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## Public Forum Doctrine Crashes at Kennedy Airport, Injuring Nine: *International Society for Krishna Consciousness, Inc. v. Lee*

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PUBLIC FORUM DOCTRINE CRASHES AT  
KENNEDY AIRPORT, INJURING NINE:  
*INTERNATIONAL SOCIETY FOR KRISHNA  
CONSCIOUSNESS, INC. v. LEE\**

INTRODUCTION

The speech and assembly clauses of the First Amendment<sup>1</sup> recognize that critical to a free society is the ability to express and exchange ideas freely.<sup>2</sup> Thus, in recent years, the Supreme Court has held unconstitutional various restrictions on speech, despite arguably forceful justifications for such restraints.<sup>3</sup> At the same time, however, the Court has recog-

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\* 112 S. Ct. 2701 (1992).

<sup>1</sup> The First Amendment provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. CONST. amend. I. The First Amendment is applicable to the states through the Fourteenth Amendment. *Stromberg v. California*, 283 U.S. 359, 368 (1931).

<sup>2</sup> Justice Brandeis stated this principle most eloquently:

Those who won our independence . . . believed liberty to be the secret of happiness and courage to be the secret of liberty. They believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth; that without speech and assembly discussion would be futile; that with them, discussion affords ordinarily adequate protection against the dissemination of noxious doctrine; that the greatest menace to freedom is an inert people; that public discussion is a political duty; and that this should be a fundamental principle of the American government.

*Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring); *see also* *Police Department of Chicago v. Mosely*, 408 U.S. 92, 95-96 (1972) ("To permit the continued building of our politics and culture, and to assure self-fulfillment for each individual, our people are guaranteed the right to express any thought."); *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964) ("[D]ebate on public issues should be uninhibited, robust, and wide-open.").

<sup>3</sup> *See, e.g.,* *R.A.V. v. City of St. Paul*, 112 S. Ct. 2538 (1992) (prohibition against posting "hate speech" symbols unconstitutional as it protects only certain groups and applies only to certain bias-motivated speech); *Simon & Schuster v. New York Crime Victim's Board*, 112 S. Ct. 501 (1992) (law preventing convicted felons from receiving income from works describing their crimes impermissible as it applies only to income derived from expressive activity, but not to other activity;

nized that there are circumstances in which the justification for restricting speech is so compelling that the First Amendment's protection of free speech must give way.<sup>4</sup>

One line of cases in which the Court often has upheld speech restrictions involves government property.<sup>5</sup> For nearly fifty-five years, the Court has struggled with what standards should govern whether government may prohibit speech on its own property in order to operate more efficiently. Initially, the Court held that government may not restrict speech on streets or in parks without compelling justification, as those forums are held by the government for the public's benefit.<sup>6</sup> Indeed, for some time thereafter, the Court often analyzed cases involving speech restrictions on public property by considering

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government's legitimate interests in preventing felons from profiting from their crimes and providing money for victims will not countervail First Amendment protection); *United States v. Eichman*, 496 U.S. 310 (1990) (ban on desecration of American flag impermissible regulation of speech). *But see* *Rust v. Sullivan*, 111 S. Ct. 1759 (1991) (upholding regulation requiring family planning clinics that receive federal funds to refrain from counseling patients about abortion).

<sup>4</sup> See, e.g., *Wisconsin v. Mitchell*, 113 S. Ct. 2194 (1993) (penalty enhancement for bias-motivated crimes upheld because of the resulting additional harms to the individual and society beyond the crime itself); *Burson v. Freeman*, 112 S. Ct. 1846 (1992) (upholding ban on campaigning within one hundred feet of voting area in order to protect the integrity of self-governance, a countervailing constitutional concern); *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990) (restrictions on certain corporate political donations upheld because use of massive corporate funds can lead to political corruption).

<sup>5</sup> See, e.g., *United States v. Kokinda*, 497 U.S. 720 (1990) (ban on solicitation of funds outside of post office upheld); *Greer v. Spock*, 424 U.S. 828 (1976) (regulation preventing political campaigning on military base upheld); *Lehman v. City of Shaker Heights*, 418 U.S. 298 (1974) (refusal to accept political advertising on city buses upheld).

<sup>6</sup> *Hague v. CIO*, 307 U.S. 496 (1939). Justice Roberts' holding has been quoted often:

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 the streets and public places has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens. The privilege . . . may be regulated in the interest of all; . . . but it must not, in the guise of regulating, be abridged or denied.

*Id.* at 515-16. Many years before *Hague*, the Court upheld a street preacher's conviction for preaching without a permit, finding that there is no constitutional right to use public property in defiance of state law. *Davis v. Massachusetts*, 167 U.S. 43 (1897). But *Davis* predates the incorporation of the First Amendment into the Fourteenth Amendment. See *supra* note 1.

whether the purported government interests outweighed the First Amendment interests, although without settling on one particular standard.<sup>7</sup>

Recently, however, the Court has rejected an approach that focuses on the particular parties' interests in favor of one categorizing the property at issue as either a public forum, whether by tradition or for a limited purpose as defined by the government, or a nonpublic forum.<sup>8</sup> Based on that determination, the Court then examines the restriction under either strict scrutiny for public forums, or a deferential review for nonpublic forums. A law restricting speech in a public forum must be narrowly tailored to serve a compelling justification if it is content-based, or a significant justification if it is content-neutral. A speech restriction in a nonpublic forum, on the other hand, need only be reasonable, so long as it does not seek to suppress a particular viewpoint.<sup>9</sup> Thus, once the Court labels a forum as public or nonpublic, the case is virtually decided.<sup>10</sup>

Because of the importance of this labeling process, the Court has struggled with the scope of the categories; ultimately, it has narrowed the definition of the public forum. Today, property will be categorized as a public forum only if it traditionally has been viewed as such or if the government intends to create it as such. If the government expresses a contrary intent, however, the Court will label the property as a nonpublic forum.<sup>11</sup> This standard effectively eviscerates the

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<sup>7</sup> See, e.g., *Greer*, 424 U.S. at 828 (need for military to remain separate from politics outweighs candidates' right to campaign on military base); *Grayned v. City of Rockford*, 408 U.S. 104 (1972) (need for quiet near school outweighs right to protest noisily); *Edwards v. South Carolina*, 372 U.S. 229 (1963) (no government interest outweighs right to protest peaceably outside seat of government).

<sup>8</sup> See *United States v. Grace*, 461 U.S. 171 (1983) (sidewalk outside Supreme Court categorized as a public forum); *Kokinda*, 497 U.S. at 720 (sidewalk outside of post office categorized as a nonpublic forum); *Madison School District v. Wisconsin Employee Relation Comm'n*, 429 U.S. 167 (1976) (town meeting regarding teachers' union categorized as a "limited" public forum); *Cornelius v. NAACP Legal Defense & Educ. Fund*, 473 U.S. 788 (1985) (government-created charitable drive for federal employees categorized as a nonpublic forum).

<sup>9</sup> This analytical framework was announced in *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45-46 (1983). For a more detailed discussion of *Perry* and the public forum framework, see *infra* notes 55-63 and accompanying text.

<sup>10</sup> Indeed, in each of the cases cited *supra* note 8, the categorization determined the outcome. See also *Perry*, 460 U.S. at 37 (finding teachers' interschool mail system to be a nonpublic forum is determinative of outcome).

<sup>11</sup> See *Kokinda*, 497 U.S. at 720 (government did not intend street outside of

First Amendment, because the government is empowered to ensure that little property will be categorized as a public forum, thereby ensuring that most of its restrictions on speech will survive challenge. As a result, the public forum doctrine has come under much criticism from both members of the Court and commentators.<sup>12</sup>

During the 1991 term, the Court once again addressed the controversial public forum doctrine. In *International Society for Krishna Consciousness, Inc. v. Lee* ("ISKCON"),<sup>13</sup> the Court considered ISKCON's challenge to a ban on the distribution of literature and solicitation of funds in airport terminals. A divided Court, in four separate opinions, upheld the solicitation ban while, at the same time, striking the distribution ban.<sup>14</sup> A

post office to be a public forum); *Cornelius*, 473 U.S. at 788 (government did not intend charitable fund raising drive to be a limited public forum); see also *infra* notes 64-76 and accompanying text.

<sup>12</sup> See, e.g., *Kokinda*, 497 U.S. at 737-38 (Kennedy, J., concurring) ("If our public forum jurisprudence is to retain vitality, we must recognize that certain objective characteristics of Government property . . . may control the case."); *id.* at 741 (Brennan, J., dissenting) ("[T]hese public forum categories . . . have been used in some of our recent decisions as a means of upholding restrictions on speech."); *Cornelius*, 473 U.S. at 821-22 (Blackmun, J., dissenting) ("The Court offers no explanation why attaching the label 'nonpublic forum' to particular property frees the Government of the more stringent constraints imposed by the First Amendment in other contexts."); see also G. Sidney Buchanan, *The Case of the Vanishing Public Forum*, 1991 U. ILL. L. REV. 949, 955 & 971-72 (government "may expand or contract at will" the use of property based on subject matter); David S. Day, *The End of the Public Forum Doctrine*, 78 IOWA L. REV. 143, 160 (1992) ("After 1983, the once-protective doctrine became an outcome determinative, threshold doctrine that is distinctly speech-restrictive."); C. Thomas Dienes, *The Trashing of the Public Forum: Problems in First Amendment Analysis*, 55 GEO. WASH. L. REV. 109, 118-20 (1986) (asking "why . . . a government decision not to open public property for speech purposes [should] negate any meaningful First Amendment review"); 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, 1224 (1984) (public forum analysis "distracts attention from the First Amendment values at stake"); Robert C. Post, *Between Governance and Management: The History and Theory of the Public Forum*, 34 UCLA L. REV. 1713, 1764 (1987) ("[T]he public forum doctrine is presently a blank check for government control of public access to the nonpublic forum for communicative purposes.").

<sup>13</sup> 112 S. Ct. 2701 (1992).

<sup>14</sup> *International Soc'y for Krishna Consciousness, Inc. v. Lee*, 112 S. Ct. 2701 (1992) (opinion of the Court delivered by Chief Justice Rehnquist upholding ban on solicitation); *Lee v. International Soc'y for Krishna Consciousness, Inc.*, 112 S. Ct. 2709 (1992) (per curiam opinion striking ban on distribution); *id.* at 2709 (Rehnquist, C.J., dissenting from judgment striking distribution ban); *International Soc'y for Krishna Consciousness, Inc. v. Lee* and *Lee v. International Soc'y for Krishna Consciousness, Inc.*, 112 S. Ct. 2711 (1992) (O'Connor, J., concurring in

narrow majority found the airport terminals to be nonpublic forums. Unlike in previous cases, however, the nonpublic forum label in *ISKCON* was not outcome determinative; the distribution ban nevertheless was held unconstitutional. Although a microscopic analysis of the Court's various public forum approaches reveals that the First Amendment continues to afford little protection to speakers on public property, the *ISKCON* decision viewed as a whole has left the public forum doctrine in a state of chaos. Because the justices took divergent approaches both in defining the public and nonpublic forum categories and in their subsequent application of those labels to the facts of the case,<sup>15</sup> it is virtually impossible for a government or lower court to determine what principles now govern speech restrictions on government property.

This Comment argues that it is time for the Court to give up the public forum doctrine in favor of an approach that is workable and more protective of First Amendment freedoms. Part I of this Comment examines several important cases in the development of the public forum doctrine, tracing the Court's shift in emphasis from a balancing approach to the categorical framework used today. Part II next sets forth the facts and issues in *ISKCON*, and describes the myriad of approaches taken by the Justices in deciding the case. Part III then considers problems raised by these approaches and their cumulative effect on the public forum doctrine. Finally, Part IV proposes a standard to replace the flawed public forum doctrine—one that would adequately protect both freedom of speech and the government's need to operate efficiently.

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judgment striking distribution ban and upholding solicitation ban); *id.* at 2715 (Kennedy, J., concurring in judgment striking distribution ban and upholding solicitation ban); *id.* at 2724 (Souter, J., concurring in judgment striking distribution ban and dissenting from judgment upholding solicitation ban). The *per curiam* opinion merely announces the judgment of the court, and refers the reader to the various opinions for the reasoning.

<sup>15</sup> In fact, only Justices O'Connor and Kennedy voted for both judgments (upholding the solicitation ban and striking the distribution ban), and their approaches were dramatically different. See *infra* notes 100-16 and accompanying text.

## I. FROM BALANCING TO FORMALISM: AN ANALYSIS GONE AWRY

The skeletal framework for determining whether a speech restriction on government property is constitutional under the First Amendment is firmly established.<sup>16</sup> Before considering the validity of the restriction, the Court first will determine whether the public property is a traditional public forum, a public forum by designation (often called a limited public forum) or a nonpublic forum. Based on that determination, the restriction will be subject either to strict scrutiny for traditional and designated public forums, or to deferential scrutiny for nonpublic forums.<sup>17</sup> Prior to the development of this framework, however, the Court approached public property cases in various ways, ranging from a balancing of government and speech interests to a *per se* rule permitting all speech restrictions.<sup>18</sup>

### A. *The Struggle Between Balancing Interests and Formalism*

Consistent throughout the early free speech cases involving government property was an attempt by the Court to balance a desire to accommodate uninhibited speech, which is critical to a free society,<sup>19</sup> against the need for the efficient operation of government.<sup>20</sup> These cases often involved restrictions of speech on public streets, which the Court recognized as deserving of particular First Amendment protection.<sup>21</sup> Early on, the Court developed a standard for evaluating such restric-

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<sup>16</sup> Even though the justices deciding *International Soc'y for Krishna Consciousness, Inc. v. Lee*, 112 S. Ct. 2701 (1992), took dramatically different approaches in their application of the public forum doctrine, all nine followed the same basic framework.

<sup>17</sup> See, e.g., *United States v. Kokinda*, 497 U.S. 720, 726-27 (1990); *Cornelius v. NAACP Legal Defense & Educ. Fund*, 473 U.S. 788, 800 (1985); *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45-46 (1983). For a discussion of this framework, see *infra* notes 55-63 and accompanying text.

<sup>18</sup> See, e.g., *Edwards v. South Carolina*, 372 U.S. 229 (1963) (applying a balancing test); *Adderley v. Florida*, 385 U.S. 39 (1966) (adopting a *per se* rule permitting all speech restrictions on government property); *Greer v. Spock*, 424 U.S. 828 (1972) (applying elements of both approaches). The various approaches are discussed below.

<sup>19</sup> See *supra* note 2.

<sup>20</sup> See *supra* note 7.

<sup>21</sup> See *Hague v. CIO*, 307 U.S. 496, 515-16 (1939), *quoted supra* note 6.

tions. Noting that while the primary purpose of a street is to facilitate movement—thus entitling a city to regulate the conduct of those using the streets—the Court held that when speech is at issue, “the delicate and difficult task falls upon the courts to weigh the circumstances and to appraise the substantiality of the reasons advanced in support of the regulation of the free enjoyment of the rights.”<sup>22</sup> Thus, while the Court did not proscribe an absolute rule favoring speech, it required an adequate justification before allowing an abridgment of First Amendment freedoms. Applying this rigorous test, the Court struck down several speech restrictions.<sup>23</sup> It soon, however, began to drift away from a consistent application of the balancing test. Instead, the Court at times used a formalistic approach,<sup>24</sup> a balancing approach<sup>25</sup> or a hybrid approach<sup>26</sup> in

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<sup>22</sup> *Schneider v. New Jersey*, 308 U.S. 147, 161 (1939). In striking down several ordinances that prevented the distribution of literature on public streets, the Court noted that the city's interest in keeping the streets clean is best furthered by punishing those who litter, and not by preventing activity involving speech. See also *Lovell v. City of Griffin*, 303 U.S. 444, 451 (1938) (striking similar ordinance).

<sup>23</sup> For example, the Court twice overturned the convictions of protesters for disturbing the peace in front of the seat of government, holding that without evidence that the protestors had violated traffic regulations or had caused any type of disruption, the First Amendment protected the citizens' use of the streets to express their views. *Cox v. Louisiana*, 379 U.S. 536 (1965) (protest outside courthouse); *Edwards v. South Carolina*, 372 U.S. 229 (1963) (protest outside the state legislature); cf. *Cox v. Louisiana*, 379 U.S. 562 (1965) (upholding statute banning picketing in front of courthouse with the intent of impeding the administration of justice because of government's interest in protecting the judicial system); *Cox v. New Hampshire*, 312 U.S. 569, 574 (1941) (in upholding narrowly tailored, nondiscriminatory licensing scheme for parade permits, Court noted that “the question in a particular case is whether [control of the streets] is extended so as not to deny or unwarrantedly abridge the right of assembly and the opportunities for the communication of thought and the discussion of public questions immemorially associated with resort to public places.”).

The Court also overturned the conviction of a protester participating in a “sit-in” in a public library. *Brown v. Louisiana*, 383 U.S. 131 (1966). With the exception of Justice Brennan, however, the *Brown* Court seemed to rely on aspects of the case not involving speech. Compare *id.* at 141-42 (plurality opinion) (primarily relying on statutory interpretation, but noting alternatively that the First Amendment is implicated) and *id.* at 151 (White, J., concurring) (relying on Equal Protection Clause) with *id.* at 143-44 (Brennan, J., concurring) (relying on *Cox v. Louisiana*). The dissenting Justices wrote that the First Amendment is not implicated because a library is not dedicated to speech activity. *Id.* at 157 (Black, J., dissenting). This reasoning commanded a majority of the justices later in the same term. See *infra* notes 27-31.

<sup>24</sup> *Adderley v. Florida*, 385 U.S. 39 (1966) (upholding speech restriction in front of jail). See *infra* notes 27-31 and accompanying text. The RANDOM HOUSE DICTIO-



upholding a variety of restrictions involving both streets and other government property. The result was a doctrine in disarray.

In *Adderley v. Florida*,<sup>27</sup> the Court upheld the trespass conviction of people who had protested in front of the county jail. The Court reasoned:

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. For this reason, there is no merit to the petitioners' argument that they had a constitutional right to stay on the property . . . .<sup>28</sup>

This statement not only abandoned the balancing approach that the Court had previously applied,<sup>29</sup> but it rejected any concern for free speech. Central to the Court's reasoning was a refusal to acknowledge the distinction between public and private action, even though the Constitution very clearly imposes limits on government action that it does not impose upon private citizens.<sup>30</sup> By equating public action with private ac-

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NARY OF THE ENGLISH LANGUAGE (Jess Stein ed., 1967) defines formalism as the "strict adherence to, or observance of, prescribed or traditional forms." *Id.* at 557. In the context of constitutional jurisprudence, formalism is an adherence to bright-line rules, although perhaps at the expense of the needs of a particular case.

<sup>25</sup> *Grayned v. City of Rockford*, 408 U.S. 104 (1972) (upholding speech restriction on street outside of school); see *infra* notes 32-39 and accompanying text.

<sup>26</sup> *Greer v. Spock*, 424 U.S. 828 (1976) (upholding speech restriction on military base); *Lehman v. City of Shaker Heights*, 418 U.S. 298 (1974) (upholding speech restriction on advertising space on city buses); see *infra* notes 40-46 and accompanying text.

<sup>27</sup> 385 U.S. 39 (1966).

<sup>28</sup> *Id.* at 47.

<sup>29</sup> See *supra* notes 19-23 and accompanying text.

<sup>30</sup> See *National Collegiate Athletic Ass'n v. Tarkanian*, 488 U.S. 179, 191 (1988) ("Embedded in our Fourteenth Amendment jurisprudence is a dichotomy between state action, which is subject to scrutiny . . . and private conduct, against which the Amendment affords no shield, no matter how unfair that conduct may be."); see also *Bowen v. Ross*, 476 U.S. 693, 732 (1986) (O'Connor, J., concurring in part and dissenting in part) ("[T]he Founding Fathers . . . constructed a society in which the Constitution placed express limits upon government actions limiting the freedoms of that society's members."); *Dothard v. Rawlinson*, 433 U.S. 321, 342 (1977) (Marshall, J., concurring in part and dissenting in part) ("[N]o governmental 'business' may operate 'normally' in violation of the Constitution. Every action of government is constrained by constitutional limitations."); Post, *supra* note 12, at 1763 ("The fourteenth amendment imposes constitutional restrictions upon the 'States' as such, not upon States acting in some capacities and not others.").

That an ordinance restricting speech on public property is public action was implicit in prior public forum cases. See, e.g., *Edwards v. Louisiana*, 372 U.S. 229

tion, the *Adderley* Court effectively freed the government from the constraints of the First Amendment.<sup>31</sup>

Although *Adderley* seemed to set a clear—indeed, inflexible—standard for considering the permissibility of speech restrictions on public property, the Court later retreated from that standard in favor of a balancing approach similar to that applied in earlier cases.<sup>32</sup> In *Grayned v. City of Rockford*,<sup>33</sup> the Court stated 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.”<sup>34</sup> In applying this test, the Court upheld the conviction of a protestor outside a school under an anti-noise statute. The Court noted that “expressive activity may be prohibited if it materially disrupts classwork or involves substantial disorder or invasion of the rights of others,”<sup>35</sup> and that the noise ordinance “punishes only conduct which disrupts or is about to disrupt normal school activities. That decision is made, as it should be, on an

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(1963) (balancing First Amendment against government interests); *Schneider v. State*, 308 U.S. 147 (1939) (same).

<sup>31</sup> Although the *Adderley* Court dissolved the distinction between public and private action in the public forum context, it also noted that unlike the street in front of the legislature or a courthouse, jails involve security risks, and that the driveway on which the protesters gathered was used for transporting prisoners. Thus, it appears that the Court did consider the special nature of the property. Nevertheless, it did not rest its holding on such concerns, which are relevant only if the First Amendment is read as mandating a justification for a speech restriction. Indeed, it is the Court's language equating public and private property rights that seized the attention of later Courts and commentators. See, e.g., *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 48 (1983); *United States Postal Serv. v. Council of Greenburgh Civic Ass'ns*, 453 U.S. 114, 129-30 (1981); *Dienes*, *supra* note 12, at 115-17; *Post*, *supra* note 12, at 1724-29 (all citing to or commenting upon proposition).

As the Court's discussion of the special nature of the jail demonstrates, it was unnecessary for the Court to take public property out of the realm of the First Amendment to reach its result. Under the Court's previously established balancing test, the potentially serious security risk posed by a crowd of protesters in a driveway that is used to unload prisoners weighs heavily in support of upholding the restriction of First Amendment rights. In fact, the Court has explicitly recognized the unique nature of a prison. In *Jones v. North Carolina Prisoners' Labor Union*, 433 U.S. 119 (1977), the Court noted, “[b]ecause the realities of running a penal institution are complex and difficult, we have . . . recognized the wide-ranging deference to be accorded to the decisions of prison administrators.” *Id.* at 126.

<sup>32</sup> See *supra* notes 19-23.

<sup>33</sup> 408 U.S. 104 (1972).

<sup>34</sup> *Id.* at 116.

<sup>35</sup> *Id.* at 118 (citation omitted).

individualized basis, given the particular fact pattern.<sup>36</sup> This approach is a more detailed version of that previously articulated by the Court,<sup>37</sup> and places the burden on the government to prove that a restriction is necessary. Whereas the Court had previously spoken of "weigh[ing] the circumstances,"<sup>38</sup> the *Grayned* Court required the government to show the incompatibility between speech and the regular uses of the property. The *Grayned* approach implicitly recognized that a government restriction of speech on public property gives rise to First Amendment concerns.<sup>39</sup>

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<sup>36</sup> *Id.* at 119. Justices White and Rehnquist, who today apply the formalistic approach of *International Society for Krishna Consciousness, Inc. v. Lee*, 112 S. Ct. 2701 (1993), and its immediate predecessors, joined in the *Grayned* Court's fact-based inquiry.

<sup>37</sup> See *Schneider v. New Jersey*, 308 U.S. 147, 161 (1939), *quoted supra* note 22 and accompanying text.

<sup>38</sup> *Id.* at 161.

<sup>39</sup> *Grayned* is remarkably different from *Adderley v. Florida*, 385 U.S. 39 (1966), which effectively removed the First Amendment from consideration. One might argue that these different approaches result from the nature of the property—jail grounds versus a sidewalk—rather than a shifting Court. But when the Court was later faced with a case involving a military base, the Court did not fully embrace the *Adderley* model or attempt to reconcile *Adderley* and *Grayned* by distinguishing them. See *Greer v. Spock*, 424 U.S. 828 (1976), discussed *infra* notes 40-44 and accompanying text.

Like *Adderley*, the *Grayned* "incompatibility test" has been seized upon by justices and commentators. See, e.g., *Cornelius v. NAACP Legal Defense & Educ. Fund*, 473 U.S. 788, 816 (1985) (Blackmun, J., dissenting); *United States Postal Serv. v. Council of Greenburgh Civic Ass'ns*, 453 U.S. 114, 136 (1981) (Brennan, J., concurring in judgment); Dienes, *supra* note 12, at 112 & 115; Post, *supra* note 12, at 1730-31 & n.213 (all citing to or commenting upon test).

A flexible balancing approach, although not phrased in terms of incompatibility, was used to disallow the suspension of high school students who wore arm bands to protest American involvement in the Vietnam War, see *Tinker v. Des Moines Sch. Dist.*, 393 U.S. 503, 508 (1969) ("There is . . . no evidence whatever of petitioners' interference, actual or nascent, with the school's work or of collision with the rights of other students to be secure and to be let alone."); the exclusion of an interest group from a public meeting, see *Madison Sch. Dist. v. Wisconsin Employment Relations Comm'n*, 429 U.S. 167, 175 (1976) ("[W]here a state has opened a public forum for direct citizen involvement, it is difficult to find justification for excluding teachers . . . who are most vitally concerned with the proceedings . . . . [T]he participation in public discussion of public business cannot be confined to one category of interested individuals.") and a student group from access to school facilities, see *Widmar v. Vincent*, 454 U.S. 263 (1981) (public school's refusal to grant religious group access to school facilities violated Free Speech Clause of First Amendment because the only proffered justification—that permitting access would violate Establishment Clause of the First Amendment—was without merit).

Just as the Court declined to follow the strict *Adderley* approach in *Grayned*, it also departed from the flexible *Grayned* approach in subsequent cases. In *Greer v. Spock*<sup>40</sup> and *Lehman v. City of Shaker Heights*,<sup>41</sup> the Court chose a confusing blend of formalism and balancing. In *Greer*, the Court upheld a military regulation preventing political speeches and other partisan activities within the confines of Fort Dix. The Court adopted the formalism of *Adderley* in noting that the purpose of the military base is "to train soldiers, not to provide a public forum,"<sup>42</sup> and that "[t]he notion that federal military reservations, like municipal streets and parks, have traditionally served as a place for free public assembly and communication of thoughts by private citizens is thus historically and constitutionally false."<sup>43</sup> Yet, consistent with the need for balancing recognized in *Grayned*, the Court also carefully articulated why a speech restriction is proper: "The military as such is insulated from both the reality and the appearance of acting as a handmaiden for partisan political causes or candidates. Such a policy is wholly consistent with the American constitutional tradition of a politically neutral military establishment under civilian control."<sup>44</sup> In *Lehman*, the Court

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Under a system of categorization, *Madison School District* and *Widmar* raise the question of which groups may be excluded from such forums without any scrutiny. For example, the Court's holding in *Madison School District* rested on the fact that the school district had excluded teachers from a meeting about teachers. Yet, it is clear that the school district need not have allowed someone to discuss bank deregulation at a meeting about teachers' salaries. Similarly, in *Widmar*, the school certainly need not have permitted an insurance convention to use space reserved for school groups. While these examples are extreme, a line must drawn somewhere. The issue of how to determine the scope of a "limited" public forum was raised in *Cornelius*, 473 U.S. at 788, and *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37 (1983). See *infra* notes 63 & 71.

<sup>40</sup> 424 U.S. 828 (1976).

<sup>41</sup> 418 U.S. 298 (1974).

<sup>42</sup> *Greer*, 424 U.S. at 838.

<sup>43</sup> *Id.*

<sup>44</sup> *Id.* at 839. Justice Powell explicitly followed the *Grayned* incompatibility test. He reasoned that there is a tradition of maintaining noninvolvement by the military in politics, *id.* at 845 (Powell, J., concurring), and echoed that "[t]he exclusion of political rallies and face-to-face campaigning from a military base furthers both the appearance and the reality of political neutrality on the part of the military." *Id.* at 846.

As Justice Powell's concurrence demonstrates, an examination of the competing interests, without considering whether Fort Dix is intended to be "a place for free public assembly and communication of thoughts" yields the same result

similarly straddled the fence between balancing and formalism. In upholding the city's refusal to accept political advertising on its buses, the Court first noted that "the nature of the forum and the conflicting interests involved have remained important in determining the degree of protection afforded by the [First] Amendment to the speech in question."<sup>45</sup> The Court, however, concluded that

[w]here we to hold to the contrary, display cases in public hospitals, libraries, office buildings, military compounds, and other public facilities immediately would become Hyde Parks open to every would-be pamphleteer and politician. This the Constitution does not require. No First Amendment forum is here to be found.<sup>46</sup>

Thus, after articulating arguably sufficient reasons for why the government could justify a restriction of First Amendment freedoms, the Court concluded by stating that the First Amendment is not even relevant.

The Court in *Greer* and *Lehman* seemed to want it both ways: although it was unwilling to ignore the First Amend-

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reached by the *Greer* majority. Justice Brennan used his own version of the incompatibility test to conclude that the military's ban is unconstitutional: it is not "necessarily disruptive so as significantly to impair training or defense, thereby requiring its prohibition." *Id.* at 862 (Brennan, J., dissenting). Under his approach, Justice Brennan seemed to reject any government interests except those that are physical. Accordingly, he disregarded the importance that the military appear and remain politically neutral, arguably quite a legitimate government interest.

<sup>45</sup> *Lehman v. City of Shaker Heights*, 418 U.S. 298, 302-03 (1974). A four-justice plurality reasoned that forcing the city to accept short-term political advertising would require it to forego long-term advertising, resulting in a loss of revenues; turn riders into a captive audience to the message; give rise to concerns about favoritism; and present administrative problems in determining which politicians would be permitted to buy space. *Id.* at 304. Justice Douglas relied entirely on the captive audience doctrine, arguing that riders have the right to avoid having an unwanted message thrust upon them. *Id.* at 307 (Douglas, J., concurring).

The dissent argued that one merely has to avert one's eyes to avoid unwanted visual messages and that riders are not captive to the ads on the outside of the bus. *Id.* at 320 & 321 n.12 (Brennan, J., dissenting). While this argument has a ring of truth to it, the plurality's remaining justifications are compelling. This case, better than any, demonstrates why Justice Brennan's view of the incompatibility test is unsatisfactory. *See supra* note 44. He ignored the justifications of avoiding political favoritism and selecting advertising that will generate additional revenues, and voted to strike the regulation because government would not be disrupted by the advertising. *Lehman*, 418 U.S. at 312. But in applying such a narrow standard, Justice Brennan gives short shrift to legitimate government interests.

<sup>46</sup> *Id.* at 304.

ment altogether, as demonstrated by its effort to articulate a factual justification for its holdings, the Court nevertheless was afraid of the potential consequences of adopting a balancing test and, accordingly, removed the First Amendment from consideration altogether. Because the Court rested its results on these opposing values, rather than formulating a standard that reflects a determination of what values are embodied by the First Amendment, the opinions are confusing.

### B. *The Struggle Ends: Formalism Trumps Speech*

Ultimately, the categorical language in *Adderley*, *Greer* and *Lehman* won out. Today, the Court does not consider the nature of the competing interests, but only the intended purpose of the forum.<sup>47</sup> While these three cases reasonably could have been decided the same way under either a formalistic or balancing approach, the formalistic approach—which at best lessens the importance of speech, and at worst ignores speech altogether—yields incorrect results in some of the more difficult cases decided recently.<sup>48</sup>

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<sup>47</sup> See, e.g., *Cornelius v. NAACP Legal Defense & Educ. Fund*, 473 U.S. 788 (1985) (upholding government's decision to deny certain charities access to a charitable fund drive because the government did not intend to create a public forum in which any charity could participate).

<sup>48</sup> See *infra* notes 55-77 and accompanying text. In his dissent in *Greer v. Spock*, 424 U.S. 328 (1976), Justice Brennan prophetically warned:

Realizing that the permissibility of a certain form of public expression at a given locale may differ depending on whether it is asked if the locale is a public forum or if the form of expression is compatible with the activities occurring at the locale, it becomes apparent that there is need for a flexible approach. Otherwise, with the rigid characterization of a given locale as not a public forum, there is the danger that certain forms of public speech at the locale may be suppressed, even though they are basically compatible with the activities otherwise occurring at the locale.

*Id.* at 860 (Brennan, J., dissenting). Although his assessment is correct, Justice Brennan's proposed approach—considering only those government interests that are physical in nature—is as extreme as the one he fears. See *supra* notes 44-45.

One might argue that the liberal justices, particularly Justice Brennan, were happy to categorize in early cases, until the conservative justices began to use categorization to uphold speech restrictions. It is true, in a sense, that the early cases involved categorization; *Hague's* "streets and parks" provide an example. See *supra* note 6. It is also true that Justice Brennan would like to have employed a categorization analysis, but eventually gave it up. Compare *Lehman*, 418 U.S. at 313 (Brennan, J., dissenting) ("More recently, the Court has added state capitol grounds to the list of public forums.") with *Greer*, 424 U.S. at 858 (Brennan, J.,

The bridge between the prior cases and the framework applied today came in *United States Postal Service v. Council of Greenburgh Civic Associations*.<sup>49</sup> There, the Court rejected a civic group's challenge to a prohibition on the placement of unstamped letters in a person's mailbox. At trial, the Postal Service offered three justifications for its regulation: protecting mail revenues, facilitating the efficient and secure delivery of the mail and promoting privacy of mail patrons. Unlike the district court, which had examined the competing interests involved, the Supreme Court simply determined that the government had not intended a person's mail box to be a public forum.<sup>50</sup> The Court therefore found it unnecessary to engage in the district court's "elaborate analysis."<sup>51</sup> Rather, the Court fully resurrected the formalism of *Adderley*<sup>52</sup> and implicitly rejected the *Grayned* incompatibility test,<sup>53</sup> pushing the First Amendment aside in the process.<sup>54</sup>

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dissenting) ("[T]he determination that a locale is a 'public forum' has never been erected as an absolute prerequisite to all forms of demonstrative First Amendment activity."). But Justice Brennan's method of categorization was much different than the modern Court's because his was based on balancing in the first instance. See *Lehman*, 418 U.S. at 312 (Brennan, J., dissenting) ("The determination of whether a particular type of public property or facility constitutes a 'public forum' requires the Court to strike a balance between the competing interests of the government, on the one hand, and the speaker and his audience, on the other."). Thus, while Justice Brennan did abandon categorization in its entirety in *Greer*, he never embraced it blindly. The *Lehman* dissent, like most of the early public forum cases, rests ultimately on balancing.

<sup>49</sup> 453 U.S. 114 (1981).

<sup>50</sup> *Id.* at 128-29.

<sup>51</sup> *Id.* at 132. The district court found that the civic group's right to disseminate its messages efficiently substantially outweighed the government's interests. The district court reasoned that the civic group lacked the funds to make large-scale mailings and rejected the argument that other alternatives, such as placing fliers on doors and in non-Postal Service mail boxes or making calls were adequate. *Id.* at 119-20.

<sup>52</sup> *Id.* at 129. The Court cited to its holdings in *Adderley*, *Lehman* and *Greer* and, more specifically, to the *Adderley* Court's comparison between public and private land owners. The Court went so far as to state that "the First Amendment does not guarantee access to property simply because it is owned or controlled by the government." *Id.*

<sup>53</sup> *Id.* at 131 n.7 ("What we hold is the principle reiterated by cases such as [*Adderley*] and [*Greer*] that property owned or controlled by the government which is not a public forum may be subject to a prohibition of speech, leafletting, picketing, or other forms of communication without running afoul of the First Amendment."). The Court noted, however, that it would reach the same result under either test. *Id.* at 130-31 nn.6-7.

<sup>54</sup> The Court did not need to adopt such an extreme approach to reach its

Soon after the mailbox case, the Court expressly adopted the formalistic analysis it currently follows in *Perry Education Association v. Perry Local Educators' Association*.<sup>55</sup> Under this approach, a court first must determine whether the nature of the property is such that it should be used for speech purposes—that is, whether the public property is a traditional public forum, a public forum by designation or a nonpublic forum.<sup>56</sup> The *Perry* Court defined a traditional public forum as one that has been devoted to speech by tradition or government fiat.<sup>57</sup> In a public forum, the proper scrutiny to be applied depends on whether or not the speech restriction is content-based. A content-based restriction must serve a compelling interest and be narrowly tailored to that interest. A content-neutral restriction, however, will be permitted if it passes the “reasonable time, place or manner” test, which requires a significant government interest, a regulation narrowly tailored to serve that interest and ample alternative channels of communication.<sup>58</sup>

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result. Indeed, Justice Brennan, who concurred in the judgment, noted that the government's interest in protecting revenues is substantial; he faulted the district court for focusing narrowly on the one civic association, rather than broadly on everyone across the nation who would be entitled to special treatment if the rule were invalidated as applied. *Id.* at 135 (Brennan, J., concurring). Similarly, Justice White simply noted that since there is no question that the government may impose a fee for users of the mail system, no different answer is required simply because the civic association wants to use only part of the system. *Id.* at 141 (White, J., concurring in the judgment). Neither Justice Brennan nor Justice White required a formalistic approach to achieve the Court's result.

<sup>55</sup> 460 U.S. 37 (1983).

<sup>56</sup> *Id.* at 45-46.

<sup>57</sup> *Id.* Citing to Justice Roberts' language in *Hague v. CIO*, 307 U.S. 496 (1939), see *supra* note 6, the Court noted that streets and parks are public forums by tradition. The Court has never clearly explained in what circumstance a forum becomes public by government fiat.

<sup>58</sup> *Perry*, 460 U.S. at 45. For an example of a content-based restriction, see *Lehman v. City of Shaker Heights*, 418 U.S. 298 (1974) (city accepted commercial advertising, but not political advertising), discussed *supra*, notes 45-46 and accompanying text. A viewpoint-based restriction is impermissible even in a nonpublic forum. For example, *Lehman* would have involved such an improper viewpoint restriction had the city declined to accept political advertising from only one political party. *United States Postal Serv. v. Council of Greenburgh Civic Ass'ns*, 453 U.S. 114 (1981), provides an example of a content-neutral restriction. There, the prohibition of placing unstamped mail into someone's mail box applies to everyone and is unrelated to the nature of the communication, such as charitable, business or personal.

Under the *Perry* framework, content-neutral restrictions are subject to less scrutiny than content-based restrictions because content-neutral restrictions do not



The Court defined a designated, or limited, public forum as one where the government voluntarily has opened the property to the public for speech purposes, even though it was not required to do so.<sup>59</sup> In such places, so long as the forum remains open, the same standards apply as if the forum were a traditional public forum.<sup>60</sup> Any other public property is a nonpublic forum.<sup>61</sup> There, a speech restriction need only be reasonable, so long as its purpose is not to suppress a disfavored viewpoint.<sup>62</sup>

Applying the new standard in *Perry*, in which a non-elected teachers' union was not permitted to use the school's internal mail system, the Court held that only "if by policy or by practice the Perry School District had opened its mail system for indiscriminate use by the general public, then [the non-elected union] could justifiably argue a public forum has been created."<sup>63</sup> Thus, the Court sent a clear message that a find-

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run the risk of burdening one type of speech more than another. Nevertheless, because "significant interest" and "compelling interest" are not dramatically different standards, this Comment will refer to all public forum scrutiny as strict scrutiny, without noting this distinction. The Court, however, recently has redefined the narrow tailoring element in the context of the content-neutral time, place or manner restriction. It is now a misnomer to refer to content-neutral scrutiny as strict. See *infra* notes 138-43 and accompanying text.

<sup>59</sup> Although "designated" and "limited" have different meanings, the Court uses them interchangeably in the public forum context. For examples of designated or limited public forums, see *Widmar v. Vincent*, 454 U.S. 263 (1981) and *City of Madison Joint Sch. Dist. v. Wisconsin Employment Relations Comm'n*, 429 U.S. 167 (1976), discussed *supra* note 39; see also *Heffron v. International Soc'y for Krishna Consciousness, Inc.*, 452 U.S. 640 (1981) (upholding rule requiring groups distributing literature or soliciting funds at state fair to do so only at fixed locations). In such forums, the government can limit the topic of speech, as in *Madison Joint School District* (teachers' meeting) or the function of the forum, as in *Widmar* (use by school groups) and *Heffron* (booths at a state fair).

<sup>60</sup> *Perry*, 460 U.S. at 45-46. The strict scrutiny analysis benefits not all would-be users, but only those who are of a character similar to those whom the government has granted access. See *Calash v. City of Bridgeport*, 788 F.2d 80, 82 (2d Cir. 1986). The difficult aspect of designated public forum cases is determining the character of those granted access—that is, the scope of the forum. See *infra* notes 63 & 71.

<sup>61</sup> The *Perry* Court cited *United States Postal Service v. Council of Greenburgh Civic Ass'ns*, 453 U.S. 114 (1981), as an example of a nonpublic forum, relying on the language in *Adderley v. Florida*, 385 U.S. 39, 47 (1966), treating government as a private property owner in the context of public forum analysis. *Perry*, 460 U.S. at 36.

<sup>62</sup> *Perry*, 460 U.S. at 46.

<sup>63</sup> *Id.* at 47. The school board permitted the teachers' elected representative union to use the system, which had been set up to facilitate school-related matters. The rival union argued that the mailboxes had become a limited public fo-

ing of traditional or designated public forum status would be the exception. Although the school had opened a forum for use by a variety of groups, because it had not opened the system to the public generally—that is, because it maintained its option to exclude some—the Court found the system to be a nonpublic forum. As a result, the school, within reason, could exclude anyone.

The Court solidified and refined the *Perry* approach in *Cornelius v. NAACP Legal Defense Fund*.<sup>64</sup> *Cornelius* involved the Combined Federal Campaign (“CFC”), an annual charitable fund-raising drive in the federal workplace, whereby federal employees may contribute money by designating particular charities. Several charities were not permitted to participate, ostensibly because they used contributions for litigation and lobbying, rather than to provide direct social services. In upholding the restriction, the Court found the CFC to be a nonpublic forum.<sup>65</sup> The Court stressed that it “has looked to

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rum, because the school had granted periodic access to non-school related groups, such as the Cub Scouts, YMCA and other civic and church organizations. Justice White, writing for the Court, rejected this argument, finding the mail system to be a nonpublic forum because the school district had not “opened its mail system for indiscriminate use by the general public.” *Id.* The Court also reasoned that even if granting access to the non-school related groups did create a limited public forum, the forum extended only to similar civic organizations. *Id.* at 48. Having categorized the forum as nonpublic, the Court therefore upheld the regulation as reasonable.

Yet, whether the rival group must be granted access if the system were a limited public forum should depend on the objective purpose of the forum. It first must be determined whether the forum provides access only for matters involving school business, for union membership to debate policy or for all groups related to the students’ education. Under the first category, and possibly the third, it is more reasonable to deny the unelected union access. Under the second, it is not. Had the Court found the system to be a limited public forum, it would have had to perform such an exacting analysis. *See supra* notes 59-60 and accompanying text. The Court, however, alluded to what its conclusion would have been without conducting any such analysis. It did not need to, because it found the forum to be nonpublic. It was much easier for the Court simply to rely on labels, rather than to examine closely the objective nature of the forum or, better, the competing interests involved.

<sup>64</sup> 473 U.S. 788 (1985).

<sup>65</sup> The Court first had to determine whether the CFC itself or the federal workplace in general was the appropriate forum to analyze. It held that the CFC was the relevant forum even though it was not tangible property, because the charities sought access to the CFC in particular, but not the federal workplace in general. *Id.* at 800-02.

Justice O’Connor wrote for the Court in *Cornelius*. The standard that she

the policy and practice of the government to ascertain *whether it intended to designate a place not traditionally open to assembly and debate*. The Court has also examined the nature of the property and its compatibility with expressive activity to *discern the government's intent*.<sup>66</sup> The Court further emphasized that it "will not find that a public forum has been created in the face of clear evidence of contrary intent, nor will [the Court] infer that the government intended to create a public forum when the nature of the property is inconsistent with expressive activity."<sup>67</sup> Applying this standard, the Court noted that

neither [the Government's] practice nor its policy is consistent with an intent to designate the CFC as a public forum open to all tax exempt organizations . . . . The Government's consistent policy has been to limit participation in the CFC to 'appropriate' voluntary agencies . . . . Such selective access, unsupported by evidence of a purposeful designation for public use, does not create a public forum.<sup>68</sup>

*Cornelius* emphasized that the government's intent is determinative of whether a forum will be open to speech. Additionally, the Court introduced a severely altered incompatibility test. Previously under that test, once speech was found to be compatible with the forum, the speech would be permitted.<sup>69</sup>

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articulated in *Cornelius*—focusing solely on government intent rather than the objective attributes of a forum—is at odds with the approach she took in her concurring opinion in *International Soc'y for Krishna Consciousness, Inc. v. Lee*, 112 S. Ct. 2711 (1992). See *infra* notes 100-05 & 135 and accompanying text.

<sup>66</sup> *Cornelius*, 473 U.S. at 802 (emphasis added).

<sup>67</sup> *Id.* at 803.

<sup>68</sup> *Id.* at 804-05. The justification—that it is best to support charities that spend directly on the needy, instead of on litigation which may never achieve its goal—met the Court's reasonableness standard. The Court also cited *Lehman* and *Greer* for the proposition that avoiding political favoritism is a valid justification. But how it is reasonable for the government, rather than the employees, to determine which charities should be supported is unclear. Even more difficult to understand is how denying access to some charitable organizations, but not others, avoids the appearance of favoritism. Regardless of whether one agrees that the government's decision was reasonable, however, the Court should have found the CFC to be a limited public forum. See *infra* note 71.

Although willing to uphold the restriction as reasonable, the Court was apparently troubled by its decision. It remanded the case for a determination of whether the justification was in fact a pretext to mask viewpoint censorship. *Cornelius*, 473 U.S. at 812-13.

<sup>69</sup> See *Grayned v. City of Rockford*, 408 U.S. 104 (1972).

Now, a finding of compatibility does not entitle the speaker to access, but is merely evidence of the government's intent to open the forum for speech purposes. By making intent the linchpin of public forum scrutiny, the Court adopted an analysis very similar to the extreme approach of *Adderley v. Florida*;<sup>70</sup> government regulation of speech on public property is not subject to First Amendment constraints, except in the rare circumstance when a traditional public forum is present or when the government intends to open the forum fully for speech.<sup>71</sup>

The Court next extended the *Cornelius* intent test to what previously was considered to be a traditional public forum—a

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<sup>70</sup> 385 U.S. 39 (1966); see *supra* notes 27-31 and accompanying text.

<sup>71</sup> As in *Perry*, the *Cornelius* Court failed to address meaningfully the scope of a limited public forum. Considering the CFC objectively, it would appear that the government had opened a forum for charitable solicitation, thereby creating a designated public forum in which any charity could participate. Under the Court's intent-driven test, however, the forum was labeled nonpublic because the government did not intend for all types of charities to participate. Justice Blackmun's dissent demonstrates how far the Court had gone:

I cannot accept . . . the Court's circular reasoning that the CFC is not a limited public forum because the Government intended to limit the forum to a particular class of speakers . . . . In essence, the Court today holds that the First Amendment's guarantee of free speech and assembly, a fundamental principle of the American government, reduces to this: when the Government acts as a holder of property other than streets, parks, and similar places, the Government may do whatever it reasonably intends to do, so long as it does not intend to suppress a particular viewpoint. The Court's analysis transforms the First Amendment into a mere ban on viewpoint censorship, ignores the principles underlying the public forum doctrine, flies in the face of the decisions in which the Court has identified property as a limited public forum, and empties the limited-public-forum concept of all its meaning.

*Cornelius*, 473 U.S. at 813-15 (Blackmun, J., dissenting) (citation omitted). Justice Blackmun further criticized the Court for simply labeling the property and dispensing with the balancing. He noted that

[i]f the Government does not create a limited public forum unless it intends to provide an 'open forum' for expressive activity, and if the exclusion of some speakers is evidence that the Government did not intend to create such a forum, no speaker challenging denial of access will ever be able to prove that the forum is a limited public forum.

*Id.* at 825 (citation omitted).

Indeed, a balancing approach would yield different results. Once the government has opened a channel for charities to solicit contributions from federal employees, it is practically impossible to conceive of a legitimate interest for denying certain charities access to the employees on the basis of the charities' use of the funds. See *infra* notes 167-70 and accompanying text.

public sidewalk. In *United States v. Kokinda*,<sup>72</sup> the Postal Service banned solicitation on the sidewalk outside of a post office and next to the parking lot. Although the Court had previously and emphatically held that streets are traditional public forums,<sup>73</sup> Justice O'Connor, writing for a plurality of four, held that the post office sidewalk is a nonpublic forum.<sup>74</sup> The plurality reasoned that "the postal sidewalk was constructed solely to assist postal patrons to negotiate the space between the parking lot and the front door, not to facilitate the daily commerce and life of the neighborhood or city."<sup>75</sup> The plurality also noted that "[t]he Postal Service has not expressly dedicated its sidewalks to any expressive activity."<sup>76</sup> Thus, after

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<sup>72</sup> 497 U.S. 720 (1990).

<sup>73</sup> *Frisby v. Schultz*, 487 U.S. 474, 481 (1988) (Justice O'Connor writing for the Court) ("No particularized inquiry into the precise nature of a specific street is necessary; all public streets are held in public trust and are properly considered public fora."); *United States v. Grace*, 461 U.S. 171, 177 (1983) (Justice White writing for the Court) ("[P]ublic places historically associated with the free exercise of expressive activities, such as streets, sidewalks, and parks, are considered, without more, to be public forums.").

<sup>74</sup> The plurality also included Chief Justice Rehnquist and Justices White and Scalia. Justice Kennedy joined in the judgment. Justice Brennan, joined in part by Justice Blackmun and in full by Justices Marshall and Stevens, dissented. Justice O'Connor's *Kokinda* opinion, like her *Cornelius* opinion, is at odds with her opinion in *ISKCON*. See *infra* notes 100-05 & 135 and accompanying text.

<sup>75</sup> *Kokinda*, 497 U.S. at 728.

<sup>76</sup> *Id.* at 730. No sidewalk is dedicated to expressive activity; the purpose of a street is to facilitate traffic, not speakers. Yet, this does not explain why the First Amendment ceases to protect those who wish to use the street for speech purposes. See *Schneider v. New Jersey*, 308 U.S. 147, 161 (1939) (recognizing that the purpose of streets is to facilitate movement, but holding that the First Amendment nevertheless protects those who use streets for speech purposes). Surely the *Kokinda* plurality did not mean to suggest that no street can ever be a public forum. This absurd conclusion could be avoided by considering not whether the government has dedicated a street for speech purposes, but whether the objective nature of the street requires a curtailment of First Amendment activities.

After holding the Post Office sidewalk to be a nonpublic forum, the plurality reasoned that because solicitation potentially could disrupt Postal business, the restriction was reasonable. Justice Kennedy provided the fifth vote, upholding the ban as a valid time, place or manner restriction. He did not decide whether the sidewalk was a public forum, but alluded to his concern that the public forum doctrine might not be working. *Id.* at 737 (Kennedy, J., concurring in judgment). Under the time, place or manner test,

the government may impose reasonable restrictions on the time, place, or manner of protected speech, provided the restrictions "are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant government interest, and that they leave open ample alternative channels of communication."

*Kokinda*, only parks and those streets that are indistinguishable from the country's Main Streets remain within the ambit of the First Amendment.

In *Perry*, *Cornelius* and *Kokinda*, the speech interests were ignored because the Court focused on how the forum should be labeled rather than on whether the government's need to operate efficiently outweighed the particular challenger's First Amendment interests. Nevertheless, the Court provided governments and courts with a very clear, workable standard to apply. With the possible exception of major streets and parks, which historically have been considered traditional public forums, virtually any public property must be found to be a nonpublic forum unless the government intended to open the forum fully for expressive activity.<sup>77</sup> It was against this back-

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Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989) (quoting *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984)). Applying this test, Justice Kennedy found significant the government's interest in maintaining an efficient postal system. He found the ban narrowly tailored because it applied only to solicitation for the immediate payment of money, but did not prevent distribution of literature soliciting contributions. *Kokinda*, 497 U.S. at 739.

Justice Kennedy used the same argument in *ISKCON*. Although this Comment later examines the use of the time, place or manner restriction to justify a complete ban of expressive activity, *see infra* note 142, it must be noted here that a true time, place or manner restriction should allow some speech. For example, the Postal Service could reasonably impose a restriction that allows only one or two people to solicit, and not during lunch hour and at least five feet away from the door. Such a regulation addresses the Postal Service's concerns without completely banning a form of expressive activity.

The dissent found the sidewalk to be a traditional public forum, and would have invalidated the restriction. *Kokinda*, 497 U.S. at 740 (Brennan, J., dissenting).

<sup>77</sup> The circuit courts have had no problem applying *Cornelius* to cases not involving streets. *See, e.g.,* *Young v. New York City Transit Auth.*, 903 F.2d 146, 161-62 (2d Cir.), *cert. denied*, 498 U.S. 984 (1990) (finding subway cars to be a nonpublic forum, because city intended to permit only charities, but not beggars, to ask for money); *Barnard v. Chamberlain*, 897 F.2d 1059, 1065 (10th Cir.), *cert. denied*, 496 U.S. 907 (1990) (finding bar journal that solicits letters to the editor to be a nonpublic forum, because there was no intent to give up editorial discretion); *Estiverne v. Louisiana State Bar Ass'n*, 863 F.2d 371, 381 (5th Cir. 1989) (same); *Kaplan v. County of Los Angeles*, 894 F.2d 1076, 1080 (9th Cir. 1990) (voter's pamphlet intended to be a limited public forum for candidates to address their views). At the risk of belaboring the point, none of these cases required the *Cornelius* model to achieve the result; a simple balancing or incompatibility test would yield the same result.

Before *Kokinda*, the circuits had split on whether non-traditional streets were public or nonpublic forums. *See, e.g.,* *Community for Creative Non-Violence v. Turner*, 893 F.2d 1387 (D.C. Cir. 1990) (street above transit authority a public

ground that the Supreme Court reexamined the public forum doctrine in *ISKCON*.

## II. HOW DOES A JUDGE APPROACH *ISKCON*? LET US COUNT THE WAYS

### A. *The Lower Court Opinions*

*International Society of Krishna Consciousness, Inc. v. Lee* ("*ISKCON*")<sup>78</sup> involved a challenge to a regulation imposed by the Port Authority of New York and New Jersey banning the

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forum); *Hale v. Department of Energy*, 806 F.2d 910, 915-16 (9th Cir. 1986) (road leading to nuclear testing site and parking area designated for demonstrations a nonpublic forum); *United States v. Nelsky*, 799 F.2d 1485, 1489 (11th Cir. 1986) (ingress and egress walkways at post office a nonpublic forum; sidewalks around building a public forum); *ACORN v. City of Phoenix*, 798 F.2d 1260, 1265-66 (9th Cir. 1986) (busy intersection open to motor vehicles a public forum); *United States v. Bjerke*, 796 F.2d 643, 648-49 (3d Cir. 1986) (post office sidewalks a nonpublic forum).

After *Kokinda* was decided, the forum categorization of a street depended on how the circuit court approaches plurality decisions. *See, e.g., Jacobsen v. United States*, No. 89-16054, 1992 U.S. App. LEXIS 15217, at \*11-15 (9th Cir. July 7, 1992) (*Kokinda* plurality not viewed as law, but circuit's own law in accord with plurality; post office sidewalk a nonpublic forum), *as amended*, 993 F.2d 649 (9th Cir. 1992) (declining to follow *ISKCON*; *see infra* note 153); *Longo v. United States Postal Service*, 953 F.2d 790, 794 (2d Cir.), *vacated*, 113 S. Ct. 31 (1992) (*Kokinda* plurality not viewed as law; unnecessary to categorize postal sidewalk's status, because ban on political campaigning valid as time, place or manner regulation); *United States v. Gilbert*, 920 F.2d 878, 884-85 (11th Cir. 1991) (*Kokinda* plurality cited as law; portico occasionally used for demonstrations a nonpublic forum, but unenclosed plaza area a public forum). *Longo* was vacated in light of the Court's recent decision in *Burson v. Freeman*, 112 S. Ct. 1846 (1992), which upheld a ban on campaigning within one hundred feet of a voting area to protect the integrity of self governance. In reconsidering *Longo*, the Second Circuit found *Burson* inapposite and reaffirmed its original holding. *Longo*, 983 F.2d 9 (2d Cir. 1992), *cert. denied*, 113 S. Ct. 2994 (1993). Rather than rely on the time, place or manner analysis, however, the Second Circuit adopted *Kokinda* as law—perhaps in light of the Supreme Court's recent decision in *ISKCON*—and held the postal sidewalk to be a nonpublic forum. The court chose not to analyze the fractured *ISKCON* decision in any detail.

Finally, there are some courts that refuse to follow closely the intent-driven *Cornelius-Kokinda* model. *See, e.g., Henderson v. Lujan*, 964 F.2d 1179, 1183 (D.C. Cir. 1992) ("[G]overnment cannot establish the inconsistency [between dedicated use of property and speech activities] simply by declaring it and by enforcing restrictions on speech . . . . The Service's speech regulations, then, regardless of their longstanding character, do not undermine the evidence supporting our conclusion that the sidewalks [near the Vietnam Memorial] are a public forum.")

<sup>78</sup> 112 S. Ct. 2701 (1992).

distribution of literature and solicitation of funds at New York and New Jersey airports.<sup>79</sup> ISKCON is a not-for-profit religious corporation whose members must perform the ritual "sankirtan," which requires the members to go into public places, disseminate religious literature and solicit funds.<sup>80</sup> ISKCON challenged the regulation as violating its members' First Amendment right to engage in speech activities in open, public property. It contended that airport terminals are traditional public forums, and that the Port Authority's regulations could not survive strict scrutiny.<sup>81</sup> Following the uniform holdings of courts that previously had considered the public forum status of airports,<sup>82</sup> the district court agreed with ISKCON's analysis and struck down the regulations as unconstitutional.<sup>83</sup>

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<sup>79</sup> The regulation provides:

The following conduct is prohibited within the interior areas of buildings or structures at an air terminal if conducted by a person to or with passers-by in a continuous or repetitive manner:

- (a) The sale or distribution of any merchandise, including but not limited to jewelry, food stuffs, candles, flowers, badges and clothing.
- (b) The sale or distribution of flyers, brochures, pamphlets, books or any other printed or written material.
- (c) The solicitation and receipt of funds.

*Id.* at 2704.

The airports at issue were Kennedy International Airport, LaGuardia Airport and Newark International Airport. In 1986, these airports served almost 79 million travelers, nearly eight percent of the domestic market and over one-half of the trans-Atlantic market. *Id.* at 2703.

<sup>80</sup> *Id.* at 2703.

<sup>81</sup> ISKCON did not seek access to areas beyond the security gates, and the Port Authority did not prevent them from conducting sankirtan outside the airport. Thus, only the airport terminals themselves were the subject of this litigation. *Id.* at 2704 & n.1.

<sup>82</sup> No circuit court had held an airport terminal to be a nonpublic forum. See *Jamison v. City of St. Louis*, 828 F.2d 1280, 1283 (8th Cir. 1987), *cert. denied*, 485 U.S. 987 (1988); *Jews for Jesus, Inc. v. Board of Airport Comm'rs of Los Angeles*, 785 F.2d 791, 795 (9th Cir. 1986), *aff'd on other grounds*, 482 U.S. 569 (1987); *U.S. South West Africa/Namibia Trade & Cult. Coven. v. United States*, 708 F.2d 760, 764 (D.C. Cir. 1983); *Fernandes v. Limmer*, 663 F.2d 619, 627 (5th Cir. 1981), *cert. dismissed*, 458 U.S. 1124 (1982); *Chicago Area Military Project v. City of Chicago*, 508 F.2d 921, 926 (7th Cir.), *cert. denied*, 421 U.S. 992 (1975).

<sup>83</sup> *ISKCON*, 721 F. Supp. 572, 575 (S.D.N.Y. 1989) (Lowe, J.). The district court reasoned that airport terminals are analogous to public streets because they are open to the public, lined with shops and used as thoroughfares. Therefore, the court found the terminals to be public forums. This decision was justified as the Supreme Court had not yet decided *United States v. Kokinda*, 497 U.S. 720 (1990), which requires courts to consider the purpose of streets before determining



The Second Circuit, which had not previously considered the public forum status of airport terminals, affirmed the district court in part and reversed in part, agreeing that the ban on distribution of literature was unconstitutional, but upholding the ban on solicitation of funds.<sup>84</sup> While recognizing that other circuits had held airport terminals to be public forums because of their similarity to streets,<sup>85</sup> the court determined that *Kokinda*, the most recent Supreme Court decision addressing the public forum doctrine, had altered the analysis.<sup>86</sup> The Second Circuit understood the *Kokinda* plurality to require a court to examine the purpose of a street before determining its category, rather than label it as a public forum *per se*.<sup>87</sup> But because *Kokinda* was a plurality decision, the Second Circuit chose not to determine for itself the public forum status of the airports, but instead predicted how it believed the justices would vote if the *ISKCON* decision were further reviewed.<sup>88</sup> Based on its predictions, the court affirmed the dis-

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their forum status. Under *Kokinda*, the fact that terminals are analogous to a major street used for general purposes is irrelevant. The court found that the government's proffered justifications, avoiding crowd control and preventing fraud, were not sufficiently compelling to justify a "blanket prohibition." *ISKCON*, 925 F. Supp. at 579.

<sup>84</sup> *International Soc'y for Krishna Consciousness, Inc. v. Lee*, 925 F.2d 576 (2d Cir. 1991). Judge Winter, joined by Judge Miner, wrote for the court. Chief Judge Oakes filed a separate opinion concurring in part and dissenting in part.

<sup>85</sup> See *supra* note 82.

<sup>86</sup> *ISKCON*, 925 F.2d at 580.

<sup>87</sup> *Id.* at 580-81. *Cornelius v. NAACP Legal Defense & Ed. Fund*, 473 U.S. 788 (1985), required this purpose inquiry for other forums. Until *Kokinda* was decided, however, the Court had broadly pronounced all streets to be public forums without engaging in an inquiry of the particular purpose behind the street. *Kokinda* extended the intent-inquiry to all streets distinguishable from Main Street. See *supra* notes 72-76 and accompanying text.

<sup>88</sup> The Second Circuit predicted that the *Kokinda* plurality would find the airports to be nonpublic forums and vote to uphold both bans. The court counted the four dissenting justices as holding the airports to be traditional public forums and voting to strike both bans. Finally, the court predicted that Justice Kennedy would vote to uphold the solicitation ban as a time, place or manner restriction. But the court reasoned that because Justice Kennedy in *Kokinda* had alluded to the importance of protecting speech, and seemed to rely on the extreme disruptive effects of solicitation in upholding the Postal Service's regulation, he would vote in this case to strike the distribution ban. *ISKCON*, 925 F.2d at 581-82.

Chief Judge Oakes dissented in part; he would have invalidated both bans. He questioned the precedential value of the *Kokinda* plurality and argued that, in any event, *Kokinda* required the court to consider objective factors as well as intent. Agreeing with the district court's comparison of terminals with major

strict court's decision striking the distribution ban, but reversed its decision striking the solicitation ban.<sup>89</sup> The Port Authority and ISKCON each appealed the adverse portion of the court's decision, and the Supreme Court granted *certiorari* on both petitions.<sup>90</sup>

## B. *The Supreme Court Opinions*

The Supreme Court affirmed the Second Circuit's result in a series of individual opinions. Ultimately, six justices voted to uphold the solicitation ban, five of whom found airport terminals to be nonpublic forums.<sup>91</sup> A different group of five justices voted to strike the distribution ban, only four of whom found the airport terminals to be traditional public forums.<sup>92</sup> Because the Court was so divided, the various opinions are described separately below.

### 1. The Opinions of Chief Justice Rehnquist

Chief Justice Rehnquist's majority opinion upholding the solicitation ban held that airport terminals are nonpublic fo-

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streets, Chief Judge Oakes concluded that the airport terminals must be considered public forums. *Id.* at 582-87 (Oakes, C.J., dissenting). Chief Judge Oakes's reading of *Kokinda* was far too broad. It is the purpose of the forum that must dominate the analysis.

<sup>89</sup> *Id.* at 581-82.

<sup>90</sup> *ISKCON*, 112 S. Ct. 855 (1992).

<sup>91</sup> *International Soc'y for Krishna Consciousness, Inc. v. Lee*, 112 S. Ct. 2701 (1992) (opinion of the Court delivered by Chief Justice Rehnquist, and joined by Justices White, O'Connor, Scalia and Thomas, upholding the solicitation ban); *International Soc'y for Krishna Consciousness, Inc. v. Lee* and *Lee v. International Soc'y for Krishna Consciousness, Inc.*, 112 S. Ct. 2711 (1992) (O'Connor, J., concurring); *id.* at 2715 (Kennedy, J., concurring in the judgment); *see also id.* at 2724 (Souter, J., joined by Blackmun and Stevens, JJ., dissenting).

This case came to the Court on two petitions for *certiorari*, and was decided as two companion cases. The two decisions of the Court are reported separately, and they are both followed by the separate opinions of Justices O'Connor, Kennedy and Souter. For convenience and ease of reading, this Comment will refer to each opinion as "*ISKCON*, 112 S. Ct. at \_\_\_\_ (opinion of \_\_\_\_)."

<sup>92</sup> *Lee v. International Soc'y for Krishna Consciousness, Inc.*, 112 S. Ct. 2709 (1992) (per curiam opinion striking ban on distribution); *ISKCON*, 112 S. Ct. at 2711 (O'Connor, J., concurring in the judgment); *id.* at 2715 (Kennedy, J., concurring in the judgment); *id.* at 2724 (Souter, J., joined by Blackmun and Stevens, JJ., concurring in the judgment); *see also ISKCON*, 112 S. Ct. at 2709 (Rehnquist, C.J., joined by White, Scalia and Thomas, JJ., dissenting).

rooms, thereby requiring that speech restrictions be subject to a deferential reasonableness review. The Court stated that "[w]here government is acting as a proprietor, managing its internal operations, rather than acting as lawmaker with the power to regulate or license, its action will not be subjected to the heightened review to which its actions as a lawmaker may be subject."<sup>93</sup> The Court noted that airports are relatively new and, thus, cannot be said to have been traditionally used for expressive activity.<sup>94</sup> In addition, it noted that because airports provide a service to travelers, neither their purpose in fact nor their intended purpose could be to provide a forum for expression.<sup>95</sup> Therefore, the Court concluded that the airport terminals are nonpublic forums.

Having found the terminals to be nonpublic forums, the Court easily upheld the solicitation ban as reasonable.<sup>96</sup> The Court determined that solicitation impedes traffic, which can cause passengers to miss their flights. It further reasoned that those soliciting funds could subject passersby to duress or even fraud. Finally, the Court noted that victims of fraud, who are likely rushing to catch a scheduled flight, would not have time to report the wrongdoers to the authorities.<sup>97</sup>

Chief Justice Rehnquist also filed a brief opinion dissenting from the Court's companion decision striking the distribution ban.<sup>98</sup> He would have upheld the ban because distribution of literature presents the same congestion problem as solicitation. The ban, therefore, is similarly a reasonable regulation of a nonpublic forum.<sup>99</sup>

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<sup>93</sup> *ISKCON*, 112 S. Ct. at 2705 (opinion of Rehnquist, C.J., upholding the solicitation ban).

<sup>94</sup> *Id.* at 2706.

<sup>95</sup> *Id.* at 2707. *ISKCON* had argued that because airports are similar to streets both in appearance, as they are lined with shops and restaurants, and in function, as people are traveling from one point to another, they therefore should be treated as such for First Amendment purposes. The Court rejected this argument by stating that "[a]lthough many airports have expanded their function beyond merely contributing to efficient air travel, few have included among their purposes the designation of a forum for solicitation and distribution activities." *Id.* at 2708.

<sup>96</sup> *Id.* at 2708.

<sup>97</sup> *Id.*

<sup>98</sup> Justices White, Scalia and Thomas joined in the Chief Justice's dissent. Justice O'Connor, who had joined the Chief Justice in upholding the solicitation ban, voted to strike the distribution ban. See *ISKCON*, 112 S. Ct. at 2711.

<sup>99</sup> *ISKCON*, 112 S. Ct. at 2710 (opinion of Rehnquist, C.J., dissenting from the

## 2. The Opinion of Justice O'Connor

Justice O'Connor agreed with the Court that airports are nonpublic forums and voted to uphold the solicitation ban.<sup>100</sup> Like the majority, Justice O'Connor applied an intent-based inquiry and determined that neither the tradition nor the purpose of airports has been to provide a forum for expression.<sup>101</sup> However, Justice O'Connor took a different approach to assessing the reasonableness of the restrictions than had Chief Justice Rehnquist. As a result, she voted to strike the distribution ban.<sup>102</sup>

While Justice O'Connor agreed with the Court that the solicitation ban was reasonable in order to prevent congestion and potential fraud, she nevertheless found the ban on distribution to be unreasonable, largely due to the presence of shops and restaurants.<sup>103</sup> She noted that distributing literature, unlike solicitation, does not force people to stop and reasoned that "[w]ith the possible exception of avoiding litter, it is difficult to point to any problems intrinsic in the act of leafletting *that would make it naturally incompatible with a large, multipurpose forum such as those at issue here.*"<sup>104</sup> She then reiterated, "[b]ecause I cannot see how peaceful pamphleteering is incompatible with the multipurpose environment of the Port Authority airports, I cannot accept that a total ban on that activity is reasonable without an explanation as to why such a restriction preserves the property for the several uses to which

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decision to strike the distribution ban).

<sup>100</sup> *ISKCON*, 112 S. Ct. at 2711 (opinion of O'Connor, J.). Indeed, Justice O'Connor joined Chief Justice Rehnquist's majority opinion upholding the solicitation ban.

<sup>101</sup> *Id.* at 2711.

<sup>102</sup> *Id.* at 2713.

<sup>103</sup> Justice O'Connor wrote:

[T]he wide range of activities promoted by the Port Authority is no more directly related to facilitating air travel than are the types of activities in which ISKCON wishes to engage. In my view, the Port Authority is operating a shopping mall as well as an airport. The reasonableness inquiry, therefore, is not whether the restrictions on speech are consistent with preserving the property for air travel, but whether they are reasonably related to maintaining the multipurpose environment that the Port Authority has deliberately created.

*Id.* at 2713 (citations omitted).

<sup>104</sup> *Id.* at 2714 (emphasis added) (citations omitted).

it has been put."<sup>105</sup>

### 3. The Opinion of Justice Kennedy

Justice Kennedy, like Justice O'Connor, voted to uphold the ban on solicitation and to strike the ban on distribution.<sup>106</sup> But the similarity ends there. Disagreeing with the intent-based inquiry followed by Chief Justice Rehnquist and Justice O'Connor, Justice Kennedy proclaimed, "[o]ur public forum doctrine ought not to be a jurisprudence of categories rather than ideas or convert what once was an analysis protective of expression into one which grants the government authority to restrict speech by fiat."<sup>107</sup> He criticized the Court's analysis for leaving the government with the constitutional authority to limit speech merely by articulating a non-speech purpose, and reminded the Court that the First Amendment is a limit on government power.<sup>108</sup> He further stressed that the public forum doctrine should preserve the right to speak where the property is suitable for expression, and that the government's purpose cannot be determinative, otherwise all streets would cease to be public forums.<sup>109</sup> Moreover, Justice Kennedy discussed modern society's particular need for a less rigid approach:

In a country where most citizens travel by automobile, and parks all too often become locales for crime rather than social intercourse, our failure to recognize the possibility that new types of government property may be appropriate forums for speech will lead to a serious curtailment of our expressive activity.<sup>110</sup>

Justice Kennedy proposed a new labeling test which would focus on "the actual, physical characteristics and uses of the property," rather than the intended use, and would consider the compatibility between the forum and speech.<sup>111</sup> Under

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<sup>105</sup> *Id.* (citations omitted).

<sup>106</sup> 112 S. Ct. at 2715 (opinion of Kennedy, J.).

<sup>107</sup> *Id.*

<sup>108</sup> *Id.* at 2716.

<sup>109</sup> *Id.* at 2717.

<sup>110</sup> *Id.*

<sup>111</sup> *Id.* at 2716-18. Justice Kennedy wrote:

If the objective, physical characteristics of the property at issue and the actual public access and uses which have been permitted by the government indicate that expressive activity would be appropriate and compati-

this test, various factors would be important, including the physical characteristics of the forum, whether the government had permitted broad access to the property and whether expressive activity would tend to interfere with the uses of the forum in a significant way. In making the determination, Justice Kennedy would consider expression in general, rather than the particular expression at issue.<sup>112</sup>

Applying this new test, Justice Kennedy concluded that airport terminals are public forums because they are similar to public streets in terms of characteristics, access and the ability to control problems created by those using the terminals for speech purposes with time, place or manner regulations. Having found the terminals to be public forums, Justice Kennedy carefully scrutinized the validity of the restrictions. He reasoned that a complete ban on distribution of literature—an activity that lies at the heart of the First Amendment—did not further a sufficiently significant government interest. Therefore, he found the ban to be unconstitutional.<sup>113</sup> At the same time, however, Justice Kennedy voted to uphold the ban on solicitation of funds as a valid time, place or manner restriction because the restriction is directed only at the immediate exchange of money, rather than all solicitation.<sup>114</sup> He explained that the regulation “does not burden any broader category of speech . . . than is the source of the evil sought to be avoid-

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ble with those uses, the property is a public forum . . . . Courts must also consider the availability of reasonable time, place, or manner restrictions in undertaking this compatibility analysis. The possibility of some theoretical inconsistency between expressive activities and the property's uses should not bar a finding of a public forum, if those inconsistencies can be avoided through simple and permitted regulations.

*Id.* at 2718.

<sup>112</sup> *Id.* For example, Justice Kennedy would ask whether speech activities in general are compatible with airport terminals, rather than whether solicitation or distribution in particular is compatible with the terminals. Thus, the airport terminals will be labeled once for all expressive activity. If a different form of expression arises in a later case, the labeling process has already been completed.

<sup>113</sup> Justices Blackmun, Stevens and Souter joined this portion of Justice Kennedy's opinion.

<sup>114</sup> *ISKCON*, 112 S. Ct. at 2721 (opinion of Kennedy, J.). The statute is quoted *supra* note 79. A time, place or manner restriction must be content-neutral, must be narrowly tailored to serve a significant government interest and must leave open ample alternative channels of communication. See *supra* note 76. No other justice joined Justice Kennedy in his discussion of the solicitation ban.

ed."<sup>115</sup> Further, Justice Kennedy noted that the ISKCON members could continue to explain their message and distribute preaddressed envelopes as a means of solicitation. Therefore, the regulation provided for ample alternative channels of communication.<sup>116</sup>

#### 4. The Opinion of Justice Souter

Justice Souter concurred in the judgment striking the ban on distribution, but dissented from the decision to uphold the ban on solicitation.<sup>117</sup> He joined in the portion of Justice Kennedy's opinion criticizing the Court's present use of the public forum doctrine and proposing a new labeling test. Further, Justice Souter added that if history must be at the center of the Court's analysis—ignoring the fact that city streets are not the only focus of community life—the Court "might as well abandon the public forum doctrine altogether."<sup>118</sup>

Justice Souter agreed with Justices Kennedy and O'Connor that the peaceful distribution of literature is compatible with airport terminals and, therefore, cannot be banned. Justice Souter also determined, however, that the solicitation ban was unconstitutional, disagreeing that the ban passed as a time, place or manner restriction. In support of his conclusion, Justice Souter cited cases in which the Court had disallowed a complete ban on solicitation in spite of the government's legitimate need to prevent fraud or duress.<sup>119</sup> He also questioned

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<sup>115</sup> *ISKCON*, 112 S. Ct. at 2722 (opinion of Kennedy, J.).

<sup>116</sup> Justice Kennedy also determined that the sale of literature cannot be banned. *Id.* at 2723. He reasoned that the government's interest in banning the sale of literature is much less important than that of banning solicitation, and found the ban to be less than narrowly tailored because it does not restrict *only* the immediate receipt of funds. He also noted that the sale of literature must have the broadest First Amendment protection.

Interestingly, the *per curiam* opinion announcing the judgment striking the ban on distribution makes no mention of the sale portion of the same statute. *See ISKCON*, 112 S. Ct. at 2710. Further, the opinions of Chief Justice Rehnquist, Justice O'Connor and the lower courts also fail to address anything more than distribution and solicitation. It is unclear that ISKCON even attempted to sell literature, and Justice Kennedy may have addressed this issue solely for the sake of completeness.

<sup>117</sup> *ISKCON*, 112 S. Ct. at 2724 (opinion of Souter, J.). Justices Blackmun and Stevens joined in Justice Souter's opinion.

<sup>118</sup> *Id.*

<sup>119</sup> *See, e.g., Schaumburg v. Citizens For A Better Env't*, 444 U.S. 620, 636

the significance of the purported interest as there was no evidence of fraud in the record. Finally, Justice Souter concluded that regardless of the adequacy of the government interests, the ban was not sufficiently tailored to those interests to survive as a time, place or manner regulation.<sup>120</sup> He noted that people can easily walk by, no matter how insistent those soliciting may be, and that vigorous enforcement of anti-fraud legislation would provide a less restrictive means of dealing with that problem.<sup>121</sup> Additionally, Justice Souter did not find handing out preaddressed envelopes to be an ample alternative channel of communication.<sup>122</sup>

### III. A FAILED PUBLIC FORUM DOCTRINE

*ISKCON* leaves lower courts, governments and, most importantly, anyone who hopes to disseminate a message with an unworkable doctrine that essentially abandons the First Amendment. Before *ISKCON*, an unsatisfactory public forum doctrine seemed to be firmly in place. First, a court ascertained the intent of the government. Unless the government intended to open a forum fully for speech purposes, the forum was designated as nonpublic. Then, regulations of nonpublic forums were subject to a deferential review, while regulations of public forums were subject to strict scrutiny.<sup>123</sup> The only arguable benefit of the doctrine was that it provided a clear, bright-line rule; there was little room for individual judges or justices to impose their own preferences.<sup>124</sup> The *ISKCON* decision, however, leaves the public forum doctrine in disarray, because the Court was unable to agree on any consistent application of the doctrine. Further, while it is difficult to articulate any underlying principle of the public forum doctrine after *ISKCON*, it seems clear that a majority of the Court will continue to avoid giving fair consideration to the First Amendment interests at stake.

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(1980); *Riley v. National Fed'n of the Blind*, 487 U.S. 781, 792 (1987).

<sup>120</sup> *ISKCON*, 112 S. Ct. at 2725-26 (opinion of Souter, J.).

<sup>121</sup> *Id.* at 2726.

<sup>122</sup> *Id.* at 2727.

<sup>123</sup> See *supra* notes 55-76 and accompanying text.

<sup>124</sup> That is, there was little room for judges or justices to consider First Amendment interests.



### A. Avoiding the Mandate of the First Amendment

Although the justices approached the public forum doctrine in different ways, most of the approaches ultimately ignore the First Amendment. There are two opportunities to do so: when determining the status of the forum (the labeling process) and in the subsequent analysis of the legitimacy of the regulation (the application stage). Unfortunately, a majority of the justices ignore the First Amendment at each stage.

#### 1. Labeling the Forum

A majority of the Court follows the intent-based inquiry set forth in *Cornelius* and *Kokinda*.<sup>125</sup> That is, a forum will be labeled as nonpublic unless the government intended to open the forum fully for speech. Because all public property except traditional Main Street must be subjected to this analysis, only Main Street ultimately will be protected by the First Amendment. The Court's analysis dates back to *Adderley v. Florida*,<sup>126</sup> which held that the First Amendment does not prevent the government from denying speakers access to public property.<sup>127</sup> Under this unprotective standard, the Court was

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<sup>125</sup> See *ISKCON*, 112 S. Ct. at 2705-07 (opinion of Rehnquist, C.J., joined by White, O'Connor, Scalia and Thomas, JJ., upholding the solicitation ban) and *id.* at 2711-13 (opinion of O'Connor, J.).

<sup>126</sup> 385 U.S. 39 (1966); see *supra* notes 27-31 and accompanying text.

<sup>127</sup> Curiously, the Court fully endorsed a distinction only occasionally invoked in public forum doctrine analysis: the Court differentiated between government-as-proprietor and government-as-lawmaker. See *ISKCON*, 112 S. Ct. at 2705 (opinion of Rehnquist, C.J.); see also *United States v. Kokinda*, 497 U.S. 720, 725 (1990); *Lehman v. City of Shaker Heights*, 418 U.S. 298, 303 (1974). This distinction is as meaningless as the public forum label itself, because only the Court can define it, and does so in such a way as to avoid consideration of the First Amendment values at stake. Perhaps one can argue that the distinction is clear for forums such as advertising space on buses, see *Lehman*, an army base, see *Greer v. Spock*, 424 U.S. 828 (1976), and even airport terminals, see *ISKCON*, because the government is running a business in such instances. But the distinction is impossible to apply in other situations. For example, the government is neither managing its internal operations nor exercising its power to license or regulate on the street in front of a state legislature. See *Edwards v. South Carolina*, 372 U.S. 229 (1963). Similarly, at a town meeting to discuss teachers' salaries, it is unclear whether the government acts as lawmaker as it is determining how to spend tax dollars on education, or proprietor as it is managing the schools. See *Madison Sch. Dist. v. Wisconsin Employee Relation Comm'n*, 429 U.S. 167 (1976). In both *Edwards* and *Madison School District*, the speech restrictions were held unconstitu-

correct to reject ISKCON's argument that airport terminals are similar to public streets because the only relevant question is whether airport terminals are intended to provide a forum for speech purposes; the objective nature of the forum is not part of the analysis.<sup>128</sup> The Court's analysis is perfectly circular. The answer to the question "does the Constitution permit particular government conduct?" is "yes, if the government intends for the Constitution to permit that conduct." Thus, government may remove itself from the constraints of the First Amendment merely by articulating its intent to do so.

In contrast, Justices Kennedy, Blackmun, Stevens and Souter would adopt a labeling approach that fully considers First Amendment interests. Their approach incorporates the incompatibility test, which the Court had previously rejected,<sup>129</sup> into the labeling process. Under that test, the government must meet a difficult burden in convincing the Court that its property is a nonpublic forum. Because the forum's objective attributes rather than the government's intent determines the label, a government may be forced to allow speech regardless of its attempt to restrain speech to some extent. Thus, Justices Kennedy and Souter's approach to labeling would bring the First Amendment back into the analysis.<sup>130</sup> Theirs, however, is only a minority view.

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tional. Finally, how does one classify the CFC in *Cornelius v. NAACP Legal Defense & Educ. Fund*, 473 U.S. 788 (1985)? Just as the public forum doctrine can be manipulated to suit the Court's ends, so can the proprietor/lawmaker distinction. It adds nothing to the analysis. Further, even if the government is acting as proprietor, the Court never explained why in such situations the Constitution should suddenly cease to act as a limit on the government's ability to restrict people's rights. See *supra* note 30.

<sup>128</sup> To the extent that *Cornelius* and *Kokinda* did leave room for a *de minimis* consideration of objective factors, see *infra* note 135, Chief Justice Rehnquist's standard eliminates such consideration.

<sup>129</sup> See *United States Postal Serv. v. Council of Greenburgh Civic Ass'ns*, 453 U.S. 114, 130 n.6 (1981).

<sup>130</sup> In fact, had Justice Kennedy expressed these views in *United States v. Kokinda*, 497 U.S. 720 (1990), in which a 4-1-4 Court left the direction of the public forum doctrine uncertain, he would have provided that elusive fifth vote for a much-needed rebirth of this doctrine.

## 2. Testing the Restriction

Although their approaches differ, a majority of the Justices also will test a speech restriction without giving adequate consideration to the First Amendment interests involved. Chief Justice Rehnquist's approach, first articulated in *Cornelius*, is the most extreme, as he applies a deferential reasonableness review.<sup>131</sup> He is not interested in the objective attributes of the forum, even during the reasonableness inquiry. Instead, he follows the *Cornelius* Court's admonition to uphold any restriction as long as it is reasonable, regardless of the possibility that more reasonable restrictions are conceivable.<sup>132</sup> Accordingly, a finding of nonpublic forum status by Chief Justice Rehnquist essentially forecloses any meaningful First Amendment consideration.

In fact, Chief Justice Rehnquist's approach has the potential to lead to such absurd results that it failed to garner the support of a majority of the Court.<sup>133</sup> While Justice O'Connor

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<sup>131</sup> This reasonableness review is applied after a finding of nonpublic forum status. Presumably, Chief Justice Rehnquist would continue to scrutinize strictly a speech restriction in the rare public forum, as he has in the past. See *United States v. Grace*, 461 U.S. 171, 183 (1983) (law preventing picketing on sidewalk outside of Supreme Court held unconstitutional because not narrowly tailored to any government interest) (Rehnquist, J., joining Court). But see *Boos v. Barry*, 485 U.S. 312, 338-39 (1988) (Rehnquist, C.J., dissenting) (dissenting from judgment striking down law prohibiting display of signs within 500 feet of foreign embassy that tend to bring foreign government into disrepute as content-based speech restriction in a public forum).

<sup>132</sup> In *Cornelius* and *Kokinda*, the Court stressed that "[t]he Government's decision to restrict access to a nonpublic forum need only be reasonable; it need not be the most reasonable or the only reasonable limitation." *Cornelius*, 473 U.S. at 808; see also *Kokinda*, 497 U.S. at 730.

<sup>133</sup> Under Chief Justice Rehnquist's approach, not only may distribution of literature be banned—a result rejected by a majority of the Court—but presumably so could proclaiming one's views. Avoiding congestion is no less reasonable an interest: just as passersby may or may not stop to pick up a flyer, they may or may not stop to listen.

In *Airport Comm'rs of Los Angeles v. Jews for Jesus, Inc.*, 482 U.S. 569 (1987), however, a unanimous Court held unconstitutional a law banning all First Amendment activities in the Los Angeles airport. Avoiding a determination of the public forum status of airports, the Court relied on the overbreadth doctrine, noting that even reading or wearing a political button would be prohibited under the ban. *Id.* at 575. Given the all-encompassing nature of the ban, *Jews for Jesus* probably remains good law after *ISKCON*. Nevertheless, it is clear that only the most unobtrusive, private First Amendment activities are shielded from the government's fist.

supports Chief Justice Rehnquist's intent analysis, she applies a reasonableness test with at least some bite. Indeed, under Justice O'Connor's approach, the door is open to allow the First Amendment to reenter the scene, although the opening may be slight. After authoring *Cornelius* and the *Kokinda* plurality opinion, Justice O'Connor is now concerned with the compatibility of the speech and the forum, and seems to have abandoned the low level of reasonableness that she formerly had articulated.<sup>134</sup> It is hard to imagine that the *Cornelius* Court would hold that, in an airport filled with people bogged down with luggage and rushing to catch their planes, congestion caused by people distributing literature may not be dealt with as efficiently as congestion caused by those engaged in solicitation.<sup>135</sup> Thus, Justice O'Connor has added some bite to the reasonableness standard.

Moreover, within the confines of a deferential review, Justice O'Connor has revitalized the incompatibility doctrine.<sup>136</sup> By considering the objective attributes of the forum and the question of compatibility in the application phase, Justice O'Connor recognizes that there are First Amendment interests at stake. While Justice O'Connor does call for a reasonableness review, it is significant that before *ISKCON*, the Court had never stricken a speech restriction after finding a forum to be nonpublic.<sup>137</sup> Nevertheless, it is important to

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<sup>134</sup> See *supra* note 132.

<sup>135</sup> While Justice O'Connor did rely on language found in *Cornelius* and *Kokinda*, she has certainly pulled back from the inflexible tone of those cases. For example, Justice O'Connor quoted from *Cornelius* that "[t]he reasonableness of the Government's restriction [on speech in a nonpublic forum] must be assessed in light of the purpose of the forum and all the surrounding circumstances." *ISKCON*, 112 S. Ct. at 2712 (opinion of O'Connor, J.) (quoting *Cornelius*, 473 U.S. at 809); and from *Kokinda* that "[c]onsideration of a forum's special attributes is relevant to the constitutionality of a regulation." *ISKCON*, 112 S. Ct. at 2712 (opinion of O'Connor, J.) (quoting *Kokinda*, 497 U.S. at 732). Nevertheless, to suggest from these isolated quotes that *Cornelius* or *Kokinda* represents a flexible approach to the public forum doctrine ignores the remaining admonitions about the doctrine and the holdings of those cases. See *supra* notes 64-76 and accompanying text.

<sup>136</sup> Of course, in labeling the forum, Justice O'Connor continues to look to whether the government intended to allow expressive activity—effectively ignoring the First Amendment. It is only during the second stage of the analysis that she is willing to step slightly beyond the narrow label.

<sup>137</sup> Justice O'Connor's approach, which allows for consideration of objective factors in only one of two stages of the analysis, leads to inconsistencies. For exam-

stress that Justice O'Connor's reasonableness review is not strict scrutiny. One can easily devise a reasonable restriction. Because of the bite, however, Justice O'Connor's approach is preferable to that of Chief Justice Rehnquist.

It is unclear what level of reasonableness review Justice Kennedy would apply in examining a restriction of a nonpublic forum, as he has not yet decided a case in which he found nonpublic status. Justice Kennedy, however, is far more likely to find a forum to be public than are Chief Justice Rehnquist and Justice O'Connor. Nevertheless, Justice Kennedy's expanded public forum category is tempered by his extremely lax time, place or manner review. This is unfortunate. Rather than allow the First Amendment interests to be considered fully throughout his analysis, Justice Kennedy considers the First Amendment only for the labeling process, but then hides it away during the equally important application stage.

The Court has long defined a time, place or manner regulation as one that is content-neutral and narrowly tailored to a significant interest, and that leaves open ample alternate channels of communication.<sup>138</sup> The solicitation ban in *ISKCON* was content-neutral,<sup>139</sup> and Justice Kennedy was well supported by authority in finding that prevention of fraud and duress were significant government interests.<sup>140</sup> It is the narrow tailoring element, however, that Justice Kennedy uses as a powerful weapon against speech. In spite of the seemingly plain meaning of "narrow," Justice Kennedy argues that a narrowly tailored regulation "need not be the least restrictive or least intrusive means of achieving an end. *The regulation must be reasonable, and must not burden substantially more*

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ple, even though the Port Authority has created a "large, multipurpose forum" and is "operating a shopping mall as well as an airport," it is not, according to Justice O'Connor, a public forum. Further, even though "the wide range of activities promoted by the Port Authority is no more related to facilitating air travel than are the types of activities in which ISKCON wishes to engage," ISKCON may not both distribute and solicit.

<sup>138</sup> See *supra* note 76.

<sup>139</sup> The ban applies irrespective of the subject matter of the speech or identity of the speaker. Perhaps there is an argument to be made that the ban is content-based because solicitation itself is the content. However, solicitation is more reasonably viewed as a manner of speaking, not the type or substantive content of the speech.

<sup>140</sup> See *Riley v. National Fed'n of the Blind*, 487 U.S. 781, 795 (1987); *Schaumburg v. Citizens for a Better Env't*, 444 U.S. 620, 636-38 (1980).

speech than necessary."<sup>141</sup> This is nothing short of a reasonableness standard.<sup>142</sup> Thus, according to Justice Kennedy,

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<sup>141</sup> *ISKCON*, 112 S. Ct. at 2722 (citing *Ward v. Rock Against Racism*, 491 U.S. 781, 798-800 (1989)) (emphasis added).

<sup>142</sup> *But see* *Frisby v. Schultz*, 487 U.S. 474, 485 (1988) ("A statute is narrowly tailored if it targets and eliminates no more than the exact source of the 'evil' it seeks to remedy."). Justice Kennedy announced the less stringent standard for the Court in *Ward*, 491 U.S. at 781. There, the Court considered a regulation requiring performers in New York Central Park's bandshell to use City-provided sound amplification equipment and technicians. The City hoped to control the volume, but not the sound mix, in an effort to respond to numerous noise complaints made by people who live near the park. *Id.* at 784-85. Applying the new time, place or manner test, the Court upheld the regulations. *Id.* at 802 (regulation "satisfies the requirement of narrow tailoring"). The new standard was properly criticized by commentators as well as the dissent in that case for abandoning the "least restrictive means" test for a test that would allow any restriction just short of one that imposes a substantial burden. *See id.* at 804 (Marshall, J., dissenting); Gregory L. Lippetz, *The Day The Music Died: Ward v. Rock Against Racism*, 25 U.S.F. L. REV. 627 (1991); Michael R. Manley, *Ward v. Rock Against Racism: How Time, Place and Manner Further Restrict the Public Forum*, 1 FORDHAM ENT. MEDIA & INTELL. PROP. L.J. 151 (1991).

Even if one accepts the *Ward* standard of review as appropriate, however, it seems that a complete ban on any speech activity cannot be a restriction of a particular time, place or manner, although there is authority defining a complete ban as a valid time, place or manner restriction. *See City Council v. Taxpayers For Vincent*, 466 U.S. 789, 808-10 (1984) (upholding complete prohibition of posting signs on government property to further interest of preventing visual blight); *United States Postal Serv. v. Council of Greenburgh Civic Ass'ns*, 453 U.S. 114, 135 (1981) (Brennan, J., concurring in judgment) (upholding complete ban on placing unstamped material in people's mailboxes for financial and efficiency reasons). Yet, this flies in the face of the common understanding of the English language. A time, place or manner restriction should be a compromise that allows a speech activity, but only to the extent that it does not infringe too much on government interests. *Cf. Lovell v. City of Griffin*, 303 U.S. 444, 451 (1938) (striking down ordinance banning distribution of literature "at any time, at any place, and in any manner.").

Further, the cases dealing with solicitation have expressly held that a complete ban on solicitation is unconstitutional, because its objectives, such as avoiding fraud and duress, can be met in less restrictive ways. *See Schaumburg*, 444 U.S. at 636-38 (requirement that fundraisers use no less than 75% of solicited funds for charitable purposes only "peripherally related" to fraud prevention; punishment of fraud and disclosure requirements are less restrictive); *Riley v. National Fed'n of the Blind*, 487 U.S. 781, 795 (1987) (similar law receives same response by Court); *see also* *Heffron v. International Soc'y for Krishna Consciousness, Inc.*, 452 U.S. 640 (1981) (upholding requirement that ISKCON conduct solicitation at table, rather than throughout fair grounds, as valid place restriction). *Ward* abandons the inquiry into the existence of less restrictive means.

Justice Kennedy argues that restricting the immediate receipt of funds is a regulation of the manner of solicitation, as solicitation for later receipt of funds is allowed. While Justice Kennedy may be correct, *ISKCON* would no doubt argue that the difference between collecting money and handing out envelopes is so dra-

even if a forum is found to be public, a content-neutral restriction need only be reasonable to survive scrutiny.<sup>143</sup>

Whether Justice Kennedy would use the relaxed time, place or manner review to uphold restrictions not involving solicitation remains uncertain.<sup>144</sup> Nevertheless, it is quite clear that Justice Kennedy's time, place or manner review in the application stage can be used as a tool to avoid the consequence of his finding of public forum status in the labelling process. Therefore, there is little cause for excitement over Justice Kennedy's debate with Chief Justice Rehnquist and Justice O'Connor. While Justice Kennedy's approach in the first stage seems to offer significant protection for speech, the first stage is meaningless without second-stage protection. Indeed, because Justice O'Connor's analysis allows for some First Amendment consideration in the second stage, her standard actually may provide greater protection for First Amendment activity.<sup>145</sup>

Of all of the approaches employed by the justices in *ISKCON*, only Justice Souter's would operate to consider First

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matic that a ban on solicitation for immediate receipt of funds is effectively a complete ban on solicitation. In any event, an example of a time, place or manner regulation of ISKCON's activities in the airports might require that ISKCON's members sit at a table at a designated spot away from the middle of heavy traffic, that only two people conduct *sankirtan* at a time and that they register with the Port Authority. Of course, these restrictions would apply to anyone seeking to use the airport terminals for solicitation or distribution; there can be no special ISKCON rule.

<sup>143</sup> It appears that Justice Kennedy's lax view of narrow tailoring applies only in the context of a time, place or manner regulation. Justice Kennedy, however, probably would scrutinize adequately a content-based speech restriction, which must be narrowly tailored to serve a compelling government interest.

<sup>144</sup> In *Frisby*, 487 U.S. at 474, Justice Kennedy joined the Court's opinion upholding an ordinance that banned picketing on a street in front of a residence. The Court found that the government's interest in protecting the tranquility and privacy of the home was substantial, and found the statute to be narrowly tailored after construing it as applying only to picketing directed at a residence, rather than simply proceeding past a home. *Id.* at 483-86. But this case may not be instructive because it pre-dates *Ward*. See *supra* note 142.

*Ward* is also of little help. There, the Court upheld a complicated effort to deal with noise resulting from concerts in New York's Central Park. In explaining its new substantial burden test, however, the Court noted that a complete ban on handbilling would be too broad, no matter what the interests. *Ward*, 491 U.S. at 799 n.7. It is unclear where solicitation falls between the parameters of handbilling and the regulation upheld in *Ward*.

<sup>145</sup> See *infra* note 155.

Amendment interests in both stages of the analysis. Justice Souter attempts to categorize the forum fairly, and does not shy away from a finding of public forum status. Moreover, he also requires government to justify a restriction in a public forum under a demanding time, place or manner standard. This is not to say, however, that Justice Souter will blindly strike all speech restrictions. It appears that he is quite cognizant of legitimate government interests, and will recognize all of the competing interests involved.<sup>146</sup> Although Justice Souter's approach is in the guise of the *Perry-Cornelius-Kokinda* framework, it acts more like a thoughtful balancing of interests.<sup>147</sup> Only two other Justices, however, joined Justice Souter's opinion.<sup>148</sup> The remaining six Justices apply a reasonableness review of one sort or another. Thus, in both stages of the analysis, a majority of the Court avoids considering and upholding First Amendment principles.

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<sup>146</sup> A prickly issue that Justice Souter raises is to what extent there must be a factual basis to support the government's interests. That is, if fraud has never been a problem, how can the government offer its prevention as a significant interest? Although in *ISKCON* there was no evidence of fraud, the Court has long recognized preventing fraud as a significant interest associated with solicitation. See *supra* note 140. Indeed, no one would argue that the potential is not there; the proffered justification is by no means ridiculous. Further, if the government must wait for evidence, it might find itself in a position of creating valid regulations in a piecemeal fashion. Moreover, the government promulgates regulations that apply to all. Thus, even though *ISKCON* has not committed fraud, another group using the airport terminals might not have such integrity. The Court has been clear that when considering these issues, it must not focus narrowly on the group asking to be released from restrictive regulations, but must consider the broad impact of its ruling. See *Heffron v. International Soc'y for Krishna Consciousness, Inc.*, 452 U.S. 640, 652-53 (1981) (if *ISKCON* not required to conduct activities at fixed location on fairgrounds, every similar group, finding itself exempt, could overrun the fairgrounds); *United States Postal Serv. v. Council of Greenburgh Civic Ass'ns*, 452 U.S. 114, 135 (1981) (Brennan, J., concurring in the judgment) (while granting free access to mailboxes to the civic group in the case would not decrease postal revenues in a significant fashion, the total effect of all civic groups that would be exempt could be enormous). Justice Souter did not explain what type of evidence or how much evidence he would require. It is possible that a *de minimis* showing would appease Justice Souter's legitimate apprehension about arbitrary government action.

<sup>147</sup> If Justice Souter is really applying a balancing test, it is unclear what value the public forum doctrine framework holds. See *infra* notes 149-57 and accompanying text.

<sup>148</sup> Justices Blackmun and Stevens joined Justice Souter's opinion.



## B. *The Big Picture: A Doctrine in Disarray*

Although dissecting the various opinions leads one to conclude that *ISKCON* stands for the proposition that the First Amendment imposes little, if any, limitation on government restrictions of speech on public property, when one steps back to examine the big picture, this thesis falters. Considered together, the various opinions of *ISKCON* become incomprehensible. The nine members of the Court applied a total of four discrete analyses<sup>149</sup> to arrive at two completely irreconcilable

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<sup>149</sup> If a future case were decided by the *ISKCON* Justices, four justices (Chief Justice Rehnquist and Justices White, Scalia and Thomas) would easily label a forum as nonpublic, and then apply a deferential reasonableness test. One justice (Justice O'Connor) would easily label a forum as nonpublic, but then apply a reasonableness test with some bite, using language that echoes cases with a much more expansive view of the public forum doctrine. Another justice (Justice Kennedy) would seriously consider speech interests in the labeling process, but would apply a time, place or manner test that gives a government great leeway in tailoring the regulation. And three justices (Justices Souter, Blackmun and Stevens) would seriously consider speech interests in the labeling process, and would then carefully scrutinize the validity of a time, place or manner regulation.

Of course, Justice White has retired and Ruth Bader Ginsburg has joined the Court. This makes predicting how the Court will resolve a future case even more difficult. Two cases rendered while Justice Ginsburg was a member of the United States Court of Appeals for the D.C. Circuit are only slightly helpful in predicting how Justice Ginsburg will approach public forum cases. The first, *Grace v. Burger*, 665 F.2d 1193 (D.C. Cir. 1981), *aff'd in relevant part sub nom.* *United States v. Grace*, 461 U.S. 171 (1983) was a relatively easy case. Judge Ginsburg joined a decision holding unconstitutional a statute that prohibited picketing on the grounds of the Supreme Court. *Grace*, 665 F.2d at 1194. Because these sidewalks are traditional public forums—at least they were prior to *Kokinda*, see *supra* note 73 and accompanying text—the circuit court properly held that the government's proffered interests of maintaining the dignity of the Court and avoiding the appearance that justices may be influenced were not compelling enough to justify a total ban of expressive activity. *Id.* at 1202-03.

In a much more difficult case, Judge Ginsburg wrote separately to explain why she agreed that the National Park Service had acted unconstitutionally in refusing to allow protesters to sleep in Washington D.C.'s Lafayette Park, even though the protesters had obtained a permit for a seven-day, round-the-clock demonstration concerning homelessness. See *Community for Creative Non-Violence v. Watt*, 703 F.2d 586 (D.C. Cir. 1983) (per curiam) [hereinafter *CCNV*], *rev'd sub nom.* *Clark v. Community for Creative Non-Violence*, 468 U.S. 288 (1984) [hereinafter *Clark*]; *CCNV*, 703 F.2d at 604 (Ginsburg, J., concurring). This case, however, turned not on the definition of a public forum, but on whether sleeping constitutes expressive conduct. Judge Ginsburg ultimately resolved that, given the nature of the demonstration, sleeping was expressive conduct. *Id.* at 605-06. In weighing the competing interests, Judge Ginsburg found "that it is not a rational rule of order to forbid sleeping while permitting tenting, lying down, and maintaining a

decisions: (1) airport terminals are nonpublic forums; solicitation may be banned; and (2) airport terminals are public forums (plurality); distribution may not be banned. In fact, upon announcing the decision of the Court, Justice O'Connor remarked, "Now, if anyone can figure that out, they're doing well."<sup>150</sup>

While commentators may find it interesting to analyze the various approaches taken in *ISKCON*, the Supreme Court is not in the business of providing material for law review articles. Rather, it must interpret the Constitution and provide guidance for those who might be affected by its decisions. Yet, it is currently impossible for a court or government to know whether a regulation of speech on public property is permissible. When the Second Circuit decided *ISKCON*, it chose to predict the Justices' votes based on their prior votes in *Kokinda*, rather than treat the plurality opinion as law.<sup>151</sup> Some circuits, however, do treat plurality decisions as law,<sup>152</sup> while others ignore them altogether and resort to their own precedents.<sup>153</sup> Nevertheless, whatever approach a circuit

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twenty-four-hour presence . . . . [Sleeping] facilitates expression and should therefore attract ordering rules that are sensible, coherent, and sensitive to the speech interests involved. In my view, the Park Service determination does not satisfy that measurement." *Id.* at 608.

While this case, therefore, does not reveal how Justice Ginsburg might view the public forum doctrine in general, it does give a hint as to her view of time, place or manner restrictions because, even in a public forum, expressive conduct is subject to reasonable time, place or manner restrictions. *Id.* at 608; *Clark*, 468 U.S. at 293. While Judge Ginsburg did not apply the established time, place or manner test in *CCNV*, she carefully considered the restrictions and, therefore, appears to be in Justice Souter's camp in that regard. Indeed, the Supreme Court reversed, finding that the restriction was narrowly tailored to the government's "substantial interests" in keeping the nation's parks in an "attractive and intact" condition. *Clark*, 468 U.S. at 296-97. The Court reasoned that both demonstrators and non-demonstrators alike must abide by park rules. *Id.* at 298.

<sup>150</sup> Ruth Marcus, *Airports' Solicitation Ban Upheld*, WASH. POST, June 27, 1992, at A1.

<sup>151</sup> *International Soc'y for Krishna Consciousness, Inc. v. Lee*, 925 F.2d 576, 581-82 (2d Cir. 1991).

<sup>152</sup> See, e.g., *United States v. Gilbert*, 920 F.2d 878, 884-85 (11th Cir. 1991) (*Kokinda* plurality cited as law).

<sup>153</sup> See, e.g., *Jacobsen v. United States Postal Serv.*, 993 F.2d 649, 655 (9th Cir. 1992) (ignoring *Kokinda* in favor of circuit precedent). The Second Circuit's view is the most appropriate. A lower court should neither rely on a proposition not accepted by a majority of the Supreme Court nor ignore a decision of the Court. Attempting to predict a result based on analyzing the various approaches resolves the inherent difficulty created by a plurality decision.

adopts, the only way any court can follow *ISKCON* is to count votes—a task that may prove quite difficult, particularly regarding Justices O'Connor and Kennedy, who consider the First Amendment during only one of the two stages of the public forum analysis. The task is complicated further because one of the *ISKCON* justices has left the Court. While it may be unlikely that Justices Ginsburg will vote with Chief Justice Rehnquist as did Justice White, no one can predict exactly how she will vote.<sup>154</sup> Such a hodgepodge approach to the First Amendment is, to say the least, poor constitutional jurisprudence.<sup>155</sup>

These concerns lead to an important question. What purpose does the continued use of the public forum doctrine serve? At present, the public forum doctrine requires the Court to employ two separate, unrelated analyses. First, the Court must determine the label of a forum. The sole purpose of the labeling is to determine what level of scrutiny is required. It is unclear, however, why the First Amendment should be applied with greater or lesser vigor simply because the forum changes. Whatever considerations underlie labeling a forum as nonpublic will not be lost if the current framework is abandoned; they always remain relevant when balancing the differ-

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<sup>154</sup> See *supra* note 149. Indeed, just as *ISKCON* gives cause for hope because of Justice O'Connor's more stringent reasonableness review and Justice Kennedy and Souter's concern with the fundamentals of the doctrine, Justice White's retirement adds yet another ray of hope. The public forum doctrine may soon see its end.

<sup>155</sup> Nevertheless, arguably it is better to have a doctrine in disarray—which may force lower courts to do the work that the public forum doctrine eschews—than to have a formalistic rule that serves only to push the First Amendment aside. Indeed, courts struggling with *ISKCON* appear to be choosing either to ignore the decision altogether or to rely solely on Justice O'Connor's opinion. See, e.g., *Jews for Jesus, Inc. v. MBTA*, 984 F.2d 1319, 1324-26 (1st Cir. 1993) (noting that *ISKCON* requires merely a reasonableness review for nonpublic forums and finding several justifications for a ban on leafletting, solicitation and public address in the subway system, but nevertheless holding ban unconstitutional under Justice O'Connor's reasonableness standard as articulated in *ISKCON*); *Multimedia Pub. v. Greenville-Spartanburg Airport*, 991 F.2d 154, 160-63 (4th Cir. 1993) (finding ban on newspaper vending machines unconstitutional under Justice O'Connor's *ISKCON* standard, in spite of government's legitimate interests); *Jacobsen*, 993 F.2d at 655 n.2 (9th Cir. 1992) (noting that "the jurisprudence in the area is now quite muddled with *ISKCON*, making it difficult to comprehend exactly how the Supreme Court would rule in a case concerning newsracks at post offices, as opposed to solicitation and leafletting at airports" and looking solely to *Kokinda* for guidance).

ent interests at stake.

In the second stage, the Court must examine the particular speech at issue under the requisite scrutiny. In previous cases—and for some of the Justices in *ISKCON*—the labeling will end the inquiry. In such a case, the particular speech involved is not relevant to the resolution of the case, because the label is determined with reference to all speech activity. If, however, the labeling is not going to be determinative, that is, if the interaction of the particular speech and the forum will be fairly considered after the labeling, then the labeling serves little, if any, purpose at all.<sup>156</sup>

Thus, the Court has created a complex framework that is difficult to define and even more difficult to apply. It allows the Court to avoid any meaningful consideration of the constitutional issues with which it is faced<sup>157</sup> and to manipulate easily the analysis so as to burden speech interests unnecessarily. As most harmfully applied, the public forum doctrine is

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<sup>156</sup> Moreover, one commentator notes that the two-tiered analysis "[gives] the government two bites at the apple" and therefore "exaggerate[s] the importance of the government's interests in the particular location." See Day, *supra* note 12, at 188-89. Thus, the public forum doctrine is more than an unnecessary complexity, but a means by which the government can win its case.

<sup>157</sup> The familiar canon that the Court should avoid constitutional issues that it need not reach is not relevant here. See, e.g., *Carnival Cruise Lines, Inc., v. Shute*, 111 S. Ct. 1522, 1525 (1991) ("It is not the habit of the Court to decide questions of a constitutional nature unless absolutely necessary to a decision of the case.") (quoting *Ashwander v. TVA*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring)). That canon applies where the Court, for example, can rest its holding on statutory interpretation. In the public forum cases, however, the Court is always confronted with a First Amendment problem. It must determine whether the First Amendment protects those who wish to use public property for speech purposes. The Court avoids this question by playing labeling games. Rather than consider the values protected by the Constitution and the government's legitimate interest in curbing those values, the Court attempts to decide the cases by pigeon-holing.

This type of approach is not limited to the public forum context. The Court frequently refuses to consider the values protected by the Fourth Amendment when it can instead wrap itself in a label. See, e.g., *California v. Hodari D.*, 111 S. Ct. 1547 (1991) (police chase of fleeing suspect not a "seizure" within the meaning of the Fourth Amendment, because police did not take possession of suspect). In labeling the event that took place in this way, the Court escaped conducting a meaningful analysis of what limitation the Fourth Amendment imposes on police conduct before an arrest. Had the Court faced this question, it may very well have found such police conduct to be reasonable. But instead, just as in the public forum context, the Court chose to avoid examining the underlying values of the Constitution.

hostile toward speech, and when applied by considering competing interests, it is irrelevant. For all of these reasons, the public forum doctrine must be abandoned.

#### IV. BACK TO THE BASICS: A PROPOSAL

The public forum doctrine began with a balancing test, and that is where it should end. Rather than engage in a two-stage analysis in which the first stage exists only to identify the level of scrutiny and to avoid an honest consideration of the competing interests involved, the Court simply should consider the nature of the forum—that is, all of the legitimate government interests<sup>158</sup>—and the speech interests simultaneously,<sup>159</sup> under a uniform level of scrutiny.

The following test leaves room for any legitimate government interest without ever excluding the First Amendment interests from the balance. It would provide a simple guide for a government or court: a restriction on the use of public property for speech activity will be permitted only if the government demonstrates that the speech activity is basically incom-

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<sup>158</sup> Many legitimate interests can be found among the cases that have contributed to the public forum doctrine: avoiding the appearance of political favoritism, see *Greer v. Spock*, 424 U.S. 828 (1976) and *Lehman v. City of Shaker Heights*, 418 U.S. 298 (1974); preventing fraud, see *International Soc'y for Krishna Consciousness, Inc. v. Lee*, 112 S. Ct. 2701 (1992) and *United States v. Kokinda*, 497 U.S. 720 (1990); maintaining revenues that support a government service, see *United States Postal Serv. v. Council of Greenburgh Civic Ass'ns*, 453 U.S. 114 (1981) and *Lehman*; maintaining security, see *Adderley v. Florida*, 385 U.S. 39 (1966); protecting citizens against being a captive audience, see *Lehman*; and preventing disruption, see *Grayned v. City of Rockford*, 408 U.S. 104 (1972) and *Edwards v. South Carolina*, 372 U.S. 229 (1963). This list is certainly not meant to be exhaustive. It does suggest, however, that there are many circumstances in which government may have reason to restrict speech activity. The question should be whether the government interest outweighs the speaker's rights protected by the First Amendment.

<sup>159</sup> Like government interests, there are a variety of speech interests, all of which fall within the gambit of the First Amendment: political protest, see *Edwards*, 372 U.S. at 536; political campaigning, see *Greer*, 424 U.S. at 828; charitable solicitation, see *Kokinda*, 497 U.S. at 720 and *Cornelius v. NAACP Legal Defense & Educ. Fund*, 473 U.S. 788 (1985); and disseminating or exchanging information by civic, cultural or religious groups, see *ISKCON*, 112 S. Ct. 2701, *Widmar v. Vincent*, 454 U.S. 263 (1981) and *Council of Greenburgh Civic Ass'ns*, 453 U.S. at 114. This list similarly is not exhaustive. The First Amendment protects a broad and diverse array of expression, and these freedoms must not be infringed without adequate justification. See *supra* note 2.

patible with the nature of the forum and the interests of the government; if an incompatibility can be alleviated by a reasonable time, place or manner restriction, the government must impose that lesser restriction.

This test comes from various sources, including Justices Kennedy and Souter's analysis of the public forum doctrine in *ISKCON*<sup>160</sup> and the concerns discussed in many of the earlier public forum cases. The test is phrased to protect First Amendment interests fully; the government must show why the speech activity is incompatible with the government's legitimate interests.<sup>161</sup> Further, it is the objective attributes of the

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<sup>160</sup> See *supra* notes 106-13 and accompanying text. Although this Comment's proposal owes a debt to their approach, it is also different in some important respects. The most obvious difference, of course, is that Justices Kennedy and Souter use the incompatibility test as a means to label the forum. This Comment's proposal dispenses with the two-tiered analysis. In addition, the incompatibility approaches are somewhat different. Justices Kennedy and Souter ask whether expressive activity in general is incompatible with the relevant forum. But because the analysis suggested by this Comment's proposal yields the result, rather than an interim label, it must be performed for the particular speech activity at issue. This approach is preferable because the Court should not make a constitutional determination of whether a particular speech activity is compatible with a particular forum, unless such a question is presented for review and argued by the interested parties.

Of course, in considering the speech at issue, a court must look to the category of speech (e.g., solicitation) and not the challenging party. While one group's speech activity may be compatible with government interests, the aggregate speech activity of those of a similar character might require the restriction. See *supra* note 146.

<sup>161</sup> Several commentators have attempted to propose better ways to approach the labeling process. See, e.g., Buchanan, *supra* note 12, at 973 (suggesting different levels of scrutiny for nonpublic forums depending on whether the speech restriction is speaker-based, content-based or viewpoint-based); Mildred An, Note, *Free Speech, Post Office Sidewalks and the Public Forum Doctrine*—United States v. Kokinda, 110 S. Ct. 3115 (1990), 26 HARV. C.R.-C.L. L. REV. 633 (1991) (suggesting that factors such as forum's tradition, purpose and accessibility be considered in determining label); Peter Jakob, Note, *Public Forum Analysis after Perry Education Association v. Perry Local Educators' Association*—A Conceptual Approach to Claims of First Amendment Access to Publicly Owned Property, 54 FORDHAM L. REV. 545, 555 (1986) (suggesting that factors such as whether the forum is open and used by many people, who uses the forum and whether people who use it do so voluntarily be considered in determining label). These band-aid proposals, however, only would complicate an already unworkable analysis. For example, Buchanan's approach attempts to add substance to nonpublic forum status by creating another tier of analysis, while Jakob's and An's approaches attempt to beef up the public forum category by infusing it with objective factors.

Rather than attempt to create a foundation for a complex and fundamentally flawed approach, this Comment's proposal replaces the approach with a simple

forum that are relevant: an incompatibility will not be found simply because the government did not intend to allow for speech.<sup>162</sup> The standard also requires that all government interests, including those encountered in previous cases, be considered.<sup>163</sup> It eliminates the varying levels of scrutiny, and

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analysis that incorporates the concerns expressed by the other commentators. It rejects the assumption that the government should be subject to greater or lesser constraint by the First Amendment simply because of the nature of the forum. Instead, it requires the government to show why a particular speech activity is incompatible with the forum, considering the objective nature of that forum.

<sup>162</sup> For example, in *Council of Greenburgh Civic Ass'ns*, 453 U.S. at 114, a court reasonably could have found that allowing civic associations access to people's mailboxes would be incompatible with the operations of the Postal Service. First, the government depends on the revenues generated by those who use the system. Further, civic groups could overstuff the mail boxes, making it difficult, if not impossible, for the Postal Service to operate efficiently.

In *Kokinda*, 497 U.S. at 720, however, the simple fact that the government had not intended the post office sidewalk to be dedicated for speech use is irrelevant. Further, any incompatibility that might result from the speech activity, such as congestion, can be alleviated by a reasonable time, place or manner regulation. For example, the government could limit the number of people who may solicit, designate the time of day that they may solicit or regulate how far from the door they must remain while engaging in solicitation.

<sup>163</sup> One commentator suggests that a forum should be labeled as public or nonpublic depending on whether the government's authority over a forum relates to lawmaking or managing. See Post, *supra* note 12, at 1782-83. However, recognizing that "the [law-making/managing] metaphor does not have any obvious analytic content," *id.* at 1785-86, the author attempts to anchor his theory by stating that "[i]f government action is viewed as a matter of internal management, the attainment of institutional ends is taken as unquestioned priority. But if it is instead viewed as a matter of governance, the significance and force of all potential objectives are taken as a legitimate subject of inquiry." *Id.* at 1789. This restatement of the proposal is unhelpful. As previously discussed, the management/governance distinction is of no value. See *supra* note 127. Moreover, it makes little sense to replace one labeling process with another, particularly because the Court is likely to manipulate the new labeling process so as to find public forum status rarely and to avoid meaningful consideration of the values underlying the First Amendment.

Indeed, there would be much room for manipulation. As the author's own examples demonstrate, the lawmaking/managing distinction is meaningless. He would consider the mailboxes in *Council of Greenburgh Civic Ass'ns*, 453 U.S. at 114, discussed *supra* notes 49-54 and accompanying text, and the military base in *Greer*, 424 U.S. at 828, discussed *supra* notes 42-44 and accompanying text, to be public forums because the government is acting as *lawmaker*. Yet, one can easily argue that the contrary result is more appropriate. Logic seems to dictate that the government is acting as *manager* of the postal service and the armed forces.

To the extent that it has any meaning at all, one would better consider the management/governance distinction as a government interest. For example, in *ISKCON*, the fact that the Port Authority is running what is undoubtedly an extremely complicated undertaking should not go without consideration. Neverthe-

forces a court to assess the competing interests in every case.<sup>164</sup> Under this standard, the public forum doctrine would adequately protect First Amendment interests, while also recognizing that legitimate government interests might require a speech restriction.<sup>165</sup> Further, it provides a simple analysis

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less, this distinction must not overtake the analysis. The ultimate question must be whether the speech activity is incompatible with the government's ability to operate the airport effectively.

Perhaps the governance/management distinction would be relevant in other cases. For example, it would be difficult to argue that the government must let people protest in the lobby area of the C.I.A. Here, the objective fact that the government is running a business that involves the security of the nation, coupled with the fact that protest can be equally effective outside, seems to mandate the upholding of a blanket ban.

<sup>164</sup> Not only are the levels of scrutiny for different forums eliminated, but so, too, are the levels of scrutiny for different types of restrictions. That is, the test is the same for viewpoint-based, content-based and content-neutral restrictions. However, the fact that a viewpoint-based restriction is arguably more harmful to First Amendment values than a content-neutral restriction is not lost under this proposal, because the government must explain how its particular restriction, rather than speech in general, is incompatible with the forum. That is, a government would be forced to show how one particular viewpoint, but not another, is incompatible with a particular forum. The circumstances in which the government could make such a showing are rare indeed—not because of a different level of scrutiny, but rather because of the nature of the standard itself.

<sup>165</sup> There are other commentators who have proposed an incompatibility approach, both before and after the *ISKCON* decision. See, e.g., Dienes, *supra* note 12, at 121-22; Farber & Nowak, *supra* note 12, at 1239-43; Barbara S. Gaal, Note, *A Unitary Approach to Claims of First Amendment Access to Publicly Owned Property*, 35 STAN. L. REV. 121, 143-45 (1982); see also R. Alexander Acosta, *Revealing the Inadequacy of the Public Forum Doctrine*: International Society for Krishna Consciousness, Inc. v. Lee, 112 S. Ct. 2701 (1992), 16 HARV. J.L. & PUB. POL'Y 269, 291 (1993); Marianne Elizabeth Dixon, Note, *International Society for Krishna Consciousness, Inc. v. Lee: The Failure of the Public Forum Doctrine to Protect Free Speech*, 37 ST. LOUIS U. L.J. 437 (1993).

Indeed, this Comment's proposal may not significantly differ in operation from some of the other incompatibility approaches, including that articulated by the Court in *Grayned v. City of Rockford*, 408 U.S. 104 (1972). The approach articulated here, however, seeks to spell out in greater detail what types of interests are relevant and who bears the burden, and strives to protect legitimate government interests as well as First Amendment interests. It is important that courts understand precisely what factors are relevant, and how to assess the competing interests. Dienes has insisted that a careful analysis of the competing interests is required, rather than an *ad hoc* balancing. He is correct, and the structure of this Comment's proposal seeks to require such a careful analysis. While Dienes did not explain exactly what interests are important, or how his incompatibility test would function, it appears that he would agree fully with the approach proposed in this Comment. Likewise, Farber and Nowak have proposed a similar principled approach, called "focused balancing." Although not phrased in terms of incompatibility, their proposal, which seems rather complex at first, ultimately would operate



that lower courts and governments can understand and follow with ease; it cannot be subjected to varying approaches.<sup>166</sup>

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in the same fashion as this Comment's proposal. Yet, Farber and Nowak would continue to apply different levels of scrutiny to different types of speech restrictions, which this Comment's proposal explicitly rejects. *See supra* note 163.

In addition, insofar as some of the commentators such as Gaal are proposing an incompatibility approach similar to that advocated by Justice Brennan—who would require a court to uphold a restriction only where there is a physical disruption, *see supra* notes 44 & 45—this Comment's approach is significantly different. While some might argue that it is impossible to over-enforce the First Amendment, such an approach ignores the practical realities of running a government.

<sup>166</sup> One commentator suggests that a particularistic, balancing approach is "every bit as contestable and subject to manipulation as those entailed in the public forum analysis." Richard B. Saphire, *Reconsidering the Public Forum Doctrine*, 59 U. CINN. L. REV. 739, 761-62 (1991). He also warns that it "detracts from the individual decision maker's ability to approach any problem from a larger perspective, to understand how (or the extent to which) each problem relates to other problems of its kind." *Id.* at 788.

The first criticism is valid, but misses the point. The public forum doctrine today side-steps the First Amendment. In its effort to avoid consideration of the values that are embodied within the First Amendment, the Court uses a labeling process that is irrelevant to the problem before it, and that allows it to escape a meaningful analysis. Under a principled approach, in which the various competing interests are assessed, the Court must confront the First Amendment. That is not to say that the Court will be forever unanimous; to the contrary, the Court may still divide in a predictable fashion. Yet, each justice will have no choice but to address the issues. Each justice must state why the nature of the forum and the interests of the government sufficiently outweigh the speaker's First Amendment rights. People will agree or disagree with the assessment, but no one will feel cheated by a Court that appears to refrain from assessing difficult issues in an order to achieve a desired result. For a similar response, see Farber & Nowak, *supra* note 12, at 1244-45; *see also* GERALD GUNTHER, CONSTITUTIONAL LAW 1007 (12th ed. 1991). Professor Gunther noted that "balancing opinions, in addition to being arguably more candid [than opinions that categorize] in disclosing competing interests, can provide guidance." *Id.* He approved of Justice Harlan's view that balancing is a "mandate to perceive every free speech interest in a situation and to scrutinize every justification for a restriction of individual liberty" . . . [H]e strove for unifying principles that might guide future decisions." *Id.* n.23 (quoting Gerald Gunther, *In Search of Judicial Quality on a Changing Court: The Case of Justice Powell*, 24 STAN. L. REV. 1001 (1972)).

The second criticism—that balancing detracts from the decisionmaker's ability to approach problems from a larger perspective—is simply incorrect. There will always be a larger picture. For one thing, there is already a wealth of precedent. In each public forum case, the Court has articulated government interests and concerns. Further, the Court must decide these and all speech cases by considering what protection the First Amendment provides a free society. Indeed, today, it is nearly impossible to reconcile the public forum cases with other First Amendment cases, *see supra* notes 2-4, as the Court does not consider the broad constitutional issues raised in public forum cases. This Comment's proposal would bring the public forum cases more in line with "other problems of its kind."

Finally, it must be noted that insofar as some might prefer bright-line rules

Applying this standard to *Cornelius v. NAACP Legal Defense & Education Fund*<sup>167</sup> and *ISKCON*,<sup>168</sup> the Court would have reached different results.<sup>169</sup> In *Cornelius*, the Court found the CFC, a charitable drive in the federal workplace, to be a nonpublic forum and upheld the exclusion of certain charities as reasonable. Under the proposed standard, it cannot be said that allowing the NAACP to participate in a government-administered charitable drive is incompatible with the drive. The government had argued that money is better spent if used directly for the food and welfare needs of the poor, rather than for litigation and lobbying. However, this type of value judgment is best made by the federal employee who chooses which charities to designate for contribution. To silence the message limits the employees' opportunity to make an informed decision. Further, the government's desire to avoid the appearance of political favoritism certainly is not well served by excluding particular organizations; a non-discriminatory selection process would much better avoid the appearance of favoritism.<sup>170</sup> Fi-

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because they are simple to apply and keep judicial activists in check, the public forum doctrine has not been successful. The fractured decisions in *International Soc'y of Krishna Consciousness, Inc. v. Lee*, 112 S. Ct. 2701 (1992), and *United States v. Kokinda*, 497 U.S. 720 (1990), make that much clear. Both cases offer a myriad of approaches. Further, the *conservative* activists have created a circular intent-based inquiry that has eviscerated the First Amendment. Since there is always a risk that justices might approach a problem so as to achieve a particular result, it is better that they operate in a system that demands a consideration of the relevant issues and requires an articulation of the resulting conclusion, rather than one that allows them to ignore the Constitution.

<sup>167</sup> 473 U.S. 788 (1985). For a discussion of the facts and reasoning, see *supra* notes 64-71 and accompanying text.

<sup>168</sup> 112 S. Ct. at 2701. For a discussion of the facts and reasoning, see *supra* notes 78-122 and accompanying text.

<sup>169</sup> As demonstrated previously, the Court could have reached the same result in each of the cases decided before the formal adoption of the present framework by examining the competing interests. See *supra* notes 31, 44-45 & 162. Further, it has already been noted that *Kokinda* would have been better decided by requiring the government to adopt reasonable time, place or manner restrictions. See *supra* notes 76 & 162. This Comment examines *Cornelius* and *ISKCON* under the proposed approach because the reasoning and results in those cases were particularly unsatisfactory.

<sup>170</sup> Indeed, on remand, the district court granted a preliminary injunction against excluding the NAACP and other plaintiffs, finding that they were likely to succeed on the merits of proving viewpoint discrimination. *NAACP Legal Defense & Educ. Fund v. Horner*, 636 F. Supp. 762, 769-70 (D.D.C.), *vacated as moot*, 795 F.2d 215 (D.C. Cir. 1986). Thus, the government created, rather than avoided the appearance of partiality through its actions.

nally, if the government must limit the number of participants for administrative reasons, it should do so by adopting a fair, non-discriminatory system, such as a lottery or first-come-first-served basis. This approach is faithful to the First Amendment and achieves a much more rational result than that achieved by the Court under the current mode of analysis.

Similarly, a more rational result would have been achieved in *ISKCON* had the Court followed the proposed approach. The government interests are somewhat more legitimate in *ISKCON* than they were in *Cornelius*, as congestion and fraud are potential problems. Further, the government is indeed running an airport, which involves getting thousands of people on and off planes every day. Indeed, an onslaught of people roaming about the airport terminals handing out literature and soliciting funds could be terribly disruptive. Yet, the government has opened the forum for many activities other than travel. In so doing, the government has implicitly expressed a willingness to withstand a certain amount of disruption. More importantly, the proposed standard requires that the availability of reasonable time, place or manner restrictions also be considered. If such regulations were imposed,<sup>171</sup> it would be

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<sup>171</sup> As mentioned, the Port Authority might require that the Krishna members (and other potential speakers) sit at a table at a designated spot away from the heavy traffic, that only two people conduct the speech activities at one time, and that the speakers register with the Port Authority. See *supra* note 142. This would solve the congestion problem and simplify prevention of fraud. Another example is the course taken by the City of Houston. At Houston Intercontinental Airport, among the frequent public-address announcements is one stating:

At Houston Intercontinental Airport, certain individuals and organizations have registered to solicit contributions for various causes. This activity is protected by the First Amendment of the United States Constitution. However, the City of Houston and Airport Management does [sic] not endorse this activity. You are under no obligation to contribute to this individual or organization.

Houston Intercontinental Airport, Public Service Announcement (1993) (transcript on file with the *Brooklyn Law Review*). While this statement is not entirely accurate (solicitation is *not* protected by the First Amendment after *ISKCON*) it does aid in preventing fraud and duress, by informing travelers that they need not contribute and that those engaging in solicitation do not do so with any official approval. In addition, those wishing to engage in solicitation at the Houston airport must display a registration permit while engaging in solicitation. Moreover, they may not obstruct the free movement of or coerce travelers or misrepresent their identity. HOUSTON, TX., CODE, §§ 9-75 & 9-76 (1993). Thus, Houston has addressed the same interests that underlie the New York regulations, but without banning speech.

difficult to articulate how distribution or solicitation could be incompatible with the huge airport terminals at issue. In fact, by requiring the use of such regulations, which could apply to both distribution and solicitation, the Port Authority would not be faced with the rather absurd split result at which the Court arrived.<sup>172</sup>

While the facts of these two cases—particularly those in *Cornelius*—seem to require the results described, a decisionmaker who can articulate a reasonable argument as to why the government's interests do indeed outweigh the speech interests is free to resolve the cases accordingly. That is the essence of this proposal: a reasoned, principled decision that fairly weighs the competing interests is legitimate; a result achieved through arbitrary pigeon-holing without consideration of competing interests is not.

## CONCLUSION

The public forum doctrine has lived through many stages. It started as a balancing test, flipped to a *per se* rule against affording First Amendment protection, flopped back to a balancing test, evolved into to a confusing mixture of a *per se* rule and a balancing test, settled as a complicated analysis that increasingly acted as a *per se* rule and finally fragmented into a series of analyses that yields results incapable of reconciliation. One reason for this may be that the Court has yet to articulate an approach that gives fair consideration to government interests without sacrificing speech interests. Instead, the Court seems to travel from one extreme to another. A single consistency, however, is the constant presence of justices who remain hostile toward speech when public property is involved.

Ultimately, the public forum doctrine is much less a means to ensure that government can operate efficiently than it is a cynical and convenient tool for government and courts to stamp out unpopular or marginal voices. In *ISKCON*, a fringe religious group came to Kennedy Airport and other large airports to disseminate its message and raise the funds that en-

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<sup>172</sup> Although the solicitation ban is constitutional, the Krishna members may still roam freely throughout the airport terminals distributing literature.

able it to continue its work. No doubt many users of the airports were grateful to the Port Authority for ridding the terminals of a minor nuisance. But the fact that the political process will never operate to protect the Krishnas' speech rights is the very reason that the First Amendment exists. If the Constitution is to have any meaning, it must protect the unpopular and marginal voices as stridently as those in the mainstream.

Of course, government also must operate efficiently, and the First Amendment simply cannot be absolute. But the existing public forum doctrine fails in two respects. By resting on a premise that government conduct is equivalent to private conduct when public property is concerned, the analysis, at its worst, fails to provide adequate consideration for First Amendment rights and, therefore, allows the exclusion of far more speech activity than necessary. At its best, because a lack of principled reasoning has led to a multitude of approaches, the doctrine has reached such a point of disarray that it fails to offer guidance. Accordingly, it is clear that the Court must give up its public forum doctrine and begin anew.

This Comment's proposal—an objective balancing approach that requires the government to show incompatibility—remedies both problems. It gives the First Amendment top priority by requiring the government to justify adequately any ban on speech activity, while always recognizing that such justifications in fact do exist. Just as importantly, the proposal achieves its results through a simple test that requires no more and no less than a fair consideration of the values that underlie the First Amendment, and a fair articulation of the reasoning that underlies the decisionmaker's result.

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