FIRST AMENDMENT — FREEDOM OF SPEECH — BECAUSE AIRPORT TERMINALS CONSTITUTE NONPUBLIC FORA, A BAN ON SOLICITATION IS REASONABLE, WHILE A BAN ON THE DISTRIBUTION OF LITERATURE IS UNCONSTITUTIONAL — *International Soc'y for Krishna Consciousness, Inc. v. Lee*, 112 S. Ct. 2701 (1992).

Ian R. Scheinmann

I. INTRODUCTION

The First Amendment to the United States Constitution provides in pertinent part, that "Congress shall make no law . . . abridging the freedom of speech."[1] Although the freedom of speech and press is considered the undeniable condition of nearly all other forms of freedom,[2] it is well established that First Amendment protections are not absolute.[3]

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[1] U.S. CONST. amend I. The United States Supreme Court has held that the First Amendment is fully applicable to the states through the Fourteenth Amendment. *See* Cantwell v. Connecticut, 310 U.S. 296, 303 (1940) ("[T]he fundamental concept of liberty embodied in [the Fourteenth Amendment] embraces the liberties guaranteed by the First Amendment."); Lovell v. Griffin, 303 U.S. 444, 450 (1938) (stating that the freedoms of speech and press are fundamental personal rights which are protected by the Fourteenth Amendment from state intrusion); Gitlow v. New York, 268 U.S. 652, 666 (1925) ("[F]reedom of speech and of press — which are protected by the First Amendment from abridgment by Congress — are among the fundamental personal rights and 'liberties' protected by the due process clause of the Fourteenth Amendment from impairment by the States.").

[2] *See* Thomas v. Collins, 312 U.S. 516, 530 (1944) (declaring that freedom of speech is a liberty which possesses "a sanctity and a sanction not permitting dubious intrusions"); Palko v. Connecticut, 302 U.S. 319, 327 (1937) (pronouncing that freedom of speech is "the matrix, the indispensable condition, of nearly every other form of freedom.").

[3] *See* Cornelius v. NAACP Legal Def. & Educ. Fund, Inc., 473 U.S. 788, 799 (1985) (determining that the Constitution does not grant absolute access to all who desire to exercise their First Amendment rights on all types of government property); Heffron v. International Soc'y for Krishna Consciousness, Inc., 452 U.S. 640, 647 (1981) (opining that the First Amendment does not permit every individual to communicate his views wherever or whenever desired); Greer v. Spock, 424 U.S. 828, 836 (1975) (positing that the First Amendment "must be exercised in subordination to the general comfort and convenience, and in consonance with peace and good order"); Cohen v. California, 403 U.S. 15, 19 (1971) (stating that the First and Fourteenth Amendments have never afforded absolute protection to all persons to address the public whenever or wherever one chooses); Breard v. Alexandria, 341 U.S. 622, 642-43 (1950) (holding that freedom of speech does not permit one to "talk or distribute where, when and how one chooses").

Among the restrictions on speech that the United States Government is constitutionally permitted to impose are time, place, and manner restrictions on expressive activities.[4] Time, place, and manner restrictions are constitutional so long as the regulation does not proscribe the substantive content of the speech.[5] These restrictions stem from the principle that not even protected speech is permissible at all times and in all places.[6] The Supreme Court of the United States has analyzed the constitutionality of time, place, and manner restrictions in light of the location of the speech, as well as the nature of the speaker's forum.[7] This analysis has evolved into the public forum doctrine, which attempts to balance the common law notion of the property owner's right to control property use with the First Amendment

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[4] *See* Renton v. Playtime Theaters, Inc., 475 U.S. 41, 46 (1986) (citing Young v. American Mini Theaters, 427 U.S. 50, 70 (1975)). In time, place, and manner restrictions the regulatory effect on speech is not directly aimed at the expressive conduct of the speech but rather at content neutral secondary effects on speech. *Id.* at 47-50. In Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983), the Court held that time, place, and manner regulations balance the interests of the individual in conducting expressive activities against those of the government to protect legitimate social interests, such as fraud, crime, military security and aesthetics. *See also Cantwell,* 310 U.S. at 304 (holding that a state may constitutionally regulate the time, place, and manner of solicitation on its streets without violating the Fourteenth Amendment). *See generally* Philip L. Hirschhorn, *Noncommercial Door-to-Door Solicitation and the Proper Standard of Review for Municipal Time, Place and Manner Restrictions*, 55 FORDHAM L. REV. 1139, 1144 (1987) (asserting that time, place, and manner restrictions "accommodate the government's power to protect legitimate social interests and individual rights.").

[5] *But see Renton*, 475 U.S. at 47-50. In *Renton*, the Court held that certain time, place, and manner restrictions may impair the substantive content of speech, so long as the effects of the regulation are only incidental. *Id.*

[6] *Cornelius*, 473 U.S. at 799-800. In *Cornelius*, the majority found that a charity drive held on the perimeter of a military installation with the purpose of attracting federal employees and military personnel, was a nonpublic forum. *Id.* Accordingly, the Court concluded that the United States Government could constitutionally limit participation in order to "minimize disruption of the federal workplace[,] . . . ensure the success of the fund raising effort[,] . . . or avoid the appearance of political favoritism without regard to the viewpoint of [any] . . . groups [excluded from the fund raising activities]." *Id.* at 813.

[7] International Soc'y for Krishna Consciousness, Inc. v. Lee, 925 F.2d 576 (2d Cir. 1991); *see also Perry*, 460 U.S. at 45. The Court in *Perry* recognized three types of fora: the traditional public forum; the "designated" or "limited" public forum; and the nonpublic forum. *Id.* Distinguishing the degree of constitutional protection afforded to free speech in each forum, the Court in *Perry* permitted the state to invalidate identical restrictions on free speech activity, depending upon the forum where the speech occurred. *Id.* at 44.

guarantee of free expression.[8]

In *International Soc'y for Krishna Consciousness, Inc. v. Lee*,[9] the United States Supreme Court applied the public forum doctrine to government-run airport terminals.[10] The most recent *ISKCON* decision contributes to the confusion surrounding the appropriate test to be used in determining the validity of speech restrictions within public fora. This casenote will explore the development of the public forum doctrine, placing particular emphasis on the current forum analysis that the Supreme Court utilizes to determine the validity of government restrictions on particular fora.

In *ISKCON*, the Port Authority of New York and New Jersey[11]

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[8] The two conflicting common law and First Amendment interests are the "traditional common-law notion that an owner has dominion over his property and the First Amendment's prohibition of laws that abridge the freedom of speech." *Freedom of Speech, Press, and Association*, 106 HARV. L. REV. 279, 279 (1992); *see also* United States Postal Serv. v. Council of Greenburgh Civic Ass'ns, 453 U.S. 114, 129 (1981) ("[The] First Amendment does not guarantee access to property simply because it is owned or controlled by the government."); Adderley v. Florida, 385 U.S. 39, 47 (1966) ("The State, no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated."); Jamie L. Wallace, *Continued Erosion of a Fundamental Right (Heffron v. International Soc'y for Krishna Consciousness, Inc.)*, 9 FLA. ST. U. L. REV. 682, 692 (1981) (arguing that the Court continues to "search for a just balance between time, place and manner restrictions that may legitimately be imposed upon activities protected by the First Amendment.").

[9] 112 S. Ct. 2701 (1992). This case generated three separately paginated opinions. *See Id.* [hereinafter *ISKCON I*] (addressing the public forum and solicitation issues); Lee v. International Soc'y for Krishna Consciousness, Inc., 112 S. Ct. 2709 (1992) (per curiam) [hereinafter *ISKCON II*] (addressing the distribution issue); International Soc'y for Krishna Consciousness, Inc. v. Lee, 112 S. Ct. 2711 (1992) [hereinafter *ISKCON III*] (collecting the opinions of Justices O'Connor, Kennedy and Souter on *ISKCON I* and *ISKCON II*). This casenote uses *ISKCON I*, *ISKCON II* and *ISKCON III* to refer to the individual opinions and *ISKCON* to refer to all three opinions. All references to ISKCON without italics refers to the religious organization.

[10] *ISKCON I*, 112 S. Ct. at 2703; *ISKCON II*, 112 S. Ct. at 2709; *ISKCON III*, 112 S. Ct. at 2711.

[11] The defendant, the Port Authority of New York and New Jersey, is a public-private corporation that coordinates interstate mass-transit travel between New York and New Jersey. *ISKCON I*, 112 S. Ct. at 2703. The Port Authority also owns and operates three major airports in the New York City metropolitan area: John F. Kennedy International Airport [hereinafter Kennedy]; La Guardia Airport [hereinafter La Guardia]; and Newark International Airport [hereinafter Newark]. *Id.* In 1975, ISKCON initially sued the Port Authority, superintendent of the Port Authority (Walter Lee) and numerous private airlines because ISKCON sought access to both the airline controlled areas as well as the terminals. *Id.* The

enacted a regulation prohibiting the solicitation of airport visitors as well as the distribution of literature in Newark, La Guardia, and Kennedy terminals.[12] The plaintiff, ISKCON,[13] claimed these regulations unconstitutionally prohibited protected First Amendment speech within a public forum.[14] Agreeing with ISKCON's contention, the Southern District Court of New York found that like public streets and sidewalks, airport

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claim against the private airlines was eventually dismissed. *Id.* Accordingly, ISKCON's remaining claim was against Lee and the Port Authority itself. *Id.*

[12] *Id.* The provision regulating speech activities in the airports provided:

> 1. The following conduct is prohibited within the interior area of buildings or structures at an air terminal if conducted by a person to or with passers-by in a continuous manner:
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> (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. at 2704. Although this regulation was not formally promulgated until 1988, it represented a formal codification of the Port Authority's pre-suit policy. *Id.* at 2704 n.1.

[13] *Id.* at 2704. ISKCON is a non-profit religious organization which requires members to perform a religious ritual called *Sankirtan*, which consists of publicly soliciting funds for the support of the organization and disseminating its religious literature. *Id.* at 2703. ISKCON traces its beliefs to the *Vaishnava* tradition of *Bhakti* Hinduism formalized in the ninth century in southern India. International Soc'y for Krishna Consciousness, Inc. v. Barber, 650 F.2d 430, 433 (2d Cir. 1981). Members of ISKCON follow the rituals and teachings of the *Chaitanya* movement, which is derived from the *Bhakti* tradition. *Id.* Accordingly, all members must surrender their material possessions and abide by a particular religious diet, lifestyle and physical appearance while devoting their life to serving their God. *Id.*

Sankirtan was first identified as a religious ritual in Srimad Bhagavatam, during the ninth century A.D. and remains an integral element of the Krishna faith. *Id.* The traditional purposes of *Sankirtan* are to bring a devotee closer to God, invoke others in such worship, and raise funds for the organization. *Id.* The American branch of the ISKCON movement emphasizes the importance of *Sankirtan* and spreading their religious teachings. *Id.* at 434.

[14] International Soc'y for Krishna Consciousness, Inc. v. Lee, 721 F. Supp. 572 (S.D.N.Y. 1989). ISKCON analogized the airport terminal to public streets and sidewalks and contended that the terminals should be considered traditional public fora. *Id.* at 575.

terminals were traditional public fora.[15] Accordingly, the district court invalidated both the ban on solicitation and the ban on distribution, ruling that they were invalid restrictions on traditional public fora.[16]

On appeal, the Court of Appeals for the Second Circuit reversed the opinion below in part and affirmed the opinion below in part.[17] The Second Circuit held that the airport terminals were not akin to streets and sidewalks and therefore, were not traditional public fora.[18] The court further

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[15] *Id.* at 579. The district court concluded that the airport terminals at hand were analogous to the bus terminals at issue in Wolin v. Port of New York Authority, 392 F.2d 83, 90 (2d Cir.) (holding that the New York City Port Authority bus terminal is an appropriate forum for First Amendment activities because the terminal building is a public thoroughfare, "the primary activity for which it is designed is attended with noisy crowds and vehicles, some unrest and less than perfect order."), *cert. denied*, 393 U.S. 940 (1968).

[16] International Soc'y for Krishna Consciousness, Inc. v. Lee, 721 F. Supp. 572, 577 (S.D.N.Y. 1989). The court held that blanket prohibitions could only be sustained if they were narrowly tailored to promote a compelling state interest. *Id.* at 579. The district court then granted plaintiff's motion for summary judgment and commented that the restriction was not narrowly tailored, with no argument advanced supporting this position. *Id.*

[17] International Soc'y for Krishna Consciousness, Inc. v. Lee, 925 F.2d 576, 577 (2d Cir. 1991).

[18] *Id.* at 580. The court relied on United States v. Kokinda, 497 U.S. 720 (1990) (plurality opinion). For a discussion of *Kokinda*, see *infra* notes 109-115 and accompanying text. The Second Circuit stated that: "*Kokinda* has altered public forum analysis and that [the Second Circuit] would not be faithful to Supreme Court precedent if [they] were to follow other circuits which [had] held that airport terminals are traditional public fora for expressive activities." International Soc'y for Krishna Consciousness, Inc. v. Lee, 925 F.2d 576, 580 (2d Cir. 1991); *see, e.g.*, Jamison v. City of St. Louis, 828 F.2d 1280 (8th Cir. 1987) (holding that airport terminals at Lambert-St. Louis International Airport constitute traditional public fora and that the terminals are not incompatible with the free speech activities associated with more traditional public fora), *cert. denied*, 485 U.S. 987 (1988); Fernandes v. Limmer, 663 F.2d 619, 626 (5th Cir. 1981) (finding that Dallas-Fort Worth Airport terminals qualify as traditional public fora for free speech activities), *cert. dismissed*, 458 U.S. 1124 (1982); Gannett Satellite Info. Network v. Berger, 716 F.Supp. 140, 149 (D.N.J. 1989) (deeming Newark Airport a public forum). *See also* Jews for Jesus, Inc. v. Board of Airport Comm'rs of the City of Los Angeles, 785 F.2d 791, 793-95 (9th Cir. 1986), *aff'd on other grounds*, 482 U.S. 569, 574 (1987) (invalidating on overbreadth grounds a blanket prohibition on all First Amendment activity in the Los Angeles International Airport terminals).

Three circuits have declined to categorize airport terminals as public or non public fora, classifying them only as generic "public fora." *See, e.g.*, United States Southwest Africa/Namibia Trade & Cultural Council v. United States, 708 F.2d 760, 763-68 (D.C. Cir. 1983) (stating that the airport terminals at Washington National Airport and Dulles International Airport are public fora); Chicago Area Military Project v. City of Chicago, 508 F.2d 921, 925 (7th Cir.) (deeming O'Hare Airport a public forum), *cert. denied*,

concluded that the Port Authority's regulation on expressive activity need only be reasonable to be valid.[19] The court below then determined that the solicitation regulation was reasonable and reversed the District Court.[20]

The Second Circuit then maintained that although the solicitation prohibition was reasonable,[21] the distribution ban was unreasonable.[22] Accordingly, the court of appeals affirmed the opinion below and invalidated the Port Authority regulation proscribing the dissemination of leaflets.[23]

The United States Supreme Court granted certiorari to address whether airport terminals operated by a public authority constitute public fora and to delineate the appropriate standard for free speech regulations.[24] In two decisions, the Supreme Court affirmed the Second Circuit decision.[25] In *ISKCON I*, the Court concluded that the airport terminals were nonpublic fora and found that the ban on solicitation was both reasonable and

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421 U.S. 992 (1975); *but see* International Caucus of Labor Comms. v. Metropolitan Dade County, Fla., 724 F. Supp. 917, 924 (S.D. Fla. 1989) (classifying the terminals at Miami International Airport as nonpublic fora).

[19] International Soc'y for Krishna Consciousness, Inc. v. Lee, 925 F.2d 576, 581 (2d Cir. 1991). The Court in Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 46 (1983), observed that the state can maintain a nonpublic forum for its intended purposes provided that the restrictions on speech are reasonable and "not an effort to suppress expression merely because public officials oppose the speaker's view." *Id.* (citation omitted). *See also* ROTUNDA & NOWAK, TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE, 2ND § 20.47, at 311 (1992).

[20] International Soc'y for Krishna Consciousness, Inc. v. Lee, 925 F.2d 576, 582 (2d Cir. 1991).

[21] *Id.* The Second Circuit stated that the solicitation ban was reasonable because the Port Authority's terminals are isolated from pedestrian thoroughfares and intended exclusively to facilitate air travel. *Id.* The court then balanced this conclusion against the Port Authority's "significant interest" in protecting airport patrons from the annoyance and possible intimidation that accompanies in-person solicitation. *Id.*

[22] *Id.* The Second Circuit, relying on Justice Kennedy's concurring opinion in *Kokinda*, stressed the need "to protect public places where traditional modes of speech and forms of expression can take place," and concluded that the Port Authority must permit reasonable access to the terminals for distributing literature. *Id.* (citing *Kokinda*, 497 U.S. at 737 (Kennedy, J., concurring)).

[23] *Id.*

[24] *ISKCON I*, 112 S. Ct. 2701, 2703 (1992).

[25] *Id.* at 2701.

constitutional.[26] In the accompanying *ISKCON II* opinion, a fragmented majority held that the distribution prohibition violated the First Amendment, regardless of whether the airport terminals were classified as public or nonpublic fora.[27]

II. THE EVOLUTION OF THE PUBLIC FORUM DOCTRINE

The public forum doctrine is generally attributed to Harry Kalven's article, *The Concept of the Public Forum: Cox v. Louisiana*.[28] As

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[26] *Id.* Chief Justice Rehnquist wrote the majority opinion, and was joined by Justices White, O'Connor, Scalia and Thomas.

[27] 112 S. Ct. 2709 (1992) (per curiam). Chief Justice Rehnquist dissented and was joined by Justices Scalia and Thomas. *Id.* at 2710 (Rehnquist, C.J., dissenting).

[28] Robert C. Post, *Between Governance and Management: The History and Theory of the Public Forum*, 34 UCLA L. REV. 1713, 1718 (1987); Kalven illustrated the public forum doctrine by stating that:

> In an open democratic society the streets, the parks and other public places are an important facility for public discussion and political process. They are in brief a public forum that the citizen can commandeer; the generosity and empathy with which such facilities are made available is an index of freedom.

Kalven, *The Concept of the Public Forum: Cox v. Louisiana*, 1965 SUP. CT. REV. 1, 11-12; *see also* Cox v. Louisiana, 379 U.S. 536 (1965) [hereinafter *Cox I*].

In *Cox I*, the defendant, Cox, was arrested after participating in a peaceful civil rights demonstration. *Id.* at 544. Cox was eventually convicted for violating local ordinances that prohibited breaching the public peace and obstructing public passageways. *Id.* The Court reversed Cox's conviction, determining that the ordinances granted public officials unfettered discretion to determine which expression constituted a breach of peace or obstructed public passageways. *Id.* at 552. Consequently, the Court determined that local officials could effectively determine what speech would be permitted and what speech would not. *Id.* at 557. The Court refused to address, however, the legality of a uniform, non-discriminatory prohibition on all street parades and assemblies, as that issue was not specifically before the Court. *Id.* at 555.

In a companion case to *Cox I*, the Court upheld the conviction of the same defendant for picketing near a state courthouse. Cox v. Louisiana, 379 U.S. 559, 564 (1965) [hereinafter *Cox II*]. Determining that the ordinance involved in *Cox II* was not unconstitutionally vague, the Court found that a state has a legitimate interest in protecting its judicial system from the potential disruptions that protests near a courthouse may cause. *Id.* at 562.

See also LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 12-24, at 986 (2d ed. 1988) (asserting that the public forum notion originated in Kalven's essay); Peter Jakab, *Public Forum Analysis After Perry Educ. Ass'n v. Perry Local Educators' Ass'n — A*

previously intimated,[29] the public forum doctrine is an exception to the government's power to regulate the time, place, and manner of speech.[30] The public forum doctrine, espoused by Kalven, suggests that the nature and traditional use of property determines the level of First Amendment protection given to speech on that property.[31] Accordingly, when invoking the public forum doctrine, courts and commentators have struggled to focus on the classification of public property or on the relationship between the property and the constitutional value of the expressive activity.[32]

In defining the public forum doctrine, Kalven relied upon three cases decided by the Supreme Court between 1930 and 1940: *Schneider v. State*;[33] *Martin v. City of Struthers*;[34] and *Hague v. CIO*.[35] Kalven relied

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Conceptual Approach to Claims of First Amendment Access to Publicly Owned Property, 54 FORDHAM L. REV. 545 (1986) (contending that the public forum doctrine originated in Kalven's article); 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 (1984) (tracing the origin of the public forum doctrine to both Justice Roberts' dictum in Hague v. Committee for Indus. Org., 307 U.S. 496 (1939) [hereinafter Hague v. CIO] and Kalven's article).

[29] *See supra* notes 1-8 and accompanying text.

[30] *See supra* note 4, and accompanying text.

[31] Post, *supra* note 28, at 1719.

[32] *Id.*

[33] 308 U.S. 147 (1939). *Schneider* combined four separate constitutional challenges to ordinances that regulated door-to-door and street corner solicitation. *Id.* at 157-58. The Court held that all four regulations violated the First Amendment because less restrictive means were available without directly infringing on free speech activities. *Id.* at 162-63. In *Schneider*, the defendant was convicted for violating anti-litter ordinances after leafleting on a public street. *Id.* at 154. The Court held that although the state and municipalities have the authority to enact legislation to maintain the cleanliness of the public streets, litter control was not a significant government interest to warrant an infringement on the First Amendment rights of citizens. *Id.* at 160.

Additionally, the Court held that the ordinance afforded the municipality unbridled discretion to deny the permits. *Id.* at 163-64. Although the Court was concerned with protecting First Amendment free speech, it is unclear whether the Court was specifically concerned with protecting such activities in public places. *See* Post, *supra* note 28, at 1720.

[34] 319 U.S. 141 (1943). In *Martin*, the defendant, a Jehovah's Witness, was convicted of violating an ordinance that broadly prohibited door-to-door leafleting. *Id.* at 142. The Court reversed the conviction, holding that such a flat ban was "a naked restriction on the dissemination of ideas." *Id.* at 149. Despite concluding that the First Amendment right to distribute and receive information must be protected, the Court was not concerned with the

most heavily on *Hague*, where the Court invalidated an ordinance that prohibited all public meetings without a permit issued by the Chief of Police.[36] The majority, per Justice Butler, rejected the city's justification for the ordinance, opining that it permitted an arbitrary suppression of free speech.[37] In a concurring opinion, Justice Roberts, stressing the importance of free speech activities in public places, stated:

> Wherever the title of streets and parks may rest, 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 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.[38]

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location of the free speech activities. Post, *supra* note 28, at 1720. One commentator has contended that *Schneider* and *Martin* evince the Court's concern in protecting free speech activities no matter the locale of the speech. *Id.* at 1721.

[35] 307 U.S. 496 (1939).

[36] *Id.* at 501.

[37] *Id.* at 516.

[38] *Id.* at 515-16. Justice Roberts' passage has been understood to protect speech occurring in public places irrespective of whether public officials have unfettered discretion to restrict free speech activities in public places. Post, *supra* note 28, at 1721. Post asserted that Justice Roberts' passage also forbids ordinances and statutes that grant unlimited discretion to public officials to suppress speech in public and private places. *Id.*

The same commentator further contended that the thrust of Justice Roberts' concurring opinion (that streets and parks have "immemorially been held in trust for the use of the public") was that the government cannot exercise proprietary control over public places. *Id.* *See, e.g.*, City of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789, 813-14 (1984); Perry Educ. Ass'ns v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983); United States Postal Serv. v. Council of Greenburgh Civic Ass'ns, 453 U.S. 114, 131 (1981); Carey v. Brown, 447 U.S. 455, 460 (1980); Greer v. Spock, 424 U.S. 828, 835-36 (1976).

Justice Roberts' emphasis on the importance of public places for communicative activity[39] remains pertinent after fifty years of constitutional jurisprudence.[40]

Following *Hague*, the Court began to articulate a First Amendment right of access to public places for speech activities, despite that the principle purpose of the property was not for communicative purposes.[41] In *Jamison v. Texas*,[42] the Court repudiated any legislative right to exercise absolute control over expressive activities in streets and parks.[43] The Court asserted

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[39] *Hague*, 307 U.S. at 515. The significance of the traditional public forum for communicative activity was confirmed nearly forty years later in Frisby v. Schultz, 487 U.S. 474 (1988). In *Frisby*, the Court held that a residential street was a traditional public forum. *Id.* at 480-81. The Court in *Frisby* asserted that "[n]o particular 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 forum." *Id.* at 481. Nonetheless, the Court held that the state was entitled to ban all picketing on a residential street in front of a particular home. *Id.* at 488.

[40] In fact, some commentators suggest that Justice Roberts' concurring opinion in *Hague*, and not Kalven's article, is the origin of the public forum doctrine. Post, *supra* note 28, at 1721; TRIBE, *supra* note 28, at 986.

Hague appears to have been a response to the Court's decision in Davis v. Commonwealth of Massachusetts, 167 U.S. 43 (1897), upholding a regulation requiring permits for public speaking in Boston Commons. Post, *supra* note 28, at 1722. The Court in *Davis* reasoned that "[f]or the Legislature absolutely or conditionally to forbid public speaking in a highway or public park is no more an infringement of the rights of a member of the public than for the owner of a private house to forbid it in his house." *Davis*, 167 U.S. at 43 (quoting Commonwealth v. Davis, 39 N.E. 113 (Mass. 1895)). In unanimously affirming the decision of the Massachusetts Supreme Court, the Court did not recognize the role of such public places with regard to First Amendment activities. *Id.* at 48. Rather, the Court determined that when the government acts in a proprietary capacity, it may regulate First Amendment activities. *Id.*

Post maintains that *Hague* rescued streets and parks and recognized "a kind of First Amendment easement" in these places because prior to *Hague*, the Supreme Court rejected any right of access to these public places. Post, *supra* note 28, at 1722-23. *See* Jakab, *supra* note 28, at 546; Kalven, *supra* note 28, at 13. Unlike *Davis*, the city's interest in the streets in *Hague* was not proprietary because the streets had "immemorially been held in trust for the use of the public." *See* Post, *supra* note 28, at 1723.

[41] *See generally* Post, *supra* note 28, at 1723.

[42] 318 U.S. 413 (1942).

[43] *Id.* at 415-16. The Court in *Jamison* determined that the State of Texas could not prohibit distribution of religious leaflets on public streets. *Id.* *Jamison* established that an individual's constitutional rights are not lost merely due to the fact that they are standing on property over which the state claims to have proprietary control. Post *supra* note 28, at 1724.

that a person "who is rightfully on a street which the state has left open to the public carries with him there as elsewhere the constitutional right to express his views in an orderly fashion."[44]

Throughout the next two decades, the public forum doctrine experienced a "troubled period of gestation."[45] The doctrine eventually emerged as a fully viable concept, however, based principally on the free speech tenets enunciated in *Hague*.[46] Among the cases instrumental in the development of the public forum doctrine was *Edwards v. South Carolina*.[47] In *Edwards*, the Court vacated convictions of student civil rights protestors who conducted a peaceful demonstration on the grounds of the South Carolina State Capitol building.[48] The Court reasoned that the State Capitol Building has traditionally been open to the public and to public debate over controversial issues and thus, reversed the protestors' convictions.[49]

The "traditional public use" language of *Hague*, relied upon in *Edwards*, was the gravamen of the Court's decision in *Adderley v. Florida*.[50] In *Adderley*, the Court, per Justice Black,[51] sustained trespass

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Although these rights are not lost when one is standing on a public place, these rights are no stronger than rights exercised elsewhere. *Id.* In so holding, the Court expressly rejected the apposite theory established in *Davis*. *Jamison*, 318 U.S. at 415-16.

Subsequent to *Hague*, the Court established that leafleting, parading and other speech related activities involving streets, sidewalks, and parks could not be banned nor subjected to discretionary licensing. *See, e.g.*, Saia v. New York, 334 U.S. 558, 562 (1948) (holding an ordinance prohibiting loud noises to be unconstitutional because of the Chief of Police's discretion to make exceptions); Martin v. City of Struthers, 319 U.S. 141, 149 (1943) (reversing the conviction of a Jehovah's Witness for distributing religious materials door-to-door).

[44] *Jamison*, 318 U.S. at 416.

[45] TRIBE, *supra* note 28, at 986.

[46] C. Thomas Dienes, *The Trashing of the Public Forum: Problems in the First Amendment Analysis*, 55 GEO. WASH. L. REV. 109, 112 (1986) (asserting that the Court recognized the importance of First Amendment access to public places and expanded the public forum doctrine to more than streets and parks).

[47] 372 U.S. 229 (1963).

[48] *Id.* at 238.

[49] *Id.* at 236. The Court in *Edwards* reasoned that "[t]he Fourteenth Amendment does not permit a State to make criminal the peaceful expression of unpopular views." *Id.* at 237.

[50] 385 U.S. 39 (1966).

convictions of thirty-two civil rights demonstrators who protested the segregation of prisoners and staff at a county jail.[52] The Court rejected the students' attempt to analogize their situation to *Edwards*.[53] The Court posited that the statute banning assemblies near jails and prisons proscribed conduct threatening to the state's security interest in those areas.[54] The Court also stated that unlike the state capitol building in *Edwards*, jails and prisons are not public areas traditionally dedicated to public discourse or free expression.[55]

In the same year *Adderley* was issued, the Court decided *Brown v. Louisiana*,[56] reversing the conviction of African-American civil rights demonstrators who had peacefully protested segregated libraries.[57] The Court, per Justice Fortas, opined that unlike the prison officials in *Adderley*, Louisiana proscribed protected expression in a traditional public forum.[58] The Court reasoned that African-American protesters could use libraries to

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[51] Justice Douglas dissented and was joined by Chief Justice Warren and Justices Brennan and Fortas. Id. at 48 (Douglas, J., dissenting).

[52] *Id.* at 40.

[53] *Id.* at 41.

[54] *Id.* at 41-42. The Court in *Adderley* mimicked the language used in *Davis*, stating, "[t]he State, no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated." *Id.* at 47; Post, *supra* note 28, at 1726; *see also* Davis v. Commonwealth of Massachusetts, 167 U.S. 43 (1897). *Adderley* must be read as a narrow decision regulating conduct because the opinion is not concerned with the government's authority to regulate speech. Post, *supra* note 28 at 1727.

[55] *Adderley*, 385 U.S. at 41. The Court implied that although streets and capitol grounds have traditionally been used for First Amendment purposes, the jail house property has no such history of communicative use. *Id.*

[56] 383 U.S. 131 (1966) (plurality opinion).

[57] *Id.* at 143 (plurality opinion). In *Brown*, the Court introduced a compatibility test and extended public forum status to property not historically associated with First Amendment activities. *See id.* at 142-43 (plurality opinion).

[58] *Id.* at 142 (plurality opinion).

protest unconstitutional discrimination.[59] Striking down the state statute, the Court held that the regulation against peaceful sit-ins in public libraries amounted to viewpoint discrimination against the civil rights advocates.[60]

Soon thereafter, the Court seemingly abandoned the "classification" test enunciated in *Hague* in favor of a "compatibility analysis" in *Grayned v. City of Rockford*.[61] In *Grayned*, the Court, per Justice Marshall, upheld the convictions of defendants who violated anti-noise ordinances banning loud and boisterous demonstrations near public schools.[62] Similar to the holding in *Adderley*, the Court opined that the ordinance was constitutional because the statute precluded conduct inimical to providing an atmosphere conducive to education.[63] The Court commented that expression on or near school grounds that is compatible with the normal activities of the grounds may not be absolutely prohibited.[64] The Court did determine, however, that such activities may be regulated to ensure that the normal educational functions of the school are not disturbed.[65]

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[59] *Id.* The plurality in *Brown* emphasized that the First Amendment included "the right in a peaceable and orderly manner to protest by silent and reproachful presence, in a place where the protestant has every right to be, the unconstitutional segregation of public facilities." *Id.*

[60] *See id.* The plurality commented that the protestors' demonstration did not disrupt the library activities and did not violate any library regulations. *Id.*

[61] 408 U.S. 104 (1972).

[62] *Id.* at 119.

[63] *Id.* at 112.

[64] *Id.* The Court emphasized that "[t]he crucial question is whether the manner of expression is basically incompatible with the normal activity of a particular place at a particular time." *Id.* at 116. In interpreting the Court's decision in *Grayned*, one commentator has contended that this test provides that speech is protected if the expressive activity involved is not inconsistent with the normal functioning of the property — this analysis does not distinguish between public and private property. Dienes, *supra* note 46, at 112 (stating the issue is not whether these fora are open for all types of protest, at all times and under all circumstances but rather, whether the value of access to the fora when the expression is compatible with the normal functioning of the place).

[65] *Grayned*, 408 U.S. at 114. *Grayned* repudiated *Davis* and rejected the notion that the government could abridge First Amendment speech by virtue of its proprietary interest. Post *supra* note 28, at 1730; *see also* Davis v. Commonwealth of Massachusetts, 167 U.S. 43 (1897). The Court stated that speech on all property may be subject to reasonable time, place, and manner restrictions, although "[t]he right to use a public place for expressive activity may be restricted only for weighty reasons." *Grayned*, 408 U.S. at 115. The Court

Despite the Court's apparent rejection of a classification-based test, the Court adopted the phrase "public forum" in *Police Department of the City of Chicago v. Mosley*, issued the same day as *Grayned*.[66] In *Mosley* the Court invalidated a statute that prohibited organized labor demonstrations near school buildings during school hours.[67] The Court opined that the statute excluded speech from a public forum based on the content of the speech.[68] Adding to the morass developing around the public forum doctrine, the Court rejected *Grayned's* assertion that all public property is subject to a single, unified "compatibility analysis."[69] Rather, the Court in *Mosley* proffered that public and nonpublic fora are guided by different degrees of First Amendment protection.[70]

Following *Mosley*, the Court began to treat the phrase "public forum" as a substantive term of limitation.[71] In *Lehman v. City of Shaker*

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in *Grayned*, while focusing on the importance of public discussion, concluded that all public property, no matter the classification, is subject to one unified First Amendment test. Post, *supra* note 28, at 1731. Also important to highlight is the fact that the Court in *Grayned* did not adopt Kalven's phrase "public forum," but rather, took great effort to reject the classification of property in order to determine what level of constitutional protection is afforded to free speech. *Id.*

[66] 408 U.S. 92 (1972).

[67] *Id.* at 102.

[68] *Id.* at 99. The ordinance in *Mosley* exempted "peaceful picketing of any school involved in a labor dispute." *Id.* at 93 (quotation omitted). The Court noted that once a forum is opened to the public, the government may not selectively exclude individuals based on content alone. *Id.* at 96. Accordingly, the Court asserted that a total ban on picketing near a school building may not exempt labor picketing although the government may ban all activities which interfere with the operation of the school. *See* Farber & Nowak, *supra* note 28, at 1246.

[69] *Mosley*, 408 U.S. at 100-01; Post, *supra* note 28, at 1732.

[70] *See Mosley*, 408 U.S. at 96-97; Post, *supra* note 28, at 1732-33. Post asserted that *Mosley* repudiated the *Davis* Court's contention that the government can absolutely control speech when it acts in a proprietary interest over its property. *Id.* at 1722; *see also* Davis v. Commonwealth of Massachusetts, 167 U.S. 43 (1897). The Court in *Mosley* contended that once a forum is opened to the public for communicative purposes, the government's authority to restrict free speech activities is subject to constitutional limitations, despite the government's proprietary interest in the property. Post, *supra* note 28, at 1733.

[71] *See* Barbara S. Gall, Note, *The Public Forum: Minimum Access, Equal Access, and the First Amendment*, 28 STAN. L. REV. 117, 123 (1982) (stating that the Court began to use the phrase 'public forum' to differentiate between various types of public property); *see also*

Heights,[72] a plurality, led by Justice Blackmun, upheld advertising restrictions on city-owned buses,[73] noting that the buses did not constitute a traditional public forum.[74] In so doing, the Justice embraced a categorical forum test for determining the regulation's constitutionality, and rejected *Grayned's* compatibility analysis providing that all public property, no matter the classification, receives First Amendment protection.[75] Justice Brennan, however, dissented in *Lehman*,[76] contending that the buses were public fora; thus, the municipality could not discriminate based on the content of the speech.[77]

Post, *supra* note 28, at 1733 (noting that following *Mosley*, the public forum doctrine "moved to the forefront of the Court's attention.").

[72] 418 U.S. 298 (1974) (plurality opinion).

[73] *Id.* at 302 (plurality opinion). Justice Blackmun rejected the claim that the rapid transit system was a public forum which had been opened up to the public. *Id.* The Justice asserted that government regulations of First Amendment free speech depend on the nature of the property and the conflicting interests involved. *Id.* at 302-03 (plurality opinion); Post, *supra* note 28, at 1734. Justice Blackmun further opined that the transit cars were part of a commercial venture and the municipality had discretion to make restrictions on their usage because of their proprietary interest in the system. *Lehman*, 418 U.S. at 303 (plurality opinion). Post contends that Justice Blackmun's opinion in *Lehman* relied on the Court's holding in *Davis* such that in acting in a proprietary capacity, the municipality, much like a private commercial enterprise, could choose which advertisements to display. Post, *supra* note 28, at 1734-35.

[74] *Lehman*, 418 U.S. at 302 (plurality opinion); *see* Post, *supra* note 28, at 1735.

[75] *Lehman*, 418 U.S. at 302-03 (plurality opinion); *Grayned*, 408 U.S. at 116.

[76] Justice Brennan was joined by Justices Stewart, Marshall, and Powell. *Lehman*, 418 U.S. at 308 (Brennan, J., dissenting).

[77] *Id.* at 310 (Brennan, J., dissenting). Justice Brennan, relying on Kalven's article, stated that in determining whether a particular property qualifies as a public forum, the Court must balance the interests of the government with the interests of the speaker and the audience. *Id.* at 312 (Brennan, J., dissenting). Furthermore, Justice Brennan contended that the Court must also investigate the disruptive effect that First Amendment free speech will have on the primary use of the property. *Id.* Justice Brennan concluded that because the municipality had already opened the rapid transit system to advertisements, there could be no argument that political advertisements were incompatible with the system's primary function of transportation and thus, the policy of discriminating among advertisements was unconstitutional. *Id.* at 314 (Brennan, J., dissenting); Post *supra* note 28, at 1736. Additionally, having created a public forum, free speech and equal protection principles preclude discrimination based solely upon the content of the speech. *Lehman*, 418 U.S. at 315-16 (Brennan, J., dissenting) (citations omitted).

Following *Lehman*, in *Greer v. Spock*,[78] the Court established the contemporary doctrinal framework of the public forum doctrine.[79] In *Greer*, the Court upheld a state statute prohibiting political demonstrations and leafleting on military bases.[80] The majority explained that the base commander could constitutionally prohibit political campaigning on the military base because of the potential interference with training and military missions on the base.[81] Relying on Justice Roberts' concurrence in *Hague*,[82] the Court in *Greer* categorized public fora as those facilities that have traditionally been utilized for assembly and communication.[83] The Court in *Greer* adopted the position of Justice Blackmun's plurality in *Lehman* and determined that the public forum doctrine focuses on the general characteristics of government property.[84]

Finally, in *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*,[85] the Supreme Court classified the types of government-owned property,

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In his article, Post contends that Justice Brennan's dissent was the first endeavor to establish a systematic public forum doctrine. Post, *supra* note 28, at 1736. Post interpreted Justice Brennan's dissent as a combination of *Mosley* and *Grayned* by dividing government property into public and nonpublic forums and distinguishing between the level of First Amendment protection afforded each type. *Id.* Additionally, Justice Brennan utilized a *Grayned* type compatibility inquiry in differentiating between public and nonpublic property. *Id.* Thus, according to Post, Justice Brennan opined that the Court's focus should be on the general characteristics of the forum rather than the specific circumstances of the speech at issue. *Id.* at 1737; *Lehman*, 418 U.S. at 320 (Brennan, J., dissenting).

Significantly, Post asserts that although Justice Brennan clearly "endow[ed] the public forum with a special position in terms of First Amendment protection," the Justice was unable to coherently establish this particular protection. Post, *supra* note 28, at 1737. Accordingly, the Court would continue to struggle attempting to define this protection. *Id.*

[78] 424 U.S. 828 (1976).

[79] Post, *supra* note 28, at 1739.

[80] *Greer*, 424 U.S. at 831.

[81] *Id.*

[82] *Id.* at 835-36.

[83] *Id.* at 835. The Court observed that Fort Dix was not traditionally open for First Amendment activity and therefore, did not qualify as a public forum. *Id.* at 838.

[84] *See id.* at 836. The Court, however, did not explain its justification for initiating a general characteristic focus. Post, *supra* note 28, at 1743.

[85] 460 U.S. 37, 45-46 (1983).

made a complete break from the compatibility analysis announced in *Grayned*, and established a classification-based test.[86] In *Perry*, a rival teacher's union sued to gain access to teachers' mailboxes.[87] The rival union contended that the internal school mailboxes were public fora, and thus, that the school district could not bar access to them.[88]

The Court, per Justice White, rejected this argument[89] and echoing *Greer*, concluded that there are different degrees of public fora.[90] The Court in *Perry* classified property based on the nature of the property, the normal activities of the forum, and whether the historical uses of the property included traditional First Amendment purposes.[91]

The first type of forum classified by the Court in *Perry* was the traditional public forum,[92] which are those places that "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[,]"[93] such as streets

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[86] *Id.* at 45.

[87] *Id.* at 41. In *Perry*, the Perry Education Association [hereinafter PEA], the exclusive bargaining representative of the teachers union in a certain school district, was given exclusive access to the inner school mailbox system. *Id.* at 39.

[88] *Id.* at 41. A rival teachers union, the Perry Local Educators' Association [hereinafter PLEA], contended that denying access to other unions to the mail system violated its free speech rights. *Id.*

[89] The Court held that there was no free speech violation because the mail system had never been open to unlimited use by the general public and therefore constituted a nonpublic forum. *Id.* at 55. The Court also attempted to clarify the public forum doctrine and assure its consistent application. *See* Jakab, *supra* note 28, at 548.

[90] Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 44 (1983).

[91] *Id.* at 44-45.

[92] *Id.* at 45.

[93] *Id.* (quoting Hague v. CIO, 307 U.S. 496, 515 (1939)). It has been argued that this first category narrowly construes the public forum concept and fails to recognize the extensions of the public forum doctrine developed by the courts since *Hague*. Jakab, *supra* note 28, at 551. Since *Hague*, the Court has by analogy extended the public forum concept and has utilized the phrase "streets, parks and other similar public places" to encompass the traditional public forum. *Id.*; *see, e.g.*, Connecticut State Fed'n of Teachers v. Board of Educ., 538 F.2d 471, 480 (2d Cir. 1976) (extending the public forum doctrine); Mosley v. Police Dep't of the City of Chicago, 432 F.2d 1256, 1259 (7th Cir. 1970) (developing the

and parks.[94] The Court explained that the government's power to restrict expression in these places is sharply circumscribed because the traditional principle purpose of these properties has always been to foster and promote the free exchange of ideas.[95] Accordingly, the Court has traditionally afforded this forum the highest degree of constitutional protection.[96] The Court cautioned that the Government may only regulate expressive activity on traditional public fora where the regulation is content-neutral,[97] narrowly tailored[98] to serve a significant state

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public forum doctrine), *aff'd*, 408 U.S. 92 (1972).

In these instances, the Court's omission of the phrase "and other similar public places" demonstrates a shortcoming of this first category and calls into question other public properties classified as traditional public fora. Jakab, *supra* note 28, at 551. *See, e.g.*, Chicago Area Military Project v. City of Chicago, 508 F.2d 921 (7th Cir.) (finding the airport terminal at O'Hare Airport a traditional public forum), *cert. denied*, 421 U.S. 992 (1975); Wolin v. Port of N.Y. Auth., 392 F.2d 83 (2d Cir.) (holding the New York City bus terminal a traditional public forum), *cert. denied*, 393 U.S. 940 (1968); *but see* Gannett Satellite Information Network, Inc. v. Metropolitan Transportation Authority, 745 F.2d 767 (2d Cir. 1984) (classifying the public areas of the Metropolitan Transit Authority as a nonpublic forum); *compare* Wright v. Chief of Transit Police, 558 F.2d 67 (2d Cir. 1977) (requiring the government to justify a ban on free speech activity in the public subway areas with a compelling state interest, thereby placing the public subway areas in the traditional public forum category).

The foregoing cases indicate the difficulty caused by the lack of conceptual principles by which the judiciary may apply the public forum concept to new situations. Jakab, *supra* note 28, at 554; *see also* Post, *supra* note 28, at 1715 (commenting that "[t]he Court has yet to articulate a defensible constitutional justification for its basic project of dividing government property into distinct categories . . . . These rules have proliferated to such an extent as to render the doctrine virtually impermeable to common sense.").

[94] *Perry*, 460 U.S. at 45 (citing *Hague*, 307 U.S. at 515).

[95] *Id.*

[96] *Id. See, e.g.*, United States v. Grace, 461 U.S. 171, 176-77 (1983) (invalidating part of a federal regulation prohibiting picketing on the public sidewalks around the United States Supreme Court building because the Government could not justify such a prohibition on a traditional public forum).

[97] Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983). When the government attempts to regulate a particular message, the particular forum is not significant in the Court's analysis. *See, e.g.*, Consolidated Edison Co. v. Public Serv. Comm'n, 447 U.S. 530, 535 (1980). In *Con Edison*, the Court invalidated a state utility commission regulation that prohibited the inclusion of inserts discussing the desirability of nuclear power or other controversial issues of public policy in monthly electric bills. *Id.* at 532-33. In rendering its decision, the Court concluded that the regulation was content-based and "when regulation is based on the content of speech, governmental action must be

interest,[99] and sufficiently narrow to permit alternative channels of

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scrutinized more carefully to ensure that communication has not been prohibited 'merely because public officials disapprove the speaker's views.'" *Id.* at 536 (quoting Niemotko v. Maryland, 340 U.S. 268, 282 (1951) (Frankfurter, J., concurring in result)).

Similarly, in Widmar v. Vincent, 454 U.S. 263 (1981), the Court held that a state university could not deny a student religious group the right to meet on campus where the university had generally made its facilities available for other registered student groups. *Id.* at 264-65. The Court maintained that the ban violated the religious group's First Amendment rights of free speech and association because: (a) the ban was a content-based regulation; (b) the university failed to show that the statute served a compelling state interest; and (c) the government failed to show that the restriction was narrowly tailored to achieve its interest. *See Id.* at 270 (outlining the appropriate standard of review for excluding speech from a public forum).

Additionally, in Boos v. Barry, 485 U.S. 312 (1987), the Court invalidated a District of Columbia statute that prohibited the display of any sign within 500 feet of a foreign embassy if that sign tended to bring the foreign government into "public disrepute." *Id.* at 315. Adopting the logic of *Con Edison* and *Widmar*, the Court determined that the ordinance was clearly content-based and failed to pass the strict scrutiny required of such restrictions. *Id.* at 320, 324.

[98] *Perry*, 460 U.S. at 45. *See, e.g.*, Ward v. Rock Against Racism, 491 U.S. 781 (1989). In *Ward*, the Court upheld a New York City sound amplification regulation that required New York City sound engineers to control the volume levels at concerts held in public parks. *Id.* at 786-87 (citation omitted). The Court found that the restriction was content-neutral, narrowly tailored to achieve a significant government interest, and sufficiently drawn to leave ample alternative channels of communication. *Id.* at 799-800. As a result of this finding, the Court determined that the regulation constituted a valid time, place, and manner restriction on First Amendment activities because the regulation was unnecessarily broad. *Id.*

Similarly, in Clark v. Community for Creative Nonviolence, 468 U.S. 288 (1984), the Court upheld a Park Service regulation that forbade sleeping in LaFayette Park and the National Mall, two national parks located in Washington, D.C. *Id.* at 289. The Community for Creative Nonviolence argued that the ordinance constituted a restriction on symbolic speech that could have been served in a manner less restrictive of First Amendment rights. *Id.* at 292. In upholding the regulation, the Court reiterated its holding in *Ward* and pronounced that "[e]xpression, whether oral or written or symbolized by conduct, is subject to reasonable time, place or manner restrictions," so long as the restrictions are content-neutral, narrowly tailored to achieve a significant government interest, and leave open ample alternative channels of communication. *Id.* at 293. The Court, per Justice White, reasoned that the regulation narrowly focused upon the Government's legitimate interest in maintaining the aesthetics of national parks. *Id.* at 296-97. Justice Marshall, joined by Justice Brennan, dissented, arguing that the regulation was not narrowly tailored and was supported only by vague speculation that persons sleeping in the park would increase the "wear-and-tear" on park facilities. *Id.* at 311-13 (Marshall, J., dissenting).

[99] *Perry*, 460 U.S. at 45. Significant government interests include preventing crime and fraud, preserving property aesthetics, and securing military personnel. *See* United States v. Albertini, 472 U.S. 675, 687 (1985) (holding that the Government has an important interest in maintaining the security of military bases); Village of Schaumberg v. Citizens for a Better

communication.[100]

Next, the Court defined the second forum category as "designated" or "limited" public fora.[101] The Court noted that this forum consists of government property which the government has voluntarily or intentionally opened for use by the public at large for the purpose of expressive activity.[102] The Court further held that although a state is not required to preserve the open nature of the facilities indefinitely, as long as it does so, any regulation encroaching upon free speech must pass the same standards of a traditional public forum.[103]

Finally, the Court defined the third category of government owned property, the nonpublic forum, which "is not by tradition or designation a forum for public communication."[104] In this category, the Court noted that less strict standards govern restrictions on free speech activity and thus, regulations need only be reasonable and not contain content-

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Environment, 444 U.S. 620, 636-39 (1980) (regulating door-to-door solicitation in order to prevent crime, fraud and invasion of personal privacy). *See also Community for Creative Nonviolence*, 468 U.S. at 296-97.

[100] *Perry*, 460 U.S. at 45. *See also Clark*, 468 U.S. at 293 (asserting that ample alternative channels of communication are available for protesting the plight of the homeless instead of the Washington, D.C. national parks); Heffron v. International Soc'y for Krishna Consciousness, Inc., 452 U.S. 640, 647-48 (1981) (determining that a regulation requiring all groups to conduct solicitation from booths at a state fair left open reasonable alternative channels of communication).

[101] *Perry*, 460 U.S. at 45.

[102] Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983). The Court noted that university meeting facilities, state fairgrounds, and municipal theaters are examples of this type of fora. *See, e.g.*, Young v. New York City Transit Auth., 903 F.2d 146 (2d Cir.) (finding subway property away from the trains, booths and congested areas connoted designated public fora), *rev'g*, 729 F. Supp. 341 (S.D.N.Y.), *cert. denied*, 498 U.S. 984 (1990); Widmar v. Vincent, 454 U.S. 263 (1981) (holding that university meeting facilities are designated public fora); City of Madison Joint Sch. Dist. v. Wisconsin Employment Relations Comm'n, 429 U.S. 167 (1976) (deeming a school board meeting a designated public forum); Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546 (1975) (finding a municipal theater a designated public forum).

[103] *Perry*, 460 U.S. at 46.

[104] *Id.*

based restrictions.[105]

In applying this categorical analysis, the Court in *Perry* found that the school mailbox facilities qualified as nonpublic fora.[106] The Court based this decision on the fact that the school's internal mail system was

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[105] *Id.* at 49. *See* United States Postal Serv. v. Council of Greenburgh Civic Ass'ns, 453 U.S. 114, 131 (1981) (holding that home mailboxes did not qualify as public fora).

Other examples of nonpublic fora are jailhouse property, military bases and internal school mailboxes. *See, e.g.*, United States v. Albertini, 472 U.S. 675 (1985) (deeming a military base a nonpublic forum); *Perry*, 460 U.S. at 48 (recognizing an internal school mailbox system as a nonpublic forum); Adderley v. Florida, 385 U.S. 39 (1966) (holding jailhouse property a nonpublic forum).

[106] *Perry*, 460 U.S. at 46. Justice Brennan, joined by Justices Marshall, Powell, and Stevens, dissented. *Id.* at 55 (Brennan, J., dissenting). The dissent maintained that the exclusive access afforded to PEA amounted to viewpoint discrimination which infringed upon the First Amendment rights of PLEA. *Id.* at 56 (Brennan, J., dissenting). Justice Brennan further stated that *Perry* involved an equal access claim and did not turn on whether the internal school mail system was classified as a public forum. *Id.* at 57 (Brennan, J., dissenting). Accordingly, Justice Brennan asserted that the Court's focus upon the public forum issue disregarded "the First Amendment's central proscription against censorship, in the form of viewpoint discrimination, in any forum, public or non-public." *Id.*

At least one commentator has determined that the Court's forum analysis is problematic. *See, e.g.*, TRIBE, *supra* note 28, at 993 (contending that the problem with the Court's focus on the nature or character of the forum involved, "coupled with inadequate attention to the precise details of the restrictions on expression, can leave speech inadequately protected in some cases[.]"). *See also* Cornelius v. NAACP Legal Def. & Educ. Fund, Inc., 473 U.S. 788 (1985). In *Cornelius*, the Supreme Court upheld the Government's right to exclude litigation and advocacy organizations from collective charity drive aimed at federal employees, concluding that the charity drive was a nonpublic forum and thus the regulation at issue satisfied the requisite reasonableness standard. *Id.* at 813. In a vehement dissent, Justice Stevens stated that "I do not find the precise characterization of the forum particularly helpful in reaching a decision." *Id.* at 833 (Stevens, J., dissenting).

See also City Council of the City of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789 (1984). The Court in *Vincent* held that utility poles and lampposts did not constitute public fora. *Id.* at 814. The Court did not consider the fact that several organizations utilized the posts for their signs. *Id.* Rather, the Court stated that because the Constitution does not mandate such uses, the Government may accordingly restrict their use for their intended purposes. *Id.* The Court's conclusions pose difficulties because they disregard the historical uses of the signposts for communicative activity and instead, should have regarded the signposts as traditional public fora. *See* TRIBE, *supra* note 28, at 996.

In a dissenting opinion, Justice Brennan expressed concern that the ordinance removed "a time-honored means of communicating a broad range of ideas and information, ... [which] entails a relatively small expense in reaching a wide audience[.]" *Vincent*, 466 U.S. at 819 (Brennan, J., dissenting). As a result, the dissenting Justice believed that the majority eliminated the use of signposts as an important and inexpensive mode of communication. *Id.* at 824 (Brennan, J., dissenting).

never open to the public at large.[107] Accordingly, the Court held that the differential access provided to PEA and PLEA was reasonable because the school district had a legitimate interest in maintaining the property for its lawfully dedicated use.[108]

In contrast to the categorical approach outlined by the Court in *Perry*, in *United States v. Kokinda*,[109] the Court enunciated another twist to the public forum doctrine, and set forth a "principal purpose test."[110] In *Kokinda*, the defendants were convicted of soliciting on a sidewalk in front of a United States Post Office branch.[111] The Court upheld the defendant's convictions, holding that the presence of the sidewalk and street on government property does not necessarily require a finding that the property is a public forum.[112] Instead, the Court emphasized that

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[107] Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 47 (1983). The Court in *Perry* stated that access to the internal school mailbox system was open only to those who obtained permission from the building principal. *Id.*

[108] *Id.* at 51 (citing *United States Postal Serv.*, 453 U.S. at 129-30). The Court in *Perry* stated that the access distinction was based on PEA's status, rather than on viewpoint bias. *Id.* at 49. Additionally, the Court posited that "the government may — without further justification — restrict the use to those who participate in the forum's official business" because some fora, like the school mailbox system, is not dedicated to open communication. *Id.* at 53. Finally, the Court in *Perry* noted that alternative channels remained open for union-teacher communication, thereby qualifying the limitation on PLEA's access to the internal school mailbox system as a reasonable regulation. *Id.*

[109] 497 U.S. 720 (1990) (plurality opinion).

[110] *See Kokinda*, 497 U.S. at 726 (plurality opinion). Reversing the opinion below, the Court held that the post office sidewalk was not a traditional public forum notwithstanding any similarities the sidewalk had to other public fora. *Id.* at 727 (plurality opinion). Therefore, the Court determined that speech activities conducted on sidewalks in front of post offices should not receive "strict-scrutiny" review. *Id.* at 727-28 (plurality opinion).

[111] *Id.* at 724 (plurality opinion).

[112] *Id.* at 737 (plurality opinion). The Court in *Kokinda* relied on Greer v. Spock, 424 U.S. 828 (1976), which held that a military base was a nonpublic forum despite the fact that the base permitted access to the general public in limited unrestricted areas. *Kokinda*, 497 U.S. at 727 (plurality opinion) (discussing *Greer*, 424 U.S. at 835). *See supra* notes 78-84 and accompanying text. The decision in *Greer* was significant due to the presence of sidewalks and streets within the military base. *Kokinda*, 497 U.S. at 727 (plurality opinion) (discussing *Greer*, 424 U.S. at 835). The Court in *Kokinda* noted that walkways, like those in *Kokinda* and *Greer*, which are open to the general public, do not alone establish that such entryways must be deemed traditional public fora under the First Amendment. *Kokinda*, 497 U.S. at 727 (plurality opinion) (discussing *Greer*, 424 U.S. at 835).

in determining a regulation's constitutionality, the government interest must be measured in light of the nature and function of the particular forum involved.[113] The Court noted that the "principal purpose" of the forum involved in *Kokinda* was to facilitate "the most efficient and effective postal delivery system."[114] Determining that the sidewalk must be analyzed as a nonpublic forum, the Court held the solicitation regulation content-neutral and reasonable.[115]

III. *ISKCON v. LEE:* APPLICATION OF THE PUBLIC FORUM DOCTRINE TO AIRPORT TERMINALS

In 1992, the United States Supreme Court decided *International Society for Krishna Consciousness, Inc. v. Lee*,[116] holding that airport terminals are not public fora.[117] Accordingly, the Court concluded that Port Authority regulations restricting free speech activities in the airport terminals need only satisfy a reasonableness standard.[118] Applying this standard, a fragmented Court found that the solicitation prohibition was a reasonable and constitutional restriction[119] and yet, found the leafleting preclusion was invalid.[120]

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[113] *Kokinda*, 497 U.S. at 727 (plurality opinion) (citing Heffron v. International Soc'y for Krishna Consciousness, Inc., 452 U.S. 640, 650-51 (1980)).

[114] United States v. Kokinda, 497 U.S. 720, 732 (1990) (plurality opinion).

[115] *Id.* at 736-37 (plurality opinion). The Court in *Kokinda* asserted that "it is not unreasonable to prohibit solicitation on the ground that it is unquestionably a particular form of speech that is disruptive of business." *Id.* at 736 (plurality opinion). Justice O'Connor, writing for the plurality, noted that throughout history the Postal Service has enacted regulations prohibiting solicitation in or near Post Office buildings because "solicitation is inherently disruptive of the Postal Service's business." *Id.* at 731-32 (plurality opinion).

[116] 112 S. Ct. 2701 (1992).

[117] *ISKCON I*, 112 S. Ct. at 2706.

[118] *Id.* at 2708.

[119] *Id.*

[120] *ISKCON II*, 112 S. Ct. 2709 (1992) (per curiam).

A. CHIEF JUSTICE REHNQUIST RESTRICTS THE TRADITIONAL PUBLIC FORUM TO STREETS, PARKS AND SIDEWALKS.

Chief Justice Rehnquist,[121] writing for the majority, began his analysis by acknowledging that solicitation is a form of speech protected by the First Amendment.[122] Further, Chief Justice Rehnquist recognized that free speech is not afforded absolute constitutional protection.[123] The majority proffered that the government is permitted to regulate the exercise of free speech under certain circumstances.[124] Acknowledging these concepts, Chief Justice Rehnquist asserted that the Court traditionally utilizes a forum-based approach to balance the free speech rights of speakers against the function of the property involved[125]

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[121] *See supra* note 26.

[122] *ISKCON I*, 112 S. Ct. at 2705. *See* United States v. Kokinda, 497 U.S. 720, 725 (1990) (plurality opinion) (recognizing that solicitation is a form of speech protected by the First Amendment); Heffron v. International Soc'y for Krishna Consciousness, Inc., 452 U.S. 640, 647 (1981) (observing that the First Amendment protects the right to disseminate oral and written religious views and doctrines); Schaumburg v. Citizens for a Better Environment, 444 U.S. 620, 632 (1980) (acknowledging that charitable solicitations are protected by the First Amendment); Jamison v. Texas, 318 U.S. 413, 417 (1943) (stating that "a state might not prevent the collection of funds for a religious purpose by unreasonably obstructing or delaying their collection."). *See also* TRIBE, *supra* note 28, at 988 ("Activities such as leafleting and solicitation are by tradition and function so closely linked with free expression that the Court has properly scrutinized restrictions upon those activities with special care, without pausing to establish at the outset that the restrictions operate in a public forum." (citations omitted)).

[123] *ISKCON I*, 112 S. Ct. at 2705. *See, e.g.*, Heffron v. International Soc'y for Krishna Consciousness, Inc., 452 U.S. 640, 647 (1981) (noting that the First Amendment does not grant an absolute right "to communicate one's views at all times and places or in any manner that may be desired."); Greer v. Spock, 424 U.S. 828, 836 (1976) (asserting that the First and Fourteenth Amendments do not confer an absolute right to civilian speakers to enter a military base to conduct political campaigns on the base); Cohen v. California, 403 U.S. 15, 19 (1971) (stating that the First and Fourteenth Amendments do not confer an ironclad right to every individual to speak irrespective of the circumstances under which the speech occurs); Adderley v. Florida, 385 U.S. 39, 47 (1966) (commenting that the government may temper an individual's right to speak in a manner consonant with the location where the speech occurs).

[124] *ISKCON I*, 112 S. Ct. at 2705.

[125] *Id.* at 2705. *See* Cornelius v. NAACP Legal Def. & Educ. Fund, Inc., 473 U.S. 788, 800 (1985) (adopting a forum analysis to determine when the Government's interest in restricting use of its property to its intended purpose outweighs the interest of those seeking to use the property for other purposes).

in determining whether access to the property should be permitted.[126]

Chief Justice Rehnquist framed the issue in *ISKCON I* as whether airport terminals constitute traditional public fora or nonpublic fora.[127] The Chief Justice concluded that the airport terminals are not public fora, and that the ban on solicitation qualified as a reasonable speech restriction.[128] In a separate vote, however, the Supreme Court rejected the ban on leafleting, and held such a speech restriction was unconstitutional.[129]

Relying on precedent established in *Hague*, Chief Justice Rehnquist argued that an airport terminal cannot qualify as a traditional public forum because an airport is a modern development and has not historically been used for expressive

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[126] *ISKCON I*, 112 S. Ct. at 2705-06 (citing Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45-46 (1983)). Chief Justice Rehnquist identified the three separate categories of public property for free speech analysis: the traditional public forum, the designated public forum and the nonpublic forum. *Id.* at 2705. The Chief Justice noted that the classification of the forum will determine the type of scrutiny to which the restriction is subjected. *Id.*

[127] *Id.* at 2706. The circuit courts have split over the question of whether an airport terminal qualifies as a public fora. *See* Jamison v. St. Louis, 828 F.2d 1280, 1283 (8th Cir. 1987) (categorizing the city-owned Lambert-St. Louis Airport as a public forum), *cert. denied*, 485 U.S. 987 (1988); Jews for Jesus, Inc. v. Board of Airport Comm'rs of the City of Los Angeles, 785 F.2d 791, 792 (9th Cir 1986), *aff'd on other grounds*, 482 U.S. 569 (1987) (invalidating the challenged blanket prohibition on all First Amendment activity in the Los Angeles International Airport); Fernandes v. Limmer, 663 F.2d 619, 626 (5th Cir. 1981) (classifying the Dallas-Fort Worth Airport as a public forum), *cert. dismissed*, 458 U.S. 1124 (1982).

Three circuits have declined to categorize airport terminals as public or non-public forums, classifying them only as generic "public fora." *See, e.g.*, United States Southwest Africa/Namibia Trade & Cultural Council v. United States, 708 F.2d 760, 763-68 (D.C. Cir. 1983) (stating that the airport terminals at Washington National Airport and Dulles International Airport are public fora); Chicago Area Military Project v. City of Chicago, 508 F.2d 921, 925 (7th Cir.) (deeming O'Hare Airport a public forum), *cert. denied*, 421 U.S. 992 (1975); *but see* International Caucus of Labor Comms. v. Metropolitan Dade County, Fla., 724 F. Supp. 917, 924 (S.D. Fla. 1989) (classifying the terminals at Miami International Airport as nonpublic fora).

[128] *ISKCON I*, 112 S. Ct. at 2708.

[129] *ISKCON II*, 112 S. Ct. at 2709 (per curiam). Five Justices joined Justice O'Connor's concurring opinion to form a majority in *ISKCON II*. *ISKCON III*, 112 S. Ct. 2711 (O'Connor, J., concurring). Justice Kennedy also authored a concurring opinion and was joined in part by Justices Stevens, Blackmun, and Souter. *Id.* at 2715 (Kennedy, J., concurring). Additionally, Justice Souter authored a concurring opinion and was joined by Justices Blackmun and Stevens. *Id.* at 2724 (Souter, J., concurring). Chief Justice Rehnquist filed a dissenting opinion, and was joined by Justices White, Scalia, and Thomas. *ISKCON II*, 112 S. Ct. at 2710 (Rehnquist, C.J., dissenting).

activity.[130] Chief Justice Rehnquist further opined that the airport terminals have in no respect been intentionally opened by their operators to public discourse and therefore, do not qualify as designated public fora.[131]

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[130] *ISKCON I*, 112 S. Ct. at 2706 (citing Hague v. CIO, 307 U.S. 496, 515 (1939)). Chief Justice Rehnquist further stated that the airport terminals never had a principal purpose of the free exchange of ideas. *Id.* Chief Justice Rehnquist, relying on *Hague*, emphasized that a traditional public forum is property where the principal purpose is the free exchange of ideas. *Id.* (quoting Cornelius v. NAACP Legal Def. & Educ. Fund, Inc., 473 U.S. 788, 800 (1985)). The majority further stipulated that a traditional public forum can not be created by government inaction, and one is not created "whenever members of the public are allowed to freely visit government owned or operated property." *Id.* (quoting Greer v. Spock, 424 U.S. 828, 836 (1976)). The Court determined that an affirmative act must occur which "intentionally open[s] a non-traditional forum for public discourse." *Id.* (quoting *Cornelius*, 473 U.S. at 802). Chief Justice Rehnquist further stated that the location of the property may also be a factor in determining the appropriate standard for assessing the speech restriction. *Id.* Accordingly, property separated from recognized public areas may connote a special enclave and thus be subject to greater restriction. *Id.* (citing United States v. Grace, 461 U.S. 171, 179-80 (1983)).

[131] *Id.* at 2706-07. The Court also rejected ISKCON's contention that the history and practice regarding the variety of terminal speech activity at transportation centers such as railroad and bus stations, transform the airport terminals into traditional public fora. *Id.* at 2707. The majority deemed such an analogy irrelevant for two reasons. *Id.* First, the Court distinguished the actions of privately owned transportation centers from those of a publicly owned airport. *Id.* Second, Justice Rehnquist noted that the inquiry at hand is an airport, rather than "transportation nodes" in general. *Id.* The majority asserted that to group all methods of transportation into a single category would ignore the critical differences and special characteristics of each transportation node, which must be considered. *Id.* Chief Justice Rehnquist further referred to the security requirement inherent in an airport, unlike that of a bus or railroad station, as well as to the fact that public access to airport terminals has frequently been restricted. *Id.*

The majority continued to distinguish airport terminals from other transportation centers. *Id.* The Court recognized that airports are designated as profit making commercial entities. *Id.* (discussing International Soc'y for Krishna Consciousness, Inc. v. Lee, 925 F.2d 576, 581 (2d Cir. 1991)). Chief Justice Rehnquist further pointed out that airport terminals generally attract visitors only for travel related purposes. *Id.* (discussing International Soc'y for Krishna Consciousness, Inc., 925 F.2d at 581).

Indeed, Chief Justice Rehnquist stated that an airport terminal's primary purpose is to facilitate passenger air travel. *Id.* The majority acknowledged that it is evident that an airport's purpose does not include "promoting the free exchange of ideas," nor have they ever been dedicated to either the distribution of leaflets or the solicitation of donations. *Id.* (quoting *Cornelius*, 473 U.S. at 800). Thus, the majority asserted that "neither by tradition nor purpose can the terminals be described as satisfying the standards . . . set out for identifying a public forum[;]" therefore, the speech restrictions need only satisfy a reasonableness standard. *Id.* at 2708. The Court further stressed that its holding in *Kokinda* merely required that the restriction "need only be reasonable; it need not be the most reasonable or the only reasonable limitation." *Id.* (citing United States v. Kokinda 497 U.S. 720, 730 (1990) (plurality opinion)). After careful consideration, the majority concluded that

Next, Chief Justice Rehnquist maintained that the government could regulate solicitation in the airport terminals because such conduct disrupted the intended function of the facility.[132] The Chief Justice stated that proscribing face-to-face solicitation removed any risk of duress to citizens who use the airport terminals.[133] The Court reasoned that the airport officials face considerable hardships in monitoring solicitation activities in order to guarantee that airport terminal visitors are not unduly disturbed.[134]

The majority then maintained that the sidewalk areas outside the airport terminals qualified as ample alternative channels of communication.[135] According to the Court, the overwhelming percentage of passengers frequenting this area permits sufficient access to solicit the general public.[136] The Court postulated that it seemed ironic to hold the Port Authority's solicitation regulation unreasonable when the Port Authority guaranteed daily access to a universally traveled area.[137]

The Court concluded by asserting that the potential for increased

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the prohibition on solicitation in the airport terminals was a reasonable restriction of free speech. *Id.*

[132] *Id.* Relying on *Kokinda*, the Court described solicitation as requiring action by those who choose to respond such that the respondent must decide whether to contribute. *Id.* (citing United States v. Kokinda, 497 U.S. 720, 733 (1990) (plurality opinion)). Specifically, the majority recognized that those who wish to elude a solicitor are forced to alter their intended path. *Id.* Chief Justice Rehnquist insisted that the net effect of both of these options is that the ordinary flow of traffic is impaired, especially when these air travelers are burdened by cumbersome luggage, hurrying to catch a flight, or to arrange ground transportation. *Id.* (citing International Soc'y for Krishna Consciousness, Inc. v. Lee, 925 F.2d 576, 582 (2d Cir. 1991)).

[133] *Id.* Specifically, the Court commented that "[t]he skillful, and unprincipled, solicitor can target the most vulnerable, including those accompanying children or those suffering physical impairment and who cannot easily avoid the solicitation." *Id. See also* International Soc'y for Krishna Consciousness, Inc. v. Barber, 506 F. Supp. 147, 159-63 (N.D.N.Y. 1980) (discussing various complaints filed against the International Society for Krishna Consciousness), *rev'd on other grounds*, 650 F.2d 430 (2d Cir. 1981). The court also mentioned the threat of fraud through the concealment of the solicitor's affiliation. *ISKCON I*, 112 S. Ct. at 2708 (citing *Barber*, 506 F. Supp. at 159-63). The majority expressed further concern over the fact that the target of the solicitors are often in a hurry and are less likely to take time to report transgressions to airport authorities. *Id.*

[134] *Id.*

[135] *Id.* at 2709.

[136] *Id.*

[137] *Id.*

congestion by organizations such as ISKCON demonstrates that the solicitation restriction is more than reasonable.[138] Consequently, the majority sustained the Port Authority's ban on solicitation in the airport terminals.[139]

B. JUSTICE O'CONNOR CONTENDS THAT AIRPORTS ARE NOT TRADITIONAL PUBLIC FORA AND VOTES TO AFFIRM THE OPINION BELOW

Writing separately, Justice O'Connor concurred in the judgment of the majority.[140] Justice O'Connor agreed with the Court's logic, and declared that the ban on solicitation did not violate the First Amendment because the nature and purpose of the airport terminals are incompatible with free speech guarantees.[141] Justice O'Connor further posited that because access to airports is "not inherent in the open nature of the locations" but is a "matter of grace by public officials," an affirmative act of the Port Authority is required in order to transform the airport terminal into a

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[138] *Id.* (citing International Soc'y for Krishna Consciousness, Inc. v. Lee, 925 F.2d 576, 582 (2d Cir. 1991)).

[139] *Id.* Additionally, Chief Justice Rehnquist noted that the distribution of leaflets causes the same pedestrian congestion in the airport terminals and thus, the Port Authority's distribution regulation also constitutes a valid and reasonable restriction. *ISKCON II*, 112 S. Ct. 2709 (1992) (Rehnquist, C.J., dissenting).

[140] *See ISKCON III*, 112 S. Ct. 2711 (1992) (O'Connor, J., concurring in *ISKCON I* and concurring in the judgment of *ISKCON II*). Justice O'Connor concurred in both the decision to uphold the ban on repetitive solicitation as well as the decision to strike down the leafleting prohibition. *Id.* Justice O'Connor wrote separately to reiterate the Court's holding that publicly owned airport terminals do not qualify as traditional public fora because they do not have among their purposes the "free exchange of ideas," *id.* (quoting Cornelius v. NAACP Legal Def. & Educ. Fund, Inc., 473 U.S. 788, 800 (1985)), nor have they "by long tradition or by government fiat . . . been devoted to assembly and debate," *id.* (quoting Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983)), nor "time out of mind . . . . been used for purposes of . . . communicating thoughts between citizens, and discussing public questions." *Id.* (quoting Hague v. CIO, 307 U.S. 496, 515 (1939)).

[141] *Id.* at 2712, 2713 (O'Connor, J., concurring) (citing *Cornelius*, 473 U.S. at 809). Justice O'Connor stated that when the forum in question is a multipurpose facility, such as an airport, the inquiry is whether the restriction is reasonably consistent with preserving the property for its dedicated purpose. *Id.* at 2713 (O'Connor, J., concurring) (citing *Perry*, 460 U.S. at 50-51). According to Justice O'Connor, the inquiry as to the reasonableness of speech restrictions must focus on whether such restrictions are "reasonably related to maintaining the multipurpose environment that . . . has [been] deliberately created." *Id.*

public forum.[142] Moreover, the Justice asserted that the inconveniences associated with solicitation (such as deciding whether to donate, search for money or write a check) disrupt the normal flow of airport traffic.[143] Thus, Justice O'Connor concluded that the solicitation restriction was a reasonable method of preventing disruption of an airport's functioning.[144]

Justice O'Connor also determined that the ban on all continuous distribution of literature violated the First Amendment.[145] The Justice explained that aside from possible litter, leafleting did not present any intrinsic difficulties that would make it incompatible with the multipurpose environment of airports.[146] Moreover, Justice O'Connor distinguished leafleting distribution from solicitation, noting that leafleting does not involve the same problems as face to face solicitation.[147]

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[142] *Id.* at 2711 (O'Connor, J., concurring) (quoting *Kokinda*, 497 U.S. at 743 (plurality opinion)). Justice O'Connor subsequently found that the terminals were nonpublic fora because the Port Authority did not specifically create public fora. *Id.*

[143] *Id.* at 2713 (O'Connor, J., concurring).

[144] *Id.*

[145] *Id.*

[146] *Id.* at 2713-14 (O'Connor, J., concurring). Justice O'Connor contrasted the Port Authority's leafleting restriction, which was an absolute ban on the distribution of literature, with the restriction in Greer v. Spock, 424 U.S. 828 (1976), where the leafleting ban was not an absolute ban but rather limited to those publications which "constitute[d] 'a clear danger to [military] loyalty, discipline, or morale.'" *ISKCON III*, 112 S. Ct. at 2714 (O'Connor, J., concurring) (contrasting *Greer*, 424 U.S. at 840).

Justice O'Connor further noted that in *Greer*, the Supreme Court held that despite the fact that certain parts of a military base were accessible by the public, the base did not qualify as a public forum. *Id.* Justice O'Connor distinguished *Greer* from *ISKCON*, noting that the Port Authority in *ISKCON* failed to provide any evidence to support the absolute prohibition on the distribution of pamphlets. *Id.* Justice O'Connor concluded that the prohibition failed the reasonableness standard and constituted an unjustified restriction of free speech. *Id.*

[147] *Id.* at 2713 (O'Connor, J., concurring). The Justice asserted that "confrontation by a person asking for money disrupts passage and is more intrusive and intimidating than an encounter with a person giving out information." *Id.* (quoting United States v. Kokinda, 497 U.S. 720, 733-34 (1990) (plurality opinion)). Justice O'Connor added that the Port Authority may still utilize time, place, and manner restrictions with regard to leafleting so long as they are content neutral, narrowly tailored and leave open alternate channels of communication. *Id.* at 2715 (O'Connor, J., concurring) (citing Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983)).

C. JUSTICE KENNEDY ASSERTS THAT AIRPORTS ARE PUBLIC FORA BUT THE SOLICITATION REGULATION CONSTITUTES A VALID TIME, PLACE, AND MANNER REGULATION.

In a separate opinion, Justice Kennedy concurred in the judgment of the majority.[148] Justice Kennedy asserted that airport terminals are public fora and thus, speech is afforded the highest level of protection against government restriction.[149] The Justice concluded, however, that the solicitation ban was constitutional because the regulation was a valid time, place, and manner restriction on a non-speech element of expressive activity.[150] Furthermore, Justice Kennedy agreed with the majority, finding that an absolute ban on leafleting is unconstitutional.[151]

First, Justice Kennedy recounted the concurring opinion in *Kokinda*,[152] and rejected the majority's twist given to the public forum doctrine as applied to airport terminals.[153] The Justice contended that the principal purpose analysis applied in *ISKCON I* is flawed because that standard permits the Government to restrict speech on its property solely by articulating a non-speech related purpose for the forum.[154]

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[148] *ISKCON III*, 112 S. Ct. 2711, 2715 (1992) (Kennedy, J., concurring). Part I of Justice Kennedy's concurrence was joined by Justices Blackmun, Stevens, and Souter. *Id.*

[149] *Id.* *See supra* notes 92-100 and accompanying text.

[150] *Id.*

[151] *Id.* at 2723 (Kennedy, J., concurring).

[152] 497 U.S. 720, 737 (1990) (Kennedy, J., concurring); *see supra* notes 109-115 and accompanying text.

[153] *ISKCON III*, 112 S. Ct. 2711, 2716 (1992) (Kennedy, J., concurring). Although Justice Kennedy agreed with the tripartite analysis to designate government property as either a traditional public forum, a designated public forum or a nonpublic forum, Justice Kennedy disagreed with the manner of its application to the Port Authority's airport terminals. *Id.* at 2715 (Kennedy, J., concurring).

[154] *Id.* at 2714 (Kennedy, J., concurring). Justice Kennedy asserted that the majority's application misconstrues the First Amendment as a grant of power to the government rather than its intended limitation on the government. *Id.* at 2716 (Kennedy, J., concurring). The Justice further stated that the Court's approach conflicts with the underlying goals of the public forum doctrine. *Id.* According to Justice Kennedy, the public forum doctrine is derived from the Speech, Press, and Assembly Clauses of the First Amendment and is fundamental to a functioning democracy. *Id.* Justice Kennedy asserted that the public forum doctrine is indicative of the fundamental tenet of the United States Constitution: that the

Justice Kennedy further argued that even if the principal purpose test is the proper analysis when applying the public forum doctrine, the majority misapplied the test.[155] Criticizing the majority's application, the Justice proffered that the true principal purpose of airports, akin to that of streets, sidewalks, and parks, is to facilitate transportation, not promote discourse.[156] Consequently, Justice Kennedy asserted that the majority's principal purpose test fails even on the most quintessential public fora, such as public buildings and street corners.[157]

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government is often subject to constraints that private citizens are not. *Id.* at 2717 (Kennedy, J., concurring). The Justice opined that the majority's analysis impairs the ability of citizens to protest against arbitrary government action and "[is] at the heart of our jurisprudence . . . that in a free nation citizens must have the right to gather and speak with other persons in public places." *Id.* at 2716-17 (Kennedy, J., concurring). Thus, Justice Kennedy asserted that the proper inquiry must be an objective one, which focuses upon the actual physical characteristics and uses of the arena, rather than upon the government's definition of the arena. *Id.* at 2717 (Kennedy, J., concurring).

[155] *Id.*

[156] *Id.* (referring to Frisby v. Schultz, 487 U.S. 474, 480-81 (1988); Cornelius v. NAACP Legal Def. & Educ. Fund, Inc., 473 U.S. 788, 802 (1985)). Justice Kennedy rendered this conclusion based on the similarities between the airport terminals and public thoroughfares such as public streets. *Id.* at 2719 (Kennedy, J., concurring). Justice Kennedy also relied on the unlimited accessibility of the airport areas because "[i]t is the very breadth and extent of the public's use of airports that makes it imperative to protect speech rights [in the airports]." *Id.* Finally, Justice Kennedy noted that recent history indicates that expressive activity is compatible in airport terminals when proper time, place, and manner restrictions are enacted. *Id.* Justice Kennedy relied on numerous lower federal court decisions which have designated airports as public fora. *See, e.g.*, Jamison v. St. Louis, 828 F.2d 1280 (8th Cir.), *cert. denied*, 485 U.S. 987 (1988); Jews for Jesus, Inc. v. Board of Airport Comm'rs of the City of Los Angeles, 785 F.2d 791 (9th Cir.), *aff'd on other grounds*, 482 U.S. 569 (1987); United States Southwest Africa/Namibia Trade & Cultural Council v. United States, 708 F.2d 760 (D.C. Cir. 1983); Fernandes v. Limmer, 663 F.2d 619 (5th Cir.), *cert. dismissed*, 458 U.S. 1124 (1982); Chicago Area Military Project v. City of Chicago, 508 F.2d 921 (7th Cir.), *cert. denied*, 421 U.S. 992 (1975). Rather than impose an absolute restriction, Justice Kennedy suggests that the airport enact appropriate time, place, and manner restrictions which would effectively solve the Port Authority's concerns. *ISKCON III*, 112 S. Ct. at 2719 (Kennedy, J., concurring).

[157] *ISKCON III*, 112 S. Ct. at 2717 (Kennedy, J., concurring). Justice Kennedy maintained that the Court's narrow interpretation of what constitutes designated public fora will make it an ineffectual doctrine, thus illustrating the need to protect speech in other fora. *Id.* In order to give effect to the doctrine, Justice Kennedy stated that it is necessary to recognize that "open, public spaces and thoroughfares which are suitable for discourse may be public forums, whatever their historical pedigree and without concern for a precise classification of the property." *Id.* *See* Lehman v. City of Shaker Heights, 418 U.S. 298, 303 (1974) (holding that city owned buses constituted a public forum, preventing the city from

Nonetheless, Justice Kennedy agreed that the solicitation ordinance should be upheld as a reasonable time, place, and manner restriction.[158] In the alternative, the Justice posited that the regulation restricted a non-speech element of solicitation — the exchange of money.[159]

Second, Justice Kennedy determined that the leafleting proscription violated the First Amendment.[160] Justice Kennedy asserted that the distinguishing feature between the distribution of literature restriction and that of the solicitation restriction is that the government has a more powerful and significant interest in regulating solicitation.[161] Additionally, Justice Kennedy contended that the solicitation restriction was narrowly drawn and left open ample alternative channels of communication, while the leafleting

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distinguishing between types of advertising). Justice Kennedy further stated that the failure to recognize new types of government property as proper fora for speech will curtail the public's expressive activity as well as erase the relevance of the public forum doctrine. *ISKCON III*, 112 S. Ct. at 2717 (Kennedy, J., concurring).

[158] *ISKCON III*, 112 S. Ct. 2711, 2717 (1992) (Kennedy, J., concurring). First, the Justice espoused many of the reasons enunciated by the majority for upholding the regulation. *Id.* Justice Kennedy stated that the solicitation regulation was justified based on the risks of fraud and duress that are associated with in-person solicitation. *Id.* at 2721 (Kennedy, J., concurring). The Justice also recognized that the regulation was directed at all abusive practices and was therefore, content-neutral while serving a significant government interest. *Id.* Justice Kennedy then opined that the regulation was clearly reasonable and narrowly tailored because it only prohibited the solicitation of money for immediate receipt. *Id.* Next, Justice Kennedy reiterated that the restriction need not be the least restrictive or least intrusive but, need only be reasonable and not be capable of substantially burdening speech. *Id.* (citing Ward v. Rock Against Racism, 491 U.S. 781, 798-800 (1989)). Furthermore, Justice Kennedy also stated that the regulation only prohibited continuous or repetitious solicitation, which the Port Authority regarded as its most serious concern. *Id.* at 2722 (Kennedy, J., concurring). Additionally, Justice Kennedy maintained that the regulation leaves open ample alternative channels of communication for solicitation because the restriction only prohibits the immediate receipt of funds. *Id.* at 2723 (Kennedy, J., concurring). The Justice noted that other solicitation practices were still permitted, thus still enabling solicitors to disseminate their message. *Id.*

[159] *Id.* Justice Kennedy maintained that this regulation involved elements of conduct "interwoven with otherwise expressive solicitation" and thus, "permits expression that solicits funds, but limits the manner of that expression to forms other than the immediate receipt of money." *Id.*

[160] *Id.*

[161] *Id.* Justice Kennedy asserted that the Government interest in preventing fraud is much greater with respect to solicitation as compared to leafleting and the sale of literature. *Id.*

regulations did not satisfy these elements.[162]

D. JUSTICE SOUTER CONTENDS THAT AIRPORTS ARE PUBLIC FORA AND THE REGULATION IS NOT AN ACCEPTABLE TIME, PLACE, AND MANNER REGULATION.

Justice Souter wrote separately in a vigorous dissent.[163] Like the majority in *ISKCON II* and the concurring opinions by Justices O'Connor and Justice Kennedy,[164] Justice Souter concluded that the leafleting ban was unconstitutional.[165] Additionally, akin to Justice Kennedy, Justice Souter contended that an airport is a public forum.[166] The Justice posited, however, that Justice Kennedy improperly applied the time, place, and manner analysis to the facts.[167]

Justice Souter proffered that the proper inquiry for determining a public forum is whether the property is similar to the archetype fora where the

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[162] *Id.* Justice Kennedy asserted that the leafleting prohibition was not narrowly drawn because unlike the solicitation regulation, "it [did] not specify the receipt of money as a critical element of a violation." *Id.* Therefore, the Justice contended that the leafleting restriction also imposed a flat ban on the sale of literature and thus, did not provide alternative channels of communication for such First Amendment activities. *Id.* Additionally, Justice Kennedy emphasized that the leafleting ban effectively shut off the airport terminals as a marketplace of ideas and prevented less affluent organizations from utilizing the airport terminals as a public forum. *Id.*

[163] *Id.* at 2724 (Souter, J., dissenting in *ISKCON I* and concurring in the judgment in *ISKCON II*).

[164] *See supra* notes 140-147, 148-162 and accompanying text.

[165] *ISKCON III*, 112 S. Ct. 2711, 2724 (1992) (Souter, J., dissenting).

[166] *Id.*

[167] *See id.* at 2727 (Souter, J., dissenting). Justice Souter agreed with Justice Kennedy's view of the proper standard of determining what is a public forum. *Id.* at 2724 (Souter, J., dissenting). The Justice opined that the Constitution does not mandate a "traditional use" analysis to determine if the property in question is a public forum, as the city streets and sidewalks no longer serve as the focus of community life in the United States. *Id.* Justice Souter recognized that while certain types of property will always be public fora (e.g. public streets), to find that one example of a particular property category is not a public forum "is not to rule out all properties of that sort." *Id.*; *cf.* United States v. Kokinda, 497 U.S. 720, 727 (1990) (plurality opinion). Justice Souter asserted that such a test would eviscerate the public forum doctrine. *ISKCON III*, 112 S. Ct. at 2724 (Souter, J., dissenting).

government is powerless to exclude speech.[168] Like Justice Kennedy, Justice Souter similarly required that the designation of property as a public forum reflect the use of the particular property at issue, rather than the particular classification of that property.[169] Employing this logic, the Justice determined that the Port Authority's airport terminals constituted public fora because they were suitable for public discourse and such expressive activity was compatible with their particular use.[170] Accordingly, the Justice would have struck down the Port Authority's regulation prohibiting solicitation in the airport terminals.[171]

In rejecting the majority's position on the solicitation ban, Justice Souter argued that the government's significant interest in preventing fraud and coercion does not justify a total ban on the solicitation of funds in the airport terminals.[172] Rather, Justice Souter asserted that the Port Authority's fraud and coercion claims were unsubstantiated allegations and that evidence of such conduct was nonexistent.[173] Furthermore, Justice Souter stated that the Port Authority's solicitation ban would also fail the narrowly tailored requirement because the Government's interest can be better served through less intrusive measures.[174] Finally, Justice Souter noted that the solicitation regulation does not provide ample alternative channels of communication because "it shuts off a uniquely

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[168] *Id.* *See* Frisby v. Schultz, 487 U.S. 474, 480 (1988). See *supra* note 39 for a discussion of *Frisby*.

[169] *ISKCON III*, 112 S. Ct. at 2724 (Souter, J., dissenting).

[170] *Id.* *See also* Grayned v. City of Rockford, 408 U.S. 104, 116 (1972); *see supra* notes 61-65 and accompanying text.

[171] *ISKCON III*, 112 S. Ct. 2711, 2725 (1992) (Souter, J., dissenting). Recognizing that solicitation is a fully protected form of speech, Justice Souter maintained that the Port Authority regulation failed to meet the requisite criteria for upholding such a ban. *Id.* Justice Souter noted that the regulation was neither narrowly tailored nor did it offer ample alternate channels of communication. *Id.*

[172] *Id.* at 2726 (Souter, J., dissenting). *See also* Organization for a Better Austin v. Keefe 402 U.S. 415, 419 (1971) (asserting that solicitation is a protected First Amendment activity).

[173] *ISKCON III*, 112 S. Ct. at 2726 (Souter, J., dissenting).

[174] *Id.*

powerful avenue of communication for organizations."[175]

IV. CONCLUSION

In *ISKCON*, the Court addressed regulations which limited free speech in airport terminals. Instead of concurring with Circuit Court opinions which recognize airport terminals as public fora,[176] the Court narrowly construed the public forum doctrine and dangerously limited free speech activity. Chief Justice Rehnquist's opinion concerning solicitation may serve as precedent that limits speech merely because the speech is annoying or disruptive. Additionally, the Chief Justice's opinion may further restrict expression in locales that have not traditionally "been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions."[177]

The Chief Justice avoided determining whether the solicitation regulation was a reasonable time, place, and manner restriction by holding that modern developments such as airport terminals are not traditional public fora and do not have a principle purpose of facilitating communication. Such a principal purpose test, however, does not recognize that as people meet and congregate in modern developments, their free speech rights must also extend to these new areas because the fora may actually promote and facilitate communication. For example, modern airports often contain shops that sell newspapers, magazines, clothing, and books; lounges and waiting areas where visitors watch televisions; and taverns and restaurants that attract people to sit for hours to engage in conversation while waiting for their flights. As more people continue to gather in new, less traditional places, the Court must recognize that the government may not curtail speech at whim. The Court should also not permit the Government to restrict expression by claiming that the locale is not a traditional public fora because the fora possesses a non-speech principle purpose.

As Justice Kennedy asserted in *ISKCON III*, the failure to recognize new types of government property as proper fora for First Amendment

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[175] *Id.* at 2727 (Souter, J., dissenting).

[176] *See supra* notes 18, 127 and accompanying text.

[177] Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983) (quoting Hague v. CIO, 307 U.S. 496, 515 (1939)).

free speech will curtail the public's expressive activity, as well as eviscerate the relevance of the public forum doctrine.[178] Moreover, Justice Kennedy's concurring opinion in *Kokinda* emphasized the need "to protect public places where traditional modes of speech and forms of expression can take place[.]"[179] Such opinions will hopefully counterbalance the potential restrictions Chief Justice Rehnquist's opinion may have on free speech. Fortunately, Chief Justice Rehnquist specifically limited the logic employed in *ISKCON* to airport terminals. Perhaps this language will liberate developing and unforeseen places where people congregate from the onus of this new interpretation of the public forum doctrine.

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[178] *ISKCON III*, 112 S. Ct. 2711, 2717 (1992) (Kennedy, J. concurring).

[179] United States v. Kokinda, 497 U.S. 720, 737 (1990) (Kennedy, J., concurring).