice Souter dissented from the Court's holding on the solicitation issue.[77] He agreed with Justice Kennedy that airport terminals are public fora,[78] yet argued that the antisolicitation regulation was not narrowly tailored to serve a significant governmental interest.[79] Justice Souter believed that the Port Authority's purpose of preventing fraud and coercion was illusory: "While a solicitor can be insistent, a pedestrian on the street or airport concourse can simply walk away or walk on."[80] Furthermore, he reminded the Court that far more coercive conduct has previously been upheld, stating that "[s]peech does not lose its

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71. *ISKCON III*, 112 S. Ct. at 2719.

72. *Id.* at 2721. Justice Kennedy noted that:

> [E]ven in a public forum the government may impose reasonable restrictions on time, place, or manner of protected speech, provided the restrictions 'are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information.'

Id. at 2720-21 (citing Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989) (quoting Clark v. Committee for Creative Non-Violence, 468 U.S. 288, 293 (1984)).

73. *Id.* at 2721.

74. *Id.*

75. *Id.* (citing Cantwell v. Connecticut, 310 U.S. 296, 306 (1940)).

76. *Id.* at 2722. Justice Kennedy concluded that the narrowness of the regulation, which applied only to solicitation demanding immediate payment of money, was dispositive. *Id.* Furthermore, Justice Kennedy believed that the Port Authority's antisolicitation regulation was the least intrusive means of achieving a legitimate government purpose and did not burden any more speech than was reasonably necessary. *Id.* at 2722-23.

77. *ISKCON III*, 112 S. Ct. at 2724. (Souter, J., dissenting). Justice Souter was joined by Justices Blackmun and Stevens. Justice Souter dissented in *ISKCON I* and concurred in the judgment in *ISKCON II*. *See supra* note 17.

78. *ISKCON III*, 112 S. Ct. at 2724-25.

79. *Id.* at 2725.

80. *Id.*

protected character . . . simply because it may embarrass others or coerce them into action."[81] Therefore, Justice Souter concluded the coercive conduct at issue in the airport terminals was not great enough to justify the ban.[82]

Justice Souter further rejected the Port Authority's intent to reduce solicitation-based fraud.[83] He noted that since 1981, there was not a single report of fraud or misrepresentation by the Port Authority.[84] This fact, combined with specious attempts to inure fraud to solicitation generally, did not satisfy the government's restriction of protected free speech activity.[85] Justice Souter noted that the antisolicitation regulation eliminates a uniquely powerful means of communication for ISKCON and prohibits poorly funded groups from receiving money for their causes.[86] Focusing on the "practical reality" of the regulation, Justice Souter concluded that it was unconstitutional.[87]

B. The Distribution Issue

The Court then turned to the issue of the Port Authority's regulation banning the distribution of literature. Per curiam, the Court held that the ban in the airport terminals was a violation of the First Amendment.[88] In the companion case, Justice O'Connor concurred in the judgment.[89] To her, leafletting does

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81. *Id.* (quoting NAACP v. Claiborne Hardware Co., 458 U.S. 886, 910 (1982)). *See also* Organization for a Better Austin v. Keefe, 402 U.S. 415, 419 (1971) ("The claim that . . . expressions were intended to exercise a coercive impact on respondent does not remove them from the reach of the First Amendment. Petitioners plainly intended to influence respondent's conduct by their activities; this is not fundamentally different from the function of a newspaper.").

82. *ISKCON III*, 112 S. Ct. at 2726.

83. *Id.*

84. *Id.*

85. *Id.* Beyond the unsubstantiated allegation of fraud in the airport terminals, Justice Souter argued that "the fact that other governmental bodies have also enacted restrictions on solicitation in other places is not evidence of fraudulent conduct." *Id.* (citation omitted).

86. *Id.* at 2727.

87. *Id.*

88. *ISKCON II*, 112 S. Ct. 2709, 2710 (1992) (per curiam). The five person majority was a combination of Justice O'Connor's concurrence, Justice Kennedy's concurrence (which was joined in part by Justices Blackmun, Stevens, and Souter), and Justice Souter's concurrence (which was joined by Justices Blackmun and Stevens). *See supra* note 17.

89. *ISKCON III*, 112 S. Ct. 2711, 2713 (1992) (O'Connor, J., concurring).

not pose the same problems as solicitation; since travelers need not stop to receive literature, the problems of congestion are minimal.[90] Aside from avoiding littering, there are no intrinsic problems caused by leafletting that "would make it naturally incompatible with a large, multipurpose forum such as the one at issue here."[91]

Justice O'Connor claimed that historically, the distribution of leaflets has been protected.[92] The Port Authority's argument lacked an independent justification to support its antidistribution ban; instead, it merely focused on the problems created by the accompanying solicitation.[93] Because the Port Authority failed to explain why distribution itself was an inconsistent use of the terminals, Justice O'Connor concluded that the regulation was unreasonable.[94]

In the same companion case, Justice Kennedy concurred in the judgment.[95] To him, airports are public fora, and because the distribution regulation failed to satisfy the stringent standards of a public forum, it was unconstitutional.[96]

In response to the majority's forum analysis, Justice Kennedy argued that "[o]ur public forum doctrine ought not to be a jurisprudence of categories . . . . The Court's public forum analysis in this case is inconsistent with the values underlying the speech and press clauses of the First Amendment."[97] Furthermore, he disagreed with the majority's view that traditional fora must have public discourse as their primary purpose; even

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90. *Id.* at 2713-14. Furthermore,

> [o]ne need not ponder the contents of a leaflet or pamphlet in order mechanically to take it out of someone's hand. . . . 'The distribution of literature does not require that the recipient stop in order to receive the message the speaker wishes to convey; instead the recipient is free to read the message at a later time.'

Id. (quoting Heffron v. International Soc'y for Krishna Consciousness, Inc. 452 U.S. 640, 665 (1981)).

91. *Id.* at 2714.

92. *Id.* (citing Greer v. Spock, 424 U.S. 828, 838-40 (1976)).

93. *Id.*

94. *Id.* at 2714-15.

95. *Id.* at 2715 (Kennedy, J., concurring). Justices Blackmun, Stevens, and Souter joined Justice Kennedy on the antidistribution issue. *See supra* note 17.

96. *ISKCON III*, 112 S. Ct. at 2715.

97. *Id.*

streets and parks, the "quintessential public forums," would fail such a test.[98] Justice Kennedy stated that the majority's categorical approach, involving an historical and intent analysis, precludes the development of new fora absent the unlikely approval by the government.[99] The speech-restrictive nature of the modern forum doctrine ignores what must be the critical inquiry: the objective characteristics and uses of the property at issue.[100]

Justice Kennedy then offered a unified test for determining a property's forum status. He believed that a "compatibility approach" avoids the majority's limiting historical inquiry and recognizes that new types of publicly-owned property are appropriate fora for expressive activity.[101] The majority's public forum analysis places the burden on private citizens, whereas the doctrine was intended to provide a Constitutional constraint on government restrictions.[102] To Justice Kennedy, the historical inquiry is but one factor; he argued that the central concern should be whether a property's objective characteristics and government-permitted uses suggest that expressive activity would be compatible with those uses.[103] Therefore, if a given property shares physical similarities with more traditional fora, if the government has allowed broad public access thereto, and if expressive activity would not interfere with the uses to which the government has expressly dedicated to the property, that property should receive heightened constitutional protection of free speech.[104]

Justice Kennedy then applied the facts of *ISKCON* to the compatibility test.[105] The airport terminals at issue were physi-

98. *Id.* at 2717.

99. *Id.* at 2716. In effect, this would eviscerate any continuing vitality of the designated forum category. *Id.* at 2717.

100. *Id.* at 2716.

101. *Id.* at 2717.

102. *Id.*

103. *Id.* at 2718.

104. *Id.* The latter inquiry—significant interference with a government's express dedication of property—must be balanced with expressive activities generally. *Id.* To do otherwise would mandate case-by-case balancing rather than a classification system, which would provide little guidance to states regarding their ability to regulate speech. *Id.* Moreover, Justice Kennedy reminded the Court that reasonable time, place, or manner limitations (if available) may avoid the strict doctrinal elimination of some property as traditional fora. *Id.*

105. *Id.* at 2719.

cally similar to public streets in that they are "broad, public thoroughfares full of people and lined with stores and other commercial activities."[106] Furthermore, he reminded the Court that plaintiffs did not seek access to secured areas of the airport, but instead sought to distribute literature in openly public areas.[107] Reasonable time, place or manner regulations would allow expressive activity compatible with the uses of airports.[108] Because airport terminals were public fora, the antidistribution regulation violated the First Amendment, since it was not narrowly tailored and "[did] not leave open ample alternative channels for communication."[109]

Justice Souter, concurring in the judgment on the distribution issue,[110] agreed with the forum analysis presented by Justice Kennedy.[111] He argued that the designation of a given property as a traditional forum "must not merely state a conclusion that the property falls within a static category . . . . [It] must represent a conclusion that the property is no different in principle from such examples . . . of property from which the government was and is powerless to exclude speech."[112] In somewhat more forceful language, Justice Souter warned that if the Court continued its rigid adherence to the narrow historical standard for traditional forum categorization, "we might as well abandon the public forum doctrine altogether."[113] Applying Justice Kennedy's compatibility test, Justice Souter found that airport terminals were public fora, and thus concluded that the flat ban on distribution was unconstitutional.[114]

Chief Justice Rehnquist dissented.[115] He argued that the

106. *Id.* (citing the district court's detailed factual findings at 721 F. Supp. 572, 576-77 (S.D.N.Y. 1989)).

107. *Id.* Justice Kennedy argued that in 1986, over 78 million passengers visited the three airports owned and operated by the Port Authority. *Id.* He concluded that the great extent of public access "makes it imperative to protect free speech rights there." *Id.*

108. *Id.* at 2720.

109. *Id.*

110. *Id.* at 2724 (Souter, J., concurring).

111. *Id.*

112. *Id.*

113. *Id.*

114. *Id.* at 2724-25.

115. *ISKCON II*, 112 S. Ct. 2709, 2710 (1992) (Rehnquist, J., dissenting). Justices White, Scalia, and Thomas joined Justice Rehnquist. *See supra* note 17.

distribution ban was reasonable because leafletting presents risks of congestion and delay in airport terminals similar to those risks posed by solicitation.[116] Although some passengers may refuse the proffered material, others will stop and debate with the leafletter or accept the pamphlets and discard them on the ground, thereby "creating an eyesore, a safety hazard, and additional clean-up work for airport staff."[117] Furthermore, leafletting may lead to solicitation, leaving "open whether at some future date the Port Authority may be able to reimpose a complete ban, having developed evidence that enforcement of a differential ban is overly burdensome."[118]

C. Summary and Implications of *ISKCON*

Despite the widely disparate opinions in *ISKCON*, two significant principles emerge. First, publicly-owned airport terminals are considered nonpublic fora for First Amendment purposes. Second, and more critically, the test for determining a "new" property's forum status is government intent. *ISKCON* reaffirms the Court's transformation of the public forum doctrine from a speech-protective methodology to an increasingly speech-restrictive, pro-government vehicle.

ISKCON's significance derives from a minor shift in language and an important shift in focus. The *ISKCON* Court sealed traditional public fora to include *only* streets, sidewalks, and parks.[119] In addition, the Court appeared to further restrain the substantive nature of this list, both in its technical analysis[120] and in its schematic classification.[121] The Court's reasoning

116. *ISKCON II*, 112 S. Ct. at 2710.

117. *Id.* (citing City Council of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789, 816-17 (1984)).

118. *Id.*

119. *Leading Cases*, *supra* note 17, at 283. The Court adopted this repressive position despite earlier cases which suggested that streets, sidewalks, and parks were merely an illustrative, and not conclusive, list of traditional fora. *See* Frisby v. Schultz, 487 U.S. 474, 480 (1988); Lehman v. City of Shaker Heights, 418 U.S. 298, 303 (1974).

120. When reviewing the standard for determining a traditional forum, the Court referred to whether the airport terminals must have expressive activity as *the* principal purpose or merely *a* principal purpose. *Leading Cases*, *supra* note 17, at 283 n.48. The Court concluded that airports were not traditional fora because the Port Authority declared "*the* principal purpose to be . . . air travel." *ISKCON I*, 112 S. Ct. 2701, 2707 (1992) (emphasis added). The Court mistakenly relied on *Cornelius* to support its decision, *id.* at 2706; however, *Cornelius* referred to "*a* purpose." Cornelius v. NAACP, 473

will inevitably affect any new forms of government property, which, by definition, will be unable to attain the Court's rigid standards of a traditional forum.[122] In sealing the traditional forum category, the *ISKCON* Court held that the only way to achieve heightened judicial review of a government regulation was by the government's affirmative desire to provide open access to the property.[123] Absent this affirmative act, government is free to reasonably regulate expressive activity on publicly-owned property, except for streets, sidewalks and parks.[124]

In the cases that launched the public forum doctrine's renaissance, the Court looked at the nature and effect of a contested regulation.[125] *ISKCON* reaffirms that the Court will now apply a categorical approach to government regulations restricting expressive activity. The resulting strict doctrinal line-drawing is clearly speech-repressive, and "convert[s] what was once an analysis protective of expression into one which grants the government authority to restrict speech by fiat."[126]

III. FREE SPEECH AND FORUM CLASSIFICATIONS

Traditionally, individual free speech interests were considered fundamental rights.[127] Government may only regulate a

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U.S. 788, 800 (1985) (emphasis added).

121. While the Court claims to safeguard streets, sidewalks, and parks under the traditional forum test, the exact meaning of these terms is open to manipulation. *See Leading Cases*, *supra* note 17, at 283 n.46; *see, e.g.*, Burson v. Freeman, 112 S. Ct. 1846, 1859-60 (1992) (Scalia, J., concurring) (arguing that the streets and sidewalks adjacent to polling places were not traditionally used for "assembly and debate" and thus were nonpublic fora); United States v. Kokinda, 497 U.S. 720, 727-28 (1990) (plurality opinion) (labeling a sidewalk leading to a post office as a nonpublic forum); Greer v. Spock, 424 U.S. 828, 838 (1976) (finding streets in a military base to be nonpublic fora). Indeed, "[t]he [*ISKCON*] Court's seal might in fact function as a selectively permeable membrane, through which no new properties can enter but through which pieces of once-traditional public fora can diffuse out." *Leading Cases*, *supra* note 17, at 283 n.46.

122. *Leading Cases*, *supra* note 17, at 283.

123. *ISKCON I*, 112 S. Ct. at 2706 (citing *Cornelius*, 473 U.S. at 802).

124. *Leading Cases*, *supra* note 17, at 284.

125. *See supra* notes 7-16, 20 and accompanying text.

126. *ISKCON III*, 112 S. Ct. 2711, 2715 (1992) (Kennedy, J., concurring in the judgment).

127. *See* Schneider v. State, 308 U.S. 147, 161 (1939) (discussing "constitutional liberty" of expression); Lovell v. Griffin, 303 U.S. 444, 450 (1938) ("Freedom of speech . . . [is] protected by the First Amendment from infringement by Congress [and is] among the fundamental personal rights and liberties which are protected by the Fourteenth Amendment from invasion by state action."); Robert B. McKay, *The Preference for*

fundamental right when the regulation is narrowly tailored to achieve a compelling government interest.[128] Thus, when a case involved "protected speech,"[129] traditional free speech doctrine focused on the nature of the government regulation and the government's purported justifications for restricting expression.[130] Simply stated, under traditional doctrine, regulations affecting free speech interests receive heightened judicial review.[131] Conversely, the Court's current forum doctrine consistently applies only rational basis judicial review to claims involving free speech interests.[132]

The Court's current forum analysis drastically weakens the once speech-protective public forum doctrine. When determining the standard of review for a contested regulation, the Court now focuses on the *nature of the location*, rather than a traditional focus on the *nature of the regulation*.[133] This fundamen-

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Freedom, 34 N.Y.U. L. REV. 1183, 1222 (1959) ("The freedom of the first amendment, particularly the freedoms of speech and thought, are so vital to the tradition of the free society that their primacy must be recognized in sufficiently varied ways to accommodate to the various contexts in which these crucial rights may be challenged.").

128. Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983). *See also* Texas v. Johnson, 491 U.S. 397, 412 (1989); Boos v. Barry, 485 U.S. 312, 321 (1988).

129. *See* Sable Communications, Inc. v. FCC, 492 U.S. 115, 126 (1989). Protected speech generally denotes expressive activity that, under the free speech clause, warrants heightened judicial review of governmental regulations. *See* City of Los Angeles v. Preferred Communications, Inc., 476 U.S. 488, 496 (1986).

130. *See Johnson*, 491 U.S. at 410; Day, *supra* note 6.

131. *See* Board of Educ. v. Barnette, 319 U.S. 624, 638 (1943) (suggesting that free speech interests should be protected against majoritarianism through more than rational basis review). *See also* Robert Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 17 (1971) (arguing against the free speech doctrine's use of a "fundamental rights" rationale, although agreeing that this rationale was the traditional basis of the doctrine); Martin Redish, *Political Consensus, Constitutional Formulae and the Rationale for Judicial Review*, 88 Mich. L. Rev. 1340, 1349 (1990) (stating that the free speech clause is an "extensive enclave of individual liberty protected from governmental invasion").

132. *See* Saphire, *supra* note 12, at 768; Day, *supra* note 6. Since 1983, signifying the ascent of modern forum doctrine methodology, the Court has concluded in every case involving the public forum doctrine that the publicly-owned property was a nonpublic forum, warranting only rational basis review. Not surprisingly, free speech challengers have yet to win. GERALD GUNTHER, CONSTITUTIONAL LAW 1317 (12th ed. 1991); Dienes, *supra* note 6, at 117.

133. *Compare* United States v. Kokinda, 497 U.S. 720, 725-28 (1990) (plurality opinion) *and* Cornelius v. NAACP, 473 U.S. 788, 800 (1985) (using a nature of the location analysis) *and* Farber & Nowak, *supra* note 6, at 1220 (describing the "geographical approach") *with* Texas v. Johnson, 491 U.S. 397, 410-13 (1989) (using a nature of the governmental regulation analysis) *and* Day, *supra* note 22, at 492 *and* TRIBE, *supra* note 8, at 993 n.41 (describing the nature of the regulation approach).

tal shift in the Supreme Court's public forum jurisprudence merits a review of the doctrine's historical progression.

A. The Speech-Protective History of the Public Forum Doctrine

Historically, the public forum doctrine was highly speech-protective.[134] In *Schneider v. State*,[135] for example, Justice Roberts reaffirmed the Court's role in protecting free speech against government regulation.[136] The *Schneider* Court struck down three antipamphletting regulations of public streets and sidewalks.[137] Even assuming that the ordinances were adopted for a legitimate purpose, the *Schneider* Court focused on the effect of the regulations which "absolutely prohibit [free speech] in the streets and, one of [the regulations], in other public places as well."[138] Despite these content-neutral regulations, the Court applied heightened judicial review.[139]

Justice Roberts furthered the sanctity of free speech values in his famous dictum in the plurality opinion of *Hague v. Committee for Industrial Organization*:[140]

> Wherever the title of streets and parks may rest,

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134. Lee C. Bollinger, The Tolerant Society 210 (1986); Recent Developments, *Free Speech, Post Office Sidewalks and the Public Forum Doctrine*—United States v. Kokinda, *110 S. Ct. 315 (1990)*, 26 Harv. C.R.-C.L. L. Rev. 633, 634 (1991); Vincent Blasi, *The Pathological Perspective and the First Amendment*, 85 Colum. L. Rev. 449, 460 (1985); Dienes, *supra* note 6, at 110.

135. 308 U.S. 147 (1939).

136. *Id.* at 161-64.

137. *Id.* at 162.

138. *Id.*

139. *Id.* at 161 ("[T]he purpose to keep the streets clean and of good appearance is insufficient to justify an ordinance which prohibits a person rightfully on a public street from handing literature to one willing to receive it."). *See also* Werhan, *supra* note 18, at 358 & n.105 (noting that heightened scrutiny was appropriate because government restricted free speech in a public place); Day, *supra* note 6.

In this regard, *Schneider* exemplified the speech-protective posture of public forum analysis. The Court's use of heightened scrutiny meant that regulations of public places were valid only if the government could provide a compelling justification. *See* Martin v. City of Struthers, 319 U.S. 141 (1943) (striking down a regulation prohibiting people from summoning occupants to their doors to distribute circulars); Cox v. New Hampshire, 312 U.S. 569 (1941); Cantwell v. Connecticut, 310 U.S. 296 (1940) (holding a state statute prohibiting solicitation of money for religious causes without government authorization violated the free exercise clause and due process); Hague v. C.I.O., 307 U.S. 496 (1939); Lovell v. City of Griffin, 303 U.S. 444 (1938).

140. 307 U.S. 496 (1939).

> they 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. Such use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens. The privilege of a citizen of the United States to use the streets and parks for communication of views on national questions may be regulated in the interest of all; it is not absolute, but relative, and must be exercised in subordination to the general comfort and convenience, and in consonance with peace and good order; but it must not, in the guise of regulation, be abridged or denied.[141]

Justice Roberts' *Hague* opinion is generally considered the origin of a public forum concept.[142] Indeed, before *Hague*, the Court did not recognize a free speech right of access to public places for expressive activity.[143]

The Court continued its speech-protective posture in *Edwards v. South Carolina*.[144] In protest against racial segregation, two hundred students peacefully marched on statehouse grounds.[145] After refusing to leave the public sidewalks, the protestors were arrested.[146] Justice Stewart, writing for the majority, argued that "[t]he Fourteenth Amendment does not permit a State to make criminal the peaceful expression of unpopular views."[147] Again, using traditional public forum analysis, the Court applied heightened judicial review to a facially neutral statute.[148]

Until early 1980, the Court relied, to varying degrees, on the public forum doctrine to strictly assess the constitutionality of government regulations restricting expressive activity on pub-

141. *Id.* at 515-16.

142. Dienes, *supra* note 6, at 111.

143. Rather, government was likened to a private property owner having dominion and control over that property. Davis v. Massachusetts, 167 U.S. 43, 47 (1897).

144. 372 U.S. 229 (1963).

145. *Id.* at 229-32.

146. *Id.* at 230.

147. *Id.* at 237.

148. *Id.* at 237-38. *See* Day, *supra* note 6.

licly-owned property.[149] However, with its decision in *Perry Education Association v. Perry Local Educators' Association*,[150] the Court significantly altered the role of this doctrine.

B. THE TRIPARTITE APPROACH TO FORUM CLASSIFICATION

In the 1983 decision of *Perry Education*, the Court announced its new categorical approach to forum doctrine analysis and used a tripartite framework for reviewing fora: the traditional forum, the designated forum, and the nonpublic forum.[151] *Perry Education* shifted the Court's inquiry from the nature of the government regulation toward the nature of the forum.[152] As a result, the category of the forum determined the level of judicial review.[153] Moreover, this shift in focus made the status determination a *threshold* factor, instead of a *subsequent* consideration.[154] As *Perry Education* demonstrates, forum classification can be speech-restrictive; here, a viewpoint-based regulation was permitted.[155]

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149. Between 1963 and 1983, the Court's use of public forum analysis was mixed. In Grayned v. City of Rockford, 408 U.S. 104 (1972), the Court held the "crucial question is whether the manner of expression is basically incompatible with the normal activity of a particular place at a particular time." *Id.* at 116. Thus, if the speech was not incompatible with the use of the public property, it was protected by the use of heightened judicial review. *See ISKCON III*, 112 S. Ct. 2711, 2724 (1992) (Souter, J., dissenting).

Less than two years after *Grayned*, however, the incompatibility approach was replaced in Lehman v. City of Shaker Heights, 418 U.S. 298 (1974). In *Lehman*, an election candidate challenged a local ordinance that allowed commercial advertising but banned political advertising in city-owned transit cars. The plurality held that transit cars were not public fora. *Id.* at 302-04. Instead of applying strict scrutiny to content-based restrictions in public fora or intermediate scrutiny to content-neutral, time, place or manner restrictions in public fora, the Court simply concluded that the regulations did not apply to a public forum; therefore, the regulations only needed to be reasonable. *Id.*

By the early 1980s, the Court varied its application of a deferential public forum analysis and a speech-protective approach. The two distinct approaches coexisted. *See* Dienes, *supra* note 6, at 114 (noting the Court's inconsistency in applying the public forum doctrine).

150. 460 U.S. 37 (1983), *rev'g* Perry Educators' Ass'n v. Hohlt, 652 F.2d 1286 (7th Cir. 1981).

151. *Id.* at 45-46. *See supra* notes 6-16 and accompanying text explaining the effect of categorization.

152. *Perry Educ.*, 460 U.S. at 44.

153. *Id.* at 53-54.

154. *Id.* at 44; Saphire, *supra* note 12, at 756; TRIBE, *supra* note 8, at 987.

155. A cursory review of the facts of *Perry Education* may prove useful to illustrate this point. Prior to a public school union election to determine an exclusive bargaining agent, two unions had equal access to internal school mailboxes. 460 U.S. at 39, 44. When one union lost the election, the school board denied that union access to the mailboxes.

Although *Perry Education* introduced the new categorical approach, the Court failed to delineate when forum analysis applied[156] or what standard is used to define a nonpublic forum.[157] In *Cornelius v. NAACP*,[158] the Court sought to clarify the function of its public forum doctrine.

Cornelius, like *ISKCON*, is significant because the facts involved a "new" forum. Federal government agencies in Washington, D.C. conducted a single charitable donation campaign (CFC), allowing government employees to make contributions to the CFC rather than receiving separate donation solicitations from participating organizations.[159] Donations could be "designated" for a specific participating charity, or they could be "undesignated" toward a pool of contributions that would later be divided among the various participating agencies.[160] In 1981, regulations governing an organization's CFC eligibility limited participation to those agencies providing "direct services," excluding those organizations regularly engaging in political advocacy, lobbying, or litigation.[161] Excluded groups, like the NAACP Legal Defense and Education Fund, challenged the direct services regulation as content-based discrimination.[162]

Justice O'Connor, writing for the majority, held that the

Id. at 40-41. As the school had a "selective access" policy that allowed other groups access to the internal mail system, the union argued that the school mailboxes were a "limited public forum;" thus, its exclusion was unconstitutional. *Id.* at 47.

The exclusive-access policy, as a viewpoint regulation, would likely have failed with requisite strict judicial scrutiny. *See supra* note 8 and accompanying text. However, the Court supplanted traditional analysis with its nature of the forum inquiry and found the policy to be valid. *Perry Educ.*, 460 U.S. at 47, 53-55.

As one commentator has noted, although *Perry Education* raises as many questions about the public forum doctrine as it answers, it clearly "determin[ed] to preserve undiminished the government's freedom to regulate public access to its . . . property, even at the price of obvious and fundamental doctrinal incoherence." Post, *supra* note 6, at 1752.

156. *See, e.g.*, Clark v. Community For Creative Non-Violence, 468 U.S. 288, 293 (1984) (deciding an apparent forum issue—regulations concerning a publicly-owned park—on other grounds).

157. *See* John V. Snyder, Note, *Forum Over Substance:* Cornelius v. NAACP Legal Defense & Education Fund, 35 CATH. U. L. REV. 307, 310 (1985).

158. 473 U.S. 788 (1985), *rev'g and remanding* NAACP v. Devine, 727 F.2d 1247 (1984), *aff'g* 567 F. Supp. 401 (D.D.C. 1983).

159. *Id.* at 792.

160. *Id.* at 791.

161. *Id.* at 792.

162. *Id.*

CFC was a nonpublic forum[163] and the direct services regulation was reasonable.[164] In a significantly speech-restrictive step, the *Cornelius* Court concluded that the test for determining a nonpublic forum was the government's intent regarding the public use of the regulated location.[165] As Justice O'Connor stated, "[t]he government [creates] a public forum . . . only by intentionally opening a nontraditional forum for public discourse."[166] To ascertain the government's intent, the Court looked "to the policy and practice of the government" and "the nature of the property and its compatibility with [the restricted] expressive activity."[167]

Thus, in a nontraditional forum, the government may permit speaker access based on subject matter and still preserve the nonpublic forum status of the property with regard to excluded speakers.[168] Consequently, the regulation will be subject to rational review; that is, it must be reasonable to be declared valid.[169] In effect, the *Cornelius* Court reduced the *Perry Education* tripartite forum analysis into two: traditional fora and fora controlled by government intent.[170] Although *Perry Education* invoked the forum issue as a substantively limiting threshold, *Cornelius* further held that this threshold factor, at least in assessing a nonpublic forum, was premised on the intent of government officials.[171]

Cornelius is inconsistent with the Court's traditional use of heightened judicial scrutiny to check government regulation of publicly-owned property.[172] The *Cornelius* Court allowed the government to determine the scope of judicial review and, in ef-

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163. *Id.* at 806.

164. *Id.* at 812-13.

165. *See id.* at 805 (holding that the government must exhibit an "affirmative desire" to open a forum to free speech activities); *see also* Day, *supra* note 6; Michael J. Mellis, *Modifications to the Traditional Public Forum Doctrine:* United States v. Kokinda *and Its Aftermath*, 19 HASTINGS CONST. L.Q. 167, 171 (1991) (noting the *Cornelius* Court's adoption of the government intent standard for designated public fora).

166. *Cornelius*, 473 U.S. at 802.

167. *Id.*

168. Buchanan, *supra* note 9, at 954.

169. *Cornelius*, 473 U.S. at 806 (citing Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 49 (1983)).

170. *Id.* at 825 (Blackmun, J., dissenting).

171. *Id.* at 802. *See also* Day, *supra* 6.

172. McKay, *supra* note 127, at 1191.

fect, relegated judicial scrutiny to judicial deference.[173] The circular reasoning offered by the Court weakened the speech-protective nature of traditional forum jurisprudence.[174] After *Cornelius*, the government intent standard controlled all forum properties except traditional fora. In *United States v. Kokinda*,[175] traditional forum analysis, the last bastion of free speech interests, likewise fell to the government intent standard.

C. The Speech-Restrictive Modern Forum Doctrine

In a plurality opinion, the *Kokinda* Court adopted a new standard for determining a traditional forum.[176] In *Kokinda*, two volunteers of the National Democratic Policy Committee solicited contributions for their cause on a sidewalk adjacent to a post office.[177] According to the Court, the volunteers were soliciting on property owned by the post office.[178] Despite partaking in admittedly "protected" speech,[179] the volunteers were arrested for violating an antisolicitation regulation.[180]

Justice O'Connor, writing for the plurality, concluded that the postal sidewalk was a nonpublic forum.[181] Although the Court agreed that solicitation was protected speech, it focused its inquiry on the nature of the forum at issue.[182] The plurality noted that the physical attributes of the property at issue cannot dictate forum analysis;[183] rather, the dispositive issue in determining whether a sidewalk constitutes a public forum is the location and purpose of the sidewalk.[184] Distinguishing a municipal sidewalk from a postal sidewalk, the Court concluded that

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173. *Cornelius*, 473 U.S. at 811.

174. Snyder, *supra* note 157, at 332.

175. 497 U.S. 720 (1990) (plurality opinion), *rev'g* 866 F.2d 699 (4th Cir. 1989).

176. *Id.* at 729-30. Since the forum category generally dictates the level of judicial scrutiny, any change in the speech-protective nature of traditional forum analysis is critical.

177. *Id.* at 723.

178. *Id.*

179. *Id.* at 725.

180. *Id.* at 724.

181. *Id.* at 730.

182. *Id.* at 725-26, citing Cornelius v. NAACP, 473 U.S. 788, 800 (1985).

183. *Id.* at 727. The plurality stated that "[p]ostal entryways . . . may be open to the public, but that fact alone does not establish that such areas must be treated as traditional public fora under the First Amendment." *Id.* at 729.

184. *Id.* at 728-29.

the latter was not a traditional public forum.[185]

The plurality then focused on the government intent issue. Applying the *Cornelius* test, the Court concluded that despite the history of public access to the sidewalk, the government did not intend to open the postal sidewalk for expressive purposes.[186] In short, it was the government's intent which mandated that the internal sidewalk was a nonpublic forum.[187]

Kokinda clarified the "history" and "intent" elements of the *Cornelius* standard for determining a traditional forum. The plurality agreed that the sidewalk had a history of openness;[188] nevertheless, the government intended to close the publicly-owned property to the volunteer solicitation activities. In assessing a traditional forum, the *Kokinda* opinion suggests that the government's intent to close a location to expressive activity surmounts the location's history of free speech accessability.[189]

In his dissent, Justice Brennan chastised the Court's modern forum doctrine's categorical approach:

> It is only common sense that a public sidewalk adjacent to a public building to which citizens are freely admitted is a natural location for speech to occur, whether that speech is critical of the government generally, aimed at the particular governmental agency housed in the building, or focused upon issues unrelated to the government. No doctrinal pigeonholing, complex formula, or multipart test can obscure this evident

185. *See id.* at 727 (noting that the "Postal Service's sidewalk is not . . . a thoroughfare").

186. *Kokinda*, 497 U.S. at 730. Thus, even though some expressive activities had been tolerated on the postal property, the Court held that " '[t]he government does not create a public forum by . . . *permitting* limited discourse, but only by intentionally opening a nontraditional forum for public discourse.' " *Id.* (quoting and adding emphasis to *Cornelius*, 473 U.S. at 802).

187. *Id.*; Day, *supra* note 6.

188. *Kokinda*, 497 U.S. at 730.

189. *See* Day, *supra* note 6. Justice Kennedy warned that in certain circumstances, "the Government must permit wider access to the forum than it has otherwise intended." *Kokinda*, 497 U.S. at 738 (Kennedy, J., concurring in the judgment). Moreover, "[a]s society becomes more insular in character, it becomes essential to protect public places where traditional modes of speech and forms of expressive activity take place." *Id.* at 737.

conclusion.[190]

Justice Brennan challenged the plurality's use of "architectural idiosyncracies,"[191] arguing that the reason "*why* the sidewalk was built is not salient."[192] Noting Justice O'Connor's previous aversion to specific inquiries when classifying a forum, he reminded the Court that it was engaging in the same "particularized factual inquiry" that the Court once derided.[193] Justice Brennan believed that the Court's doctrinal pigeon-holing threatened the speech-protective nature of public forum analysis,[194] and concluded that the plurality's decision would greatly inconvenience proponents of free speech at postal locations, who would now be forced to engage in a "farce of the public forum doctrine."[195]

Perry Education's categorical approach was not in itself repressive of First Amendment guarantees. When combined with the government intent standard of *Cornelius* and *Kokinda*, however, the modern public forum doctrine relegates the determination of judicial scrutiny to the government, despite the fundamental nature of free speech rights.[196] Taken together, these modern forum decisions add a critical factor to the nature of the location analysis: the intent of those government officials who regulate the particular location.[197]

Furthermore, *Kokinda* eliminated the presumption of openness which once veiled traditional fora and placed the burden of persuasion upon the government.[198] Indeed, the *Kokinda* plural-

190. *Id.* at 742-43 (Brennan, J., dissenting).

191. *Id.* at 745.

192. *Id.* at 744.

193. *Id.* at 744-45. To further illustrate his point, Justice Brennan quoted from Justice O'Connor's majority opinion in Frisby v. Schultz, 487 U.S. 474, 481 (1988): " 'No particularized inquiry into the precise nature of a specific street is necessary; all public streets are held in the public trust and are properly considered traditional public fora.' " *Id.* at 745.

194. *See* Day, *supra* note 6.

195. *Kokinda*, 497 U.S. at 763. *See also* Michael J. Perry, *Freedom of Expression: An Essay on Theory and Doctrine*, 78 NW. U. L. REV. 1137, 1205 (1983) (concluding that the modern forum doctrine "simply makes no sense").

196. Day, *supra* note 6.

197. *See* Dienes, *supra* note 6, at 120.

198. *See* United States v. Kokinda, 866 F.2d 699, 701 (4th Cir. 1989) (stating the "[s]idewalks . . . are presumptively public forums"), *rev'd*, 497 U.S. 720 (1990); Dienes, *supra* note 6, at 120; William G. Buss, *School Newspapers, Public Forum, and the First Amendment*, 74 IOWA L. REV. 505, 527 (1989).

ity started with the assumption that public property was closed to the public, except where it was "expressly dedicated . . . to any expressive activity."[199] This burden shifting inevitably restrains plaintiffs from successfully challenging a governmental regulation of free speech activity.[200]

IV. JUDICIAL REVIEW AND THE FAILURE OF FORUM CLASSIFICATIONS

The Supreme Court's review of government regulations of expressive activity varies according to a forum's classification.[201] In effect, the forum category determines the extent to which government may regulate expressive activity in that area.[202] The Court has made this position abundantly clear:

> [T]he 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.[203]

The Court's classification system by itself is arguably sufficient; indeed, some form of methodological construct is arguably necessary to guide claims of access to public property for expressive purposes. If the classification system is applied in an arbitrary manner, however, the public forum doctrine runs the risk of judicial manipulation.[204]

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199. *Kokinda*, 497 U.S. at 730.

200. *See* McKay, *supra* note 127, at 1197-1203 (suggesting that allocation of the initial presumption will likely determine results). The Court's shift in burdens may potentially erode the once speech-protective nature of the traditional public forum concept. Werhan, *supra* note 18, at 395 (arguing that against countervailing government interests, first amendment interests will "invariably lose").

201. Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45-46 (1983); *see also Kokinda*, 497 U.S. at 726-27.

202. *See* Buchanan, *supra* note 9, at 955.

203. Cornelius v. NAACP, 473 U.S. 788, 800 (1985).

204. Dienes, *supra* note 6, at 110.

A. Government Intent and Presumptions

The traditional forum is historically the most speech protective forum.[205] Examples of such fora include streets, parks, sidewalks, and similar locations traditionally left open to the public.[206] A location is deemed a traditional forum if, "from time immemorial," public access was historically provided.[207] To be sure, the test for a traditional forum has been largely historical,[208] as opposed to a government intent standard.[209]

Although the nature of the forum was significant in earlier public forum analysis, the historical test carried with it a presumption that the location was open to expressive activity.[210] Consequently, the government had the burden to overcome the presumption, with mere convenience being an insufficient justification.[211] The standard of review was determined by the nature of the government regulation and usually involved heightened judicial scrutiny.[212] Under strict judicial review, government "must show that its [content-selective] regulation is necessary to serve a compelling [governmental] interest and that it is narrowly drawn to achieve that end."[213] Furthermore, if government applies a content-neutral regulation restricting access to a traditional forum, it must be "narrowly tailored to serve a significant government interest, and leave open ample alternative channels

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205. *See supra* note 8.

206. Gaal, *supra* note 4, at 122. *See also* Buchanan, *supra* note 9, at 951 & n.19 (arguing that this list appears exclusive, in that no case exists in which a Court majority has extended the definition or permitted the government to contract the concept to embrace less than streets, parks, and sidewalks).

207. Hague v. C.I.O., 307 U.S. 496, 515 (1939).

208. *See* Cornelius v. NAACP, 473 U.S. 788, 802 (1985); Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983); Buchanan, *supra* note 9, at 951.

209. *See* Dienes, *supra* note 6, at 118-19 (criticizing the Court for introducing the threshold government intent factor in first amendment analysis); Post, *supra* note 6, at 1758 (warning that a traditional forum cannot be premised upon state intentions, or it will be rendered meaningless).

210. *See* United States v. Grace, 461 U.S. 171, 177-78 (1983); United States v. Kokinda, 866 F.2d 699, 701 (4th Cir. 1989), *rev'd*, 497 U.S. 720 (1990); Saphire, *supra* note 12, at 741; *Recent Developments*, *supra* note 134, at 634-37.

211. *See* Frisby v. Schultz, 487 U.S. 474, 480-81 (1988); Board of Airport Comm'rs v. Jews for Jesus, 482 U.S. 569, 573 (1987).

212. Tribe, *supra* note 8, at 988; Day, *supra* note 6.

213. Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983), citing Carey v. Brown, 447 U.S. 455, 461 (1980). *See also* Boos v. Barry, 485 U.S. 312, 321 (1988).

of communication."[214]

The designated forum carried a similar presumption of openness;[215] however, the test for the forum was largely ahistorical[216] and, as *Cornelius* indicated, guided by government intent.[217] Furthermore, selective, content-neutral, regulatory exclusions were allowed.[218] Free speech activities could therefore be barred by government officials from designated fora. Methodologically, the standard of review for a designated forum should mirror that of a traditional forum.[219] Although government does not have to maintain the open nature of a designated forum, "as long as it does so it is bound by the same standards as apply in a traditional public forum."[220]

The analysis of a nonpublic forum was similarly ahistorical.[221] After *Cornelius*, the test was government intent.[222] The nonpublic forum differs from a designated forum because of the presumption that public access in a nonpublic forum is legitimately restricted, thereby placing the burden of persuasion on the challengers.[223] The nonpublic forum classification dictates that regulations are reviewed under a reasonableness standard, which will generally produce a pro-government result.[224]

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214. *Perry Educ.*, 460 U.S. at 45. *See also Frisby*, 487 U.S. at 482; *Grace*, 461 U.S. at 177.

215. Heffron v. International Soc'y for Krishna Consciousness, 452 U.S. 640, 655 (1981). Further, the government had the burden of overcoming the presumption. *See Jews for Jesus*, 482 U.S. at 573; Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue, 460 U.S. 575, 583 n.6 (1983) (requiring the government to adequately justify any burdens imposed).

216. *See Perry Educ.*, 460 U.S. at 45-47.

217. Cornelius v. NAACP, 473 U.S. 788, 802 (1985). *See* Post, *supra* note 6, at 1751-58 (discussing how affirmative acts by the government have created designated fora).

218. *Perry Educ.*, 460 U.S. at 46; Day, *supra* note 6.

219. Buchanan, *supra* note 9, at 953.

220. *Perry Educ.*, 460 U.S. at 46.

221. *See Cornelius*, 473 U.S. at 803; *Perry Educ.*, 460 U.S. at 47; Greer v. Spock, 424 U.S. 828, 838 (1976); Buchanan, *supra* note 9, at 952-53.

222. *Cornelius*, 473 U.S. at 800-01; Day, *supra* note 6.

223. Buss, *supra* note 198, at 527; Day, *supra* note 6.

224. *See* Buchanan, *supra* note 9, at 954-55 (stating that under a reasonableness standard, government may restrict expressive activity if pursuing a rational interest through means rationally related to that interest); Post, *supra* note 6, at 1764 (criticizing the Court's transition in forum analysis as presenting "a blank check for government control of public access to the nonpublic forum for communicative purposes"); Saphire, *supra* note 12, at 779 n.168.

B. Free Speech and the Inadequacy of Forum Classification

Free speech fosters societal discovery of truth; thus, *any* repression of free speech potentially hinders the emergence of truth, or it may even supplant uncontested truth with dogma.[225] Regulations of expression may endanger the effective exchange of ideas and reduce diversity of communication.[226] Furthermore, speech restrictions limit the "marketplace of ideas" which fosters competition among truth and falsehood.[227] Government restriction of free expression stands inapposite to fundamental notions of self-governance, a problem that is exacerbated when the government's desire for regulation is increasingly sanctioned by the Court.[228]

Although government restriction of expression hinders First Amendment goals, control of expressive activity is not beyond the reach of the government. First Amendment rights are not absolute; rather, they are balanced against varying levels of government interests.[229] Broadly speaking, a traditional forum lends greater support to First Amendment interests. As a result, the Court, fearing the erosion of countervailing government interests, may be reluctant to declare a public forum,[230] and use the doctrine's categorical structure "in the only way possible under

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225. Gaal, *supra* note 4, at 131-32. John Stuart Mill forcefully argued against speech restriction because true opinions may ultimately not be considered. John S. Mill, On Liberty 64 (John Grey & J. W. Smith eds., 1991). Debate among competing opinions is necessary to attain the whole truth—such confrontation ultimately instills conviction in the whole truth. *Id. See also* Abrams v. United States, 250 U.S. 616, 630-31 (1919) (Holmes, J., dissenting).

226. Gaal, *supra* note 4, at 132.

227. *See* Gaal, *supra* note 4, at 133; *see also* Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 390 (1969).

228. Alexander Meiklejohn, Free Speech and its Relation to Self-Government 88-89 (1948). As Meiklejohn noted:

> No one can deny that the winning of the truth is important for the purposes of self-government. But that is not our deepest need. Far more essential, if men are to be their own rulers, is the demand that whatever truth may become available shall be placed at the disposal of all the citizens of the community . . . . When a free man is voting, it is not enough that the truth is known by . . . some scholar or administrator or legislator. The voters must have it, all of them.

Id. at 88.

229. Werhan, *supra* note 18, at 394-95.

230. Werhan, *supra* note 18, at 394; Schauer, *supra* note 4, at 286-89.

that model—it finds that the place is not a public forum."[231]

In determining the forum status of particular government-owned property, the Court generally refers to a single criterion: whether the public has traditionally had open access to the forum for expressive activity.[232] The traditional use standard, however, is inadequate to determine forum status. Properties such as airports, shopping centers, and nuclear power plants lack the requisite history of accommodating expression due to their relatively recent vintage.[233] On the other hand, properties long in existence may have only recently developed into loci of controversy.[234] Moreover, custom or regulations may have restrained expression in particular areas, thereby restricting the development of a history of expressive activity.[235]

The Court's current traditional use standard ensures that modern areas will likely be classified as nonpublic fora; as a result, regulations of such fora will be subject to rational basis review. The closure of traditional use forums promises that even minimal government interests will outweigh free speech interests.[236] As Professor Dienes notes:

> In the past, the "public forum" concept has been an important tool in securing access to public property for free speech activity. The conversion of this concept into a device for denying open and equal access provides a case study in how legal concepts and doctrines can be manipulated and distorted to serve differing objectives . . . . The Court's treatment of the concepts of the public and nonpublic forums raises fundamental questions about reliance on conceptualistic, categorical approaches in analyzing First Amendment problems.[237]

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231. Werhan, *supra* note 18, at 395.

232. Gaal, *supra* note 4, at 136. *See* Greer v. Spock, 424 U.S. 828, 836 (1976). *See also supra* text accompanying notes 140-41.

233. Gaal, *supra* note 4, at 137.

234. Gaal, *supra* note 4, at 137 ("For example, until the Vietnam War made the draft a highly controversial issue, selective service offices were not perceived as a place for protest.").

235. Gaal, *supra* note 4, at 137.

236. Post, *supra* note 6, at 1764; Dienes, *supra* note 6, at 117 (concluding that rational basis review is "essentially no review at all").

237. Dienes, *supra* note 6, at 110.

The relatively minor concern applied to restrictions on expression in nonpublic fora, coupled with the transition of traditional use fora into rational basis review, raises the question of why, in the face of a fundamental right, the Court requires only a reasonable explanation for government regulation of public speech.

V. POST-*ISKCON*: THE END OF THE PUBLIC FORUM DOCTRINE

The Court's transformation of the public forum doctrine into a speech-restrictive tool allows expressive activity to turn on the intent of government officials, the very people the doctrine was created to police. The Court's modern forum doctrine lies in stark contrast with traditional free speech values.[238] As Justice Kennedy noted:

> Our public forum doctrine ought not to be a jurisprudence of categories rather than ideas or convert what was once an analysis protective of expression into one which grants the government authority to restrict speech by fiat. I believe that the Court's public forum analysis in this case is inconsistent with the values underlying . . . the First Amendment.[239]

Given the history of the public forum doctrine, Justice Kennedy aptly reminded the Court that the modern forum doctrine is no longer a check on governmental regulation of publicly-owned property.

The *ISKCON* majority's analysis appears severely flawed in light of the Court's earlier public forum doctrine analysis, given the fundamental importance of free speech rights generally. Government is "now left with almost unlimited authority to re-

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238. *ISKCON III*, 112 S. Ct. 2711, 2715 (1992) (Kennedy, J., concurring in the judgment).

Professor Saphire, attempting to rationalize a coherent basis for the public forum doctrine, suggests that attacks against the doctrine stem from "formalism-bashing." Saphire, *supra* note 12, at 758. Whether a flexible or formalistic approach is better suited for forum analysis is beyond the scope of this article. Nevertheless, in its apparent quest for some semblance of formalism, the Court has abrogated the very bounds that define the structure and content of forum analysis. The Court has rendered a three-tiered analysis, which alone may have been arguably sufficient, into a single criterion for regulations of expression on publicly-owned property: government intent.

239. *ISKCON III*, 112 S. Ct. at 2715.

strict speech on its property by doing nothing more than articulating a non-speech-related purpose for the area" being regulated.[240] Moreover, the *ISKCON* holding leaves little hope for the development of new fora, absent the "rare approval" of government.[241]

The First Amendment was designed to limit the government, not to provide additional means for restricting free speech.[242] Yet, the *ISKCON* Court asserts that government may restrict speech on its property, "for in almost all cases the critical step in the Court's analysis is a classification of the property that turns on the government's own definition or decision, unconstrained by an independent duty to respect the speech its citizens can voice there."[243] As Justice Kennedy noted, "[t]he First Amendment is often inconvenient."[244] The resulting "rationality review" of regulations affecting free speech interests "is simply a means of articulating judicial deference to governmental judgment."[245]

VI. CONCLUSION

Today, the validity of laws restricting expression on publicly-owned property depends largely on a court's forum classification of that property. The public forum doctrine was historically speech-protective, and an important tool used to afford access to public property for free speech activity.[246] The modern

240. *Id.* at 2716.

241. *Id.* The *ISKCON* Court has, in effect, closed the door on traditional fora to include only public streets, parks, and sidewalks. *See supra* notes 119-121 and accompanying text. *See also Leading Cases*, *supra* note 17, at 283:

> The Court's reasoning, when applied to new forms of government property, is self-vindicating: for example, because airports are *new* phenomena, they cannot constitute *traditional* public fora, and because the Court does not treat airports *today* as public fora, they can never attain a tradition of being public fora from *time immemorial.*

(emphasis added). Only seven years earlier, the Supreme Court warned that if its traditional forum analysis were harnessed to such torpid classifications alone, the result would be "line-drawing of the most arbitrary sort." Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 544 (1985).

242. *ISKCON III*, 112 S. Ct. at 2716. *See* TRIBE, *supra* note 8, at 992-93.

243. *ISKCON III*, 112 S. Ct. at 2716.

244. *Id.* at 2719.

245. Dienes, *supra* note 6, at 117.

246. *Id.* at 110.

forum doctrine, however, dispenses with notions of speech protection and is relentlessly speech-restrictive.[247]

The reshaping of the public forum doctrine raises fundamental questions about using a categorical approach in analyzing First Amendment issues.[248] The government intent standard utilized in forum analysis suggests that the Court, in responding to the problematic nature of classification, has relegated that responsibility to the officials who design the regulations. Challengers now have the burden of rebutting a presumptively closed forum.[249] The Court's resolve in *ISKCON* illustrates how increasingly, government regulations are reviewed with less than exacting scrutiny. The likelihood of successfully challenging such regulations by arguing that government is not nationally pursuing a legitimate goal is negligible.[250]

This article is an attempt to place public forum jurisprudence in perspective. In piecemeal fashion, the Court has eroded one of the bulwarks against censorial action by government officials. The public forum doctrine currently depends on the intent of the very officials it was designed to constrain.[251] Until the Court recognizes the failings of this approach to public forum

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247. The Court magnifies the government's interest in its use of the modern forum doctrine. United States v. Kokinda, 497 U.S. 720, 728-30 (1990). The Court's methodology accelerates the intent of government as a threshold condition in public forum analysis. The unmistakable conclusion is that the government interest will suppress free speech interests. Dienes, *supra* note 6, at 118-21.

248. Post, *supra* note 6, at 1720-24. The Court's conversion of this doctrine into a device which denies open and equal access to public property illustrates how legal concepts and doctrines can be distorted to serve differing objectives. *See* West, *supra* note 21, at 47-51 (warning that the Court often turns the purpose of a doctrine upside down to achieve its own agenda).

249. *See Leading Cases, supra* note 17, at 283-84.

250. *See* Buchanan, *supra* note 9, at 980-81.

251. The paradox seems painfully obvious. As one commentator noted:

> [C]onceptual approaches such as that embodied in the non-public-forum doctrine simply yield an inadequate jurisprudence of labels. In place of careful, candid weighing of competing free speech and public order values, with meaningful deference accorded First Amendment interests, judicial opinions embodying conceptualistic, categorical analyses reflect under-the-table definitional balancing. Legal outcomes depend on whether the speech is placed in or out of the category, on what pigeonhole of law is determined to apply. In the process, free speech values tend to be minimized or ignored; government interests tend to be emphasized and exaggerated.

Dienes, *supra* note 6, at 110.

analysis, government officials will be given a clear signal of support in regulating expressive activities.