CASENOTES

CONSTITUTIONAL LAW—An Airport Terminal Operated by a Public Authority Is a Nonpublic Forum for Purposes of First Amendment Analysis; Thus, a Ban on Solicitation Need Only Satisfy a Reasonableness Standard—*International Society for Krishna Consciousness, Inc. v. Lee*, 112 S. Ct. 2701 (1992).

I. INTRODUCTION

The Port Authority of New York and New Jersey owns and operates three major airports in the greater New York City area.[1] Collectively, the airports serve approximately eight percent of the domestic airline market, more than fifty percent of the trans-Atlantic market, and will serve an estimated one hundred ten million passengers annually by the end of the 1990s.[2] The airports "form one of the world's busiest metropolitan airport complexes."[3]

User fees fund the airports, which are operated to make a regulated profit.[4] Commercial airlines lease the majority of space at the airports.[5] The Port Authority retains control over the remaining unleased space, including the terminals.[6] The terminals, to which the public has general access, contain "various commercial establishments such as restaurants, snack stands, bars, newsstands, and stores of various types."[7] The vast majority of people who visit the terminal "do so for purposes related to air travel" and "principally include passengers, those meeting or seeing off passengers, flight crews, and terminal employees."[8]

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1. International Soc'y for Krishna Consciousness, Inc. v. Lee, 112 S. Ct. 2701, 2703 (1992).
2. *Id.*
3. *Id.*
4. *Id.* at 2704.
5. *Id.*
6. *Id.*
7. *Id.*
8. *Id.*

The Port Authority adopted a regulation forbidding anyone to continuously solicit money or distribute literature within the terminals.[9] It did not restrict solicitation or distribution on the sidewalks outside of the terminal buildings.[10]

The International Society for Krishna Consciousness, Inc. (ISKCON) is a nonprofit religious corporation.[11] Its members perform *sankirtan*, a ritual which consists of "'going into public places, disseminating religious literature and soliciting funds to support the religion.'"[12] The primary purpose of *sankirtan* is to raise funds for the movement.[13] Because the Port Authority regulation prohibited ISKCON from performing *sankirtan* in the terminals, ISKCON sought declaratory and injunctive relief under 42 U.S.C. section 1983, alleging the regulation deprived its members of their First Amendment rights.[14]

Using the "traditional public forum" doctrine, the district court concluded the terminals were analogous to public streets—the "quintessential traditional public fora."[15] Therefore, the court could sustain the regulation "only if it was narrowly tailored to support a compelling state interest."[16] Because the Port Authority did not argue that the regulation's blanket prohibition survived this scrutiny, the district court granted ISKCON summary judgment.[17]

The court of appeals relied on *United States v. Kokinda*[18] to conclude the terminals were not public fora.[19] Thus, judicial scrutiny was reduced to discovering whether the regulation was reasonable.[20] The court of appeals predicted the Supreme Court would find the regulation was reasonable and upheld the ban on solicitation.[21]

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9. *Id.* The regulation states:

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

Id. (quoting International Soc'y for Krishna Consciousness, Inc. v. Lee, 925 F.2d 576, 578-79 (2d Cir. 1991)).

10. *Id.*

11. *Id.* at 2703.

12. *Id.* (quoting International Soc'y for Krishna Consciousness, Inc. v. Lee, 925 F.2d at 577).

13. *Id.*

14. *Id.* at 2704.

15. *Id.*

16. *Id.*

17. *Id.*

18. United States v. Kokinda, 110 S. Ct. 3115, 3124-25 (1990) (holding a postal sidewalk was not a traditional or designated public forum and the Postal Service regulation prohibiting solicitation on postal premises did not violate the First Amendment).

19. International Soc'y for Krishna Consciousness, Inc. v. Lee, 112 S. Ct. 2701, 2704 (1992).

20. *Id.*

21. *Id.*

The United States Supreme Court granted certiorari and *held,* affirmed.[22] An airport terminal operated by a public authority is a nonpublic forum for purposes of First Amendment analysis; thus, a ban on solicitation need only satisfy a reasonableness standard. *International Society for Krishna Consciousness, Inc. v. Lee,* 112 S. Ct. 2701 (1992).

II. MAJORITY OPINION

Chief Justice Rehnquist, writing for the majority, began his analysis by reviewing First Amendment principles.[23] Although the solicitation at issue, *sankirtan*, is a form of speech protected by the First Amendment,[24] the government is not required to permit "all forms of speech on property that it owns and controls."[25] With respect to a piece of property, the government acts as either a proprietor and manager of its internal operations or as a lawmaker with regulatory or licensing power.[26] When acting in the former capacity, a court will not subject the government's actions to the heightened review required when it acts as a lawmaker.[27] As an example of government acting in its proprietary and managerial capacity, the Court pointed to *Lehman v. City of Shaker Heights,*[28] which "upheld a ban on political advertisements in city-operated transit vehicles even though the city permitted other types of advertising on those vehicles."[29] Similarly, in *Perry Education Ass'n v. Perry Local Educators' Ass'n,*[30] the Court permitted a school district "to limit access to an internal mail system used to communicate with teachers employed by the district."[31]

A. *Forum Analysis*

The Court explained *Lehman, Perry,* and other cases reflect a "forum based" approach to evaluating restrictions on the use of government property.[32] Forum analysis classifies government property into three categories: traditional public fora, designated public fora (either limited or unlimited), and all remaining public property.[33]

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22. *Id.* at 2709.
23. *Id.* at 2705.
24. *Id.* (citing United States v. Kokinda, 110 S. Ct. 3115 (1990); Riley v. National Fed'n of the Blind, Inc., 487 U.S. 781, 788-89 (1988); Heffron v. International Soc'y for Krishna Consciousness, Inc., 452 U.S. 640 (1981)).
25. *Id.* (citing United States Postal Serv. v. Council of Greenburgh Civic Ass'ns, 453 U.S. 114, 129 (1981); Greer v. Spock, 424 U.S. 828 (1976)).
26. *Id.*
27. *Id.*
28. Lehman v. City of Shaker Heights, 418 U.S. 298 (1974).
29. International Soc'y for Krishna Consciousness, Inc. v. Lee, 112 S. Ct. 2701, 2705 (1992) (citation omitted).
30. Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37 (1983).
31. International Soc'y for Krishna Consciousness, Inc. v. Lee, 112 S. Ct. at 2705 (citing Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37 (1983)).
32. International Soc'y for Krishna Consciousness, Inc. v. Lee, 112 S. Ct. at 2705 (citing Cornelius v. NAACP Legal Defense & Educ. Fund, Inc., 473 U.S. 788, 800 (1985)).
33. *Id.*

A traditional public forum is property "traditionally . . . available for public expression."[34] Regulation of speech in a traditional public forum must pass the highest scrutiny. The Court will strike down regulations that are not "narrowly drawn to achieve a compelling [government] interest."[35]

A designated public forum is property the government has opened to the public for expressive activity.[36] Regulation of expressive activity in a designated public forum is subject to the identical heightened scrutiny governing a traditional public forum.[37]

Government regulation of the final category, all remaining property, enjoys a much more deferential standard of review.[38] Regulations need only be reasonable; however, they cannot be an attempt to suppress a speaker's activity because of disagreement with the speaker's view.[39] Thus, regulations must be content-neutral.[40]

In order to determine whether an airport terminal was a public forum, the Court first examined prior cases describing characteristics of a public forum.[41] In *Hague v. Committee for Industrial Organization,*[42] the first case to suggest restrictions on speech in a public forum were subject to heightened scrutiny, the Court held individuals have a right to use "streets and parks for communication of views."[43] The Court reasoned the right flowed from the idea that "'streets and parks . . . 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.'"[44] The Court confirmed this observation in *Frisby v. Schultz,*[45] deciding a residential street was a public forum.[46]

In recent cases, the Court noted a public forum is property with "'a principle purpose . . . the free exchange of ideas.'"[47] The government cannot create a public forum by inaction because it, like other property owners, "has power to preserve the property under its control for the use to which it is lawfully dedicated."[48] This power allows the government to limit citizens' use of government

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34. *Id.*
35. *Id.* (citing Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983)).
36. *Id.*
37. *Id.*
38. *Id.*
39. *Id.* at 2705-06.
40. *Id.*
41. *Id.* at 2706.
42. Hague v. CIO, 307 U.S. 496 (1939).
43. International Soc'y for Krishna Consciousness, Inc. v. Lee, 112 S. Ct. 2701, 2706 (quoting Hague v. CIO, 307 U.S. at 515-16).
44. *Id.* (quoting Hague v. CIO, 307 U.S. at 515).
45. Frisby v. Schultz, 487 U.S. 474 (1988).
46. *Id.* at 481.
47. International Soc'y for Krishna Consciousness, Inc. v. Lee, 112 S. Ct. 2701, 2706 (1992) (quoting Cornelius v. NAACP Legal Defense & Educ. Fund, Inc., 473 U.S. 788, 800 (1985)).
48. *Id.* (quoting Greer v. Spock, 424 U.S. 828, 836 (1976)).

property.[49] The government also does not create a public forum "'whenever members of the public are permitted freely to visit a place owned or operated by the [g]overnment.'"[50] Rather, the government must "'intentionally open[ ] a nontraditional forum for public discourse.'"[51] Finally, the Court recognized the relevance of the location of the property because "separation from acknowledged public areas may serve to indicate that the separated property is a special enclave, subject to greater restriction" and therefore cannot be open to the public as a public forum.[52]

B. *Airports Are Nonpublic Fora*

The Court held these precedents demonstrated that airport terminals are nonpublic fora.[53] Because the modern air terminal has only recently grown to its present size and character, "it hardly qualifies for the description of having 'immemorially . . . time out of mind' been held in the public trust and used for purposes of expressive activity."[54] Even within this short history, it is only "'[i]n recent years [that] it has become a common practice for various religious and non-profit organizations to use commercial airports as a forum for the distribution of literature, the solicitation of funds, the proselytizing of new members, and other similar activities.'"[55]

The Court concluded this "tradition of airport activity" demonstrated airports historically have not been open to the public for speech activity.[56] The Court could not say operators have intentionally opened airports to speech activity, a fact supported by the frequent and continuing litigation in this area.[57] "[T]here can be no argument that society's time-tested judgment, expressed through acquiescence in a continuing practice, has resolved the issue in [ISKCON's] favor."[58]

The Court rejected ISKCON's argument that speech activity historically occurring at various "transportation nodes," such as rail stations, bus stations,

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49. *Id.*

50. *Id.* (quoting Greer v. Spock, 424 U.S. at 836).

51. *Id.* (quoting Cornelius v. NAACP Legal Defense & Educ. Fund, Inc., 473 U.S. at 802).

52. *Id.* (citing United States v. Grace, 461 U.S. 171, 179-80 (1983)).

53. *Id.*

54. *Id.* (quoting Hague v. CIO, 307 U.S. 496, 515 (1939)). Only recently have airport terminals achieved their contemporary size and character. *Id.* (citing H.V. HUBBARD ET AL., AIRPORTS: THEIR LOCATION, ADMINISTRATION AND LEGAL BASIS 8 (1930) (noting the United States had only 807 airports in 1930)).

55. *Id.* (quoting 45 Fed. Reg. 35314 (1980)).

56. *Id.*

57. *Id.* at 2706-07; *see id.* at 2705 n.2 (citing Jamison v. City of St. Louis, 828 F.2d 1280 (8th Cir. 1987), *cert. denied,* 485 U.S. 987 (1988); Jews for Jesus, Inc. v. Board of Airport Comm'rs, 785 F.2d 791 (9th Cir. 1986), *aff'd on other grounds,* 482 U.S. 569 (1987); United States Southwest Africa/Namibia Trade & Cultural Council v. United States, 708 F.2d 760 (D.C. Cir. 1983); Fernandes v. Limmer, 663 F.2d 619 (5th Cir. 1981), *cert. dismissed,* 458 U.S. 1124 (1982); Chicago Area Military Project v. City of Chicago, 508 F.2d 921 (7th Cir. 1975), *cert. denied,* 421 U.S. 992 (1975)).

58. *Id.* at 2707.

wharves, and Ellis Island, demonstrated airport terminals were public fora.[59] Even if the Court accepted this historical account, it reasoned such evidence was of little use.[60] First, the evidence was irrelevant to public forum analysis because these transportation nodes were traditionally privately owned.[61] Second, airports, not transportation nodes, were the relevant unit for inquiry.[62]

The development of new methods of transportation will require new methods of accommodation.[63] With each step, the inquiry will be "whether the transportation necessities are compatible with various kinds of expressive activity."[64] Making a category of transportation nodes, however, "would unjustifiably elide what may prove to be critical differences of which [the Court] should rightfully take account."[65] The Court concluded it would be a mistake "[t]o blithely equate airports with other transportation centers."[66]

The Court also concluded that the principle purpose of airport terminals is not "promoting the free exchange of ideas."[67] Airports must provide attractive services to the marketplace because they are commercial enterprises.[68] The airports, which are funded by user fees, are designed to make a regulated profit.[69] Almost all persons visit airports for travel related purposes.[70] The Port Authority considers the terminals' purpose is to facilitate air travel, not to promote expression.[71] Aside from the Port Authority's intent, the operation of the terminals demonstrates that the terminals were never dedicated to solicitation of contributions.[72]

The Court focused on the purpose of airport builders and managers to provide "terminals that will contribute to efficient air travel."[73] Although many airports have expanded their functions beyond facilitating efficient air travel, few airports have included designating a forum for solicitation.[74] The Court concluded "neither by tradition nor purpose can the terminals be described as satisfying the standards [the Court has] previously set out for identifying a public forum."[75]

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59. *Id.*
60. *Id.*
61. *Id.* (citing United Transp. Union v. Long Island R.R. Co., 455 U.S. 678, 687 (1982); H.R. GRANT & C.W. BOHI, THE COUNTRY RAILROAD STATION IN AMERICA, 11-15 (1978)).
62. *Id.*
63. *Id.*
64. *Id.*
65. *Id.* One example is the extensive security network present at airports, but missing from bus and train stations. *Id.*
66. *Id.*
67. *Id.* (citing Cornelius v. NAACP Legal Defense & Educ. Fund, Inc., 473 U.S. 788 (1985)).
68. *Id.*
69. *Id.*
70. *Id.*
71. *Id.*
72. *Id.*
73. *Id.*
74. *Id.* at 2708.
75. *Id.*

C. *Solicitation Ban*

Because the Court held airport terminals were not public fora, the Port Authority's prohibition of solicitation in the terminals was only required to be reasonable.[76] The Court emphasized the regulation does not need to "'be the most reasonable or the only reasonable limitation.'"[77] As a result, the Court had "no doubt" that the Port Authority regulation survived this scrutiny.[78]

The Court noted the disruptive effect of solicitation on business.[79]

> "Solicitation requires action by those who would respond: The individual solicited must decide whether or not to contribute (which itself might involve reading the solicitor's literature or hearing his pitch), and then, having decided to do so, reach for a wallet, search it for money, write a check, or produce a credit card."[80]

Passengers wishing to avoid the solicitor may impede traffic by slowing down and causing others to alter their path.[81] This is a problem because "'air travelers, who are often weighted down by cumbersome baggage . . . may be hurrying to catch a plane or to arrange ground transportation.'"[82] Delays are costly because "a flight missed by only a few minutes can result in hours worth of subsequent inconvenience."[83]

In addition to targeting disruption, the regulation appropriately targets the risks of duress caused by the solicitation.[84] Skillful and unprincipled solicitors can target vulnerable patrons who cannot easily avoid the solicitation, such as those accompanying children or those suffering physical impairment.[85] Fraud is also a potential problem because an "unsavory solicitor" can conceal his affiliation or deliberately shortchange purchasers.[86] The problem is compounded because visitors on tight schedules are unlikely to stop and formally complain to airport authorities.[87]

The Court recognized the validity of the Port Authority's conclusion that it could monitor solicitation most effectively by limiting solicitation to the sidewalk

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76. *Id.*
77. *Id.* (quoting United States v. Kokinda, 110 S. Ct. 3115, 3124 (1990) (plurality opinion)).
78. *Id.*
79. *Id.*
80. *Id.* (quoting United States v. Kokinda, 110 S. Ct. at 3123).
81. *Id.*
82. *Id.* (quoting International Soc'y for Krishna Consciousness, Inc. v. Lee, 925 F.2d 576, 582 (2d Cir. 1991)).
83. *Id.*
84. *Id.*
85. *Id.* (citing International Soc'y for Krishna Consciousness, Inc. v. Barber, 506 F. Supp. 147, 159-63 (N.D.N.Y. 1980), *rev'd on other grounds*, 650 F.2d 430 (2d Cir. 1981)).
86. *Id.* (citing International Soc'y for Krishna Consciousness, Inc. v. Barber, 506 F. Supp. at 159-63).
87. *Id.*

outside the terminals.[88] This allowed solicitors access to "an overwhelming percentage of airport users" and allowed complete access to the general public.[89] The Court stated that "it would be odd to conclude that the Port Authority's terminal regulation is unreasonable despite the Port Authority having otherwise assured access to an area universally traveled."[90]

The Court conceded passenger inconvenience and burdens on Port Authority officials flowing from solicitation "may seem small."[91] Viewed against a background in which "pedestrian congestion is one of the greatest problems facing the three terminals," the Port Authority "could reasonably worry that even such incremental effects would prove quite disruptive."[92]

III. SEPARATE OPINIONS

A. *Concurrence of Justice O'Connor*

Justice O'Connor agreed with the majority's assessment that airports are not public fora.[93] Contrasting airports with streets and parks, she wrote airports "do not count among their purposes the 'free exchange of ideas,'"[94] have not "'by long tradition or by government fiat . . . been devoted to assembly and debate,'"[95] and have not "'time out of mind, . . . been used for purposes of . . . communicating thoughts between citizens, and discussing public questions.'"[96]

Justice O'Connor also recognized the government's active role in managing its property.[97] Property does not become a public forum "'simply because members of the public are permitted to come and go at will.'"[98] When the government does not dedicate its property to open communication, it may "'restrict use to those who participate in the forum's official business'" without further justification.[99] Justice O'Connor did not doubt that airports are within the class of property the government could close to those who are there without legitimate business.[100] Therefore, public access to airports is a "'matter of grace by government officials'" because, unlike most streets and parks, that access is not

88. *Id.*
89. *Id.* at 2709.
90. *Id.*
91. *Id.*
92. *Id.*
93. *Id.* at 2711 (O'Connor, J., concurring).
94. *Id.* (O'Connor, J., concurring) (quoting Cornelius v. NAACP Legal Defense & Educ. Fund, Inc., 473 U.S. 788, 800 (1985)).
95. *Id.* (O'Connor, J., concurring) (quoting Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983)).
96. *Id.* (O'Connor, J., concurring) (quoting Hague v. CIO, 307 U.S. 496, 515 (1939)).
97. *Id.* (O'Connor, J., concurring).
98. *Id.* (O'Connor, J., concurring) (quoting United States v. Grace, 461 U.S. 171, 177 (1983)).
99. *Id.* (O'Connor, J., concurring) (quoting Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. at 53).
100. *Id.* (O'Connor, J., concurring).

"'inherent in the open nature of the locations.'"[101] Justice O'Connor also agreed the Port Authority had not created a limited or designated public forum because it had not expressly opened its airports to expressive activity.[102]

Although strict scrutiny did not apply to the Port Authority's regulation, Justice O'Connor believed this determination only began the inquiry.[103] The regulation still must be reasonable and content neutral.[104] In assessing reasonableness, the Court evaluates the regulation "'in light of the purpose of the forum and all the surrounding circumstances.'"[105] Special attributes of a forum are relevant because "'the significance of the governmental interest must be assessed in light of the characteristic nature and function of the particular forum involved.'"[106] Justice O'Connor noted the Port Authority had not limited access to its terminals and had created an extremely large complex open to both travelers and nontravelers.[107]

One factor to consider when assessing reasonableness is whether the regulation is "consistent with the [government's] legitimate interest in 'preserv[ing] the property . . . for the use to which it is lawfully dedicated.'"[108] Although it is usually a straightforward inquiry because cases typically present discrete, single-purpose facilities,[109] the question became broader due to the wide range of activities promoted by the Port Authority.[110] Justice O'Connor disagreed with the Port Authority's assertion that it dedicated its terminals to the sole purpose of facilitating air travel.[111] Rather, in her view "the Port Authority is operating a shopping mall as well as an airport."[112] Therefore, the correct reasonableness inquiry was

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101. *Id.* (O'Connor, J., concurring) (quoting United States v. Kokinda, 110 S. Ct. 3115, 3128 (1990) (Brennan, J., dissenting)).

102. *Id.* (O'Connor, J., concurring).

103. *Id.* at 2711-12 (O'Connor, J., concurring).

104. *Id.* at 2712 (O'Connor, J., concurring).

105. *Id.* (O'Connor, J., concurring) (quoting Cornelius v. NAACP Legal Defense & Educ. Fund, Inc., 473 U.S. 788, 809 (1985)).

106. *Id.* (O'Connor, J., concurring) (quoting United States v. Kokinda, 110 S. Ct. 3115, 3122 (1990)).

107. *Id.* (O'Connor, J., concurring). O'Connor explained "[t]he airports house restaurants, cafeterias, snack bars, coffee shops, cocktail lounges, post offices, banks, telegraph offices, clothing shops, drug stores, food stores, nurseries, barber shops, currency exchanges, art exhibits, commercial advertising displays, bookstores, newsstands, dental offices and private clubs." *Id.* (O'Connor, J., concurring). One airport even had two branches of Bloomingdale's. *Id.* (O'Connor, J., concurring).

108. *Id.* (O'Connor, J., concurring) (quoting Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 50-51 (1985)).

109. *Id.* at 2712-13 (O'Connor, J., concurring) (citing United States v. Kokinda, 110 S. Ct. 3115 (1990) (dedicated sidewalk between parking lot and post office); Cornelius v. NAACP Legal Defense & Educ. Fund, Inc., 473 U.S. 788 (1985) (literature for charity drive); Members of City Council v. Taxpayers for Vincent, 466 U.S. 789 (1984) (utility poles); Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37 (1985) (interschool mail system); United States Postal Serv. v. Council of Greenburgh Civic Ass'ns, 453 U.S. 114 (1981) (household mail boxes); Adderley v. Florida, 385 U.S. 39 (1966) (curtilage of jailhouse)).

110. *Id.* at 2713 (O'Connor, J., concurring).

111. *Id.* (O'Connor, J., concurring).

112. *Id.* (O'Connor, J., concurring).

whether the Port Authority's regulations were "reasonably related to maintaining the multipurpose environment that the Port Authority has deliberately created."[113]

Applying this standard, Justice O'Connor concluded the solicitation ban was reasonable.[114] Unlike the other activities permitted by the Port Authority, face-to-face solicitation is incompatible with the airport's function.[115] Justice O'Connor reasoned that because solicitation presents problems of congestion and fraud and because airport users often face time constraints and travel with luggage or children, the regulation reasonably avoided disruption of the airport's operations.[116]

B. *Concurrence of Justice Kennedy*

Although Justice Kennedy concurred in the Court's judgment, his analysis differed substantially from the Court's analysis.[117] He viewed the terminals as public fora in which speech "is entitled to protection against all government regulation inconsistent with public forum principles."[118] He would uphold the solicitation ban, however, either as a narrow and valid time, place, and manner regulation, or as a valid regulation of the nonspeech element of expressive conduct.[119]

1. *Saving Public Forum Jurisprudence*

Justice Kennedy repeated his concern that "'[i]f our public forum jurisprudence is to retain vitality, we must recognize that certain objective characteristics of government property and its customary use by the public may control' the status of the property."[120] His theme centers on the traditional public forum doctrine as a protector of expression, not a "jurisprudence of categories" allowing the government to "restrict speech by fiat."[121]

Justice Kennedy criticized the majority's decision because it granted the government "almost unlimited authority to restrict speech on its property by doing nothing more than articulating a non-speech related purpose for the area" and left "almost no scope for the development of new public forums absent the rare approval of the government."[122] He believed the Court should make an

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113. *Id.* (O'Connor, J., concurring).
114. *Id.* (O'Connor, J., concurring).
115. *Id.* (O'Connor, J., concurring).
116. *Id.* (O'Connor, J., concurring).
117. *See id.* at 2715 (Kennedy, J., concurring).
118. *Id.* (Kennedy, J., concurring).
119. *Id.* (Kennedy, J., concurring).
120. *Id.* (Kennedy, J., concurring) (quoting United States v. Kokinda, 110 S. Ct. 3115, 3125 (1990) (Kennedy, J., concurring)).
121. *Id.* (Kennedy, J., concurring).
122. *Id.* at 2716 (Kennedy, J., concurring). This analysis was inconsistent with Justice Kennedy's view of the First Amendment as a limitation on government. *Id.* (Kennedy, J., concurring). The First Amendment should prevent government from controlling speech; it is not a grant of power. *Id.* (Kennedy, J., concurring).

objective inquiry, taking into account the physical characteristics and uses of the property.[123]

Justice Kennedy argued that the Court's analysis did not comport with the liberties the public forum doctrine is designed to protect.[124] In addition to the Free Speech and Free Press Clauses of the First Amendment, he argued that the Assembly Clause protects these liberties, which are essential to a democracy.[125] Because public places are the locus of public discussion of issues and protests against arbitrary action, citizens must be allowed to gather and speak with others.[126] Recognizing property as a public forum gives citizens notice that they may exercise their freedoms without fear of government censure.[127]

Justice Kennedy labeled the notion that the purpose of traditional public fora is public discourse as "a most doubtful fiction."[128] He viewed the principal purpose of streets, parks, and sidewalks as being the facilitation of transportation, not public discourse.[129] Public parks may be created for beauty and open space as much as for discourse.[130] Thus, even quintessential public fora lack the necessary characteristics of a public forum under the Court's definition.[131]

The Court's narrow view of public fora assured that "few if any types of property other than those already recognized as public forums will be accorded that status."[132] The Court's answer of a recourse to history did not persuade Justice Kennedy because, although public forum jurisprudence has roots in historic practice, "it is not tied to a narrow textual command limiting the recognition of new forums."[133] The doctrine should "recognize that open, public spaces and thoroughfares which are suitable for discourse may be public forums, whatever their historical pedigree and without concern for a precise classification of the property."[134] Otherwise, the doctrine loses relevance when technology rapidly changes.[135] Failing to recognize new public fora will seriously curtail expressive activity because "most citizens travel by automobile, and parks all too often become locales for crime rather than social intercourse."[136]

Justice Kennedy wrote that metropolitan airports are one of the places left in our mobile society suitable for discourse.[137] Recognizing them as public is important because they are one of the few remaining government-owned places

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123. *Id.* (Kennedy, J., concurring).
124. *Id.* (Kennedy, J., concurring).
125. *Id.* (Kennedy, J., concurring).
126. *Id.* at 2716-17 (Kennedy, J., concurring).
127. *Id.* at 2717 (Kennedy, J., concurring).
128. *Id.* (Kennedy, J., concurring).
129. *Id.* (Kennedy, J., concurring).
130. *Id.* (Kennedy, J., concurring).
131. *Id.* (Kennedy, J., concurring).
132. *Id.* (Kennedy, J., concurring).
133. *Id.* (Kennedy, J., concurring).
134. *Id.* (Kennedy, J., concurring) (citing Lehman v. City of Shaker Heights, 418 U.S. 298, 303 (1974) (plurality opinion); Hague v. CIO, 307 U.S. 496, 515 (1939) (speaking of "streets and public places" as forums)).
135. *Id.* (Kennedy, J., concurring).
136. *Id.* (Kennedy, J., concurring).
137. *Id.* (Kennedy, J., concurring).

where many members of the public have extensive contact with each other.[138] The public forum doctrine must be flexible enough to allow creation of public fora which do not fit within the narrow tradition of streets, parks, and sidewalks.[139]

Although Justice Kennedy agreed with the Court that property traditionally and historically available for speech activity is a public forum, he would go further and hold property is a public forum if its "objective, physical characteristics . . . and the actual public access and uses which have been permitted by the government indicate that expressive activity would be appropriate and compatible with those uses."[140] Justice Kennedy listed several important considerations:

> whether the property shares physical similarities with more traditional public forums, whether the government has permitted or acquiesced in broad public access to the property, and whether expressive activity would tend to interfere in a significant way with the uses to which the government has as a factual matter dedicated the property.[141]

In determining whether expressive activity is compatible with the uses of the property, courts must consider whether reasonable time, place, and manner restrictions are available.[142]

Justice Kennedy recognized that designated public fora provide practically no protection for expressive activity.[143] He agreed with the Court that government must often restrict speech on property of this kind to retain its designated purpose.[144] He also agreed that the government may choose to eliminate a designation of its property for expression.[145] He argued, however, that these considerations increase the need to protect expressive activity in other places.[146]

2. *Airports Are Public Fora*

Justice Kennedy wrote that the Port Authority's airport terminals were clearly public fora.[147] He first noted the physical similarities between airport terminals and public streets.[148] The district court's findings demonstrated that the terminals were "broad, public thoroughfares full of people and lined with stores

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138. *Id.* at 2718 (Kennedy, J., concurring).
139. *Id.* (Kennedy, J., concurring). Justice Kennedy drew support from the Court's willingness to allow flexibility in other areas of constitutional interpretation to meet changing technologies. *Id.* (Kennedy, J., concurring) (citing Katz v. United States, 389 U.S. 347 (1967)).
140. *Id.* (Kennedy, J., concurring).
141. *Id.* (Kennedy, J., concurring).
142. *Id.* (Kennedy, J., concurring).
143. *Id.* (Kennedy, J., concurring).
144. *Id.* (Kennedy, J., concurring).
145. *Id.* (Kennedy, J., concurring).
146. *Id.* (Kennedy, J., concurring).
147. *Id.* at 2719 (Kennedy, J., concurring).
148. *Id.* (Kennedy, J., concurring).

and other commercial activities."[149] These physical similarities suggest the terminals should be public fora "for the same reasons that streets and sidewalks have been treated as public forums by the people who use them."[150]

Next, Justice Kennedy noted the terminals were "open to the public without restriction."[151] Although many who visit the terminals do so for a travel related purpose, this does not distinguish the terminals from the streets or sidewalks that many people use for travel.[152] Furthermore, a large portion of the public visits the terminals,[153] making it imperative to protect the public's expressive activity.[154]

Finally, the record and the recent history of airports demonstrated expressive activity is quite compatible with an airport's uses when subject to adequate time, place, and manner restrictions.[155] Justice Kennedy's response to claims that airport congestion made expressive activity incompatible with the airport's uses was that "[t]he First Amendment is often inconvenient."[156] In any event, the Port Authority made no showing that reasonable time, place, and manner restrictions could not cure any real impediments to the airport's smooth functioning.[157] To the contrary, the history of the Port Authority's airports showed this solution was feasible.[158] In addition, the wide consensus of the federal appellate courts that airport terminals were public fora led to expressive activity being considered "a commonplace feature of our Nation's major airports for many years."[159]

Justice Kennedy noted that "the logical consequence of [the] Port Authority's congestion argument is that the crowded streets and sidewalks of major cities cannot be public forums."[160] Proper time, place, and manner restrictions have resolved these problems in the past.[161] Justice Kennedy faulted the Port Authority for not showing "similar regulations would not be effective in its airports."[162]

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149. *Id.* (Kennedy, J., concurring) (citing International Soc'y for Krishna Consciousness, Inc. v. Lee, 721 F. Supp. 572, 576-77 (S.D.N.Y. 1989)).

150. *Id.* (Kennedy, J., concurring).

151. *Id.* (Kennedy, J., concurring).

152. *Id.* (Kennedy, J., concurring).

153. The Port Authority's airports served over 78 million passengers in 1986. *Id.* (Kennedy, J., concurring).

154. *Id.* (Kennedy, J., concurring).

155. *Id.* (Kennedy, J., concurring).

156. *Id.* (Kennedy, J., concurring).

157. *Id.* (Kennedy, J., concurring).

158. *Id.* (Kennedy, J., concurring). For many years, the Port Authority permitted expressive activity in its terminals without any apparent interference with its purpose of facilitating transportation. *Id.* (Kennedy, J., concurring).

159. *Id.* (Kennedy, J., concurring) (citing Jamison v. City of St. Louis, 828 F.2d 1280 (8th Cir. 1987), *cert. denied,* 485 U.S. 987 (1988); Jews for Jesus, Inc. v. Board of Airport Comm'rs, 785 F.2d 791 (9th Cir. 1986), *aff'd on other grounds,* 482 U.S. 569 (1987); United States Southwest Africa/Namibia Trade & Cultural Council v. United States, 708 F.2d 760 (D.C. Cir. 1983); Fernandes v. Limmer, 663 F.2d 619 (5th Cir. 1981); Chicago Area Military Project v. Chicago, 508 F.2d 921 (7th Cir.), *cert. denied,* 421 U.S. 992 (1975)).

160. *Id.* at 2720 (Kennedy, J., concurring).

161. *Id.* (Kennedy, J., concurring).

162. *Id.* (Kennedy, J., concurring).

3. *Alternative Bases to Uphold*

The fact that airports were public fora did not, in Justice Kennedy's view, automatically trigger the strict scrutiny employed by the Court.[163] He would uphold the Port Authority's regulation either as "a reasonable time, place, and manner restriction, or as a regulation directed at the nonspeech element of expressive conduct."[164] Both standards overlap considerably.[165]

Justice Kennedy began with the "well settled" rule that the government may reasonably restrict the time, place, or manner of protected speech in a public forum, provided the restrictions "'are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information.'"[166] Justice Kennedy noted the Court has also held that in appropriate circumstances the government may regulate conduct even if it has an expressive component.[167] He wrote that the Port Authority's regulation could be "described with equal accuracy as a regulation of the manner of expression, or as a regulation of conduct with an expressive component," and virtually identical standards applied to each classification.[168]

Justice Kennedy stressed the Port Authority's regulation prohibited only the "solicitation and receipt of funds" and did not prohibit all solicitation that requests the contribution of funds.[169] The regulation only reached solicitation for immediate monetary payment and was directed at the physical exchange of money,[170] "an element of conduct interwoven with otherwise expressive solicitation."[171] Justice Kennedy viewed the regulation as permitting "expression that solicits funds, but limit[ing] the manner of that expression to forms other than the immediate receipt of money."[172]

So construed, Justice Kennedy believed the Port Authority's regulation "survive[d] our test for speech restrictions in the public forum."[173] He noted the many dangers of this type of solicitation and agreed with the Court on this point.[174] He viewed the regulation as "a content-neutral rule serving a significant government interest" because it was not directed "at any particular message, idea,

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163. *Id.* (Kennedy, J., concurring).

164. International Soc'y for Krishna Consciousness, Inc. v. Lee, 112 S. Ct. 2701, 2720 (1992) (Kennedy, J., concurring).

165. *Id.* (Kennedy, J., concurring).

166. *Id.* at 2720-21 (Kennedy, J., concurring) (quoting Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989)).

167. *Id.* at 2721 (Kennedy, J., concurring).

168. *Id.* (Kennedy, J., concurring).

169. *Id.* (Kennedy, J., concurring).

170. *Id.* (Kennedy, J., concurring). For example, the regulation would not prohibit groups from distributing pre-addressed envelopes to passers-by along with pleas to contribute money. *Id.* (Kennedy, J., concurring).

171. *Id.* (Kennedy, J., concurring).

172. *Id.* (Kennedy, J., concurring).

173. *Id.* (Kennedy, J., concurring).

174. *Id.* (Kennedy, J., concurring).

or form of speech," but rather at the abusive practices of this type of solicitation.[175] He noted that the regulation does not prohibit speech solely because the Port Authority is concerned speech may be fraudulent, but because "the risk of fraud and duress is intensified by . . . the immediate exchange of money."[176] He argued the Court has recognized "such narrowly drawn regulations are in fact the proper means for addressing the dangers which can be associated with speech."[177]

Justice Kennedy also found the regulation was narrowly tailored.[178] Regulations need not be the least restrictive or intrusive means available, but must only be reasonable and cannot burden more speech than necessary.[179] The solicitation ban passed scrutiny because it prohibited only the immediate solicitation and receipt of money.[180] He also pointed out the ban was narrow because it prohibited only continuous or repetitive solicitation.[181]

Finally, Justice Kennedy believed the regulation "left open ample alternative channels of communication."[182] He noted the regulation forbids only narrow conduct; a violation occurs only if a solicitor accepts immediate payment of money.[183] Other avenues to solicit money continued to exist.[184]

C. *Dissent of Justice Souter*

1. *Airports Are Public Fora*

Justice Souter argued designating public property as a traditional public forum "must not merely state a conclusion that the property falls within a static category including streets, parks, and sidewalks and perhaps not much more."[185] Instead, the designation must represent a conclusion that the particular piece of public property is no different from streets, parks, and sidewalks—examples the Court previously labeled "'archetypes' of property from which the government was and is powerless to exclude speech."[186] The Court should not "treat the class of [traditional public] forums as closed by their description as traditional, taking that word merely as a charter for examining the history of the particular public property claimed as a forum."[187]

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175. *Id.* at 2722 (Kennedy, J., concurring).
176. *Id.* (Kennedy, J., concurring).
177. *Id.* (Kennedy, J., concurring) (citing Riley v. National Fed'n of Blind, 487 U.S. 781, 799 n.11 (1988); Village of Schaumburg v. Citizens for a Better Environment, 444 U.S. 620, 637 (1980)).
178. *Id.* (Kennedy, J., concurring).
179. *Id.* (Kennedy, J., concurring).
180. *Id.* (Kennedy, J., concurring).
181. *Id.* (Kennedy, J., concurring).
182. *Id.* at 2723 (Kennedy, J., concurring).
183. *Id.* (Kennedy, J., concurring).
184. *Id.* (Kennedy, J., concurring); *see supra* note 171.
185. International Soc'y for Krishna Consciousness, Inc. v. Lee, 112 S. Ct. 2711, 2724 (1992) (Souter, J., dissenting).
186. *Id.* (Souter, J., dissenting) (citing Frisby v. Schultz, 487 U.S. 474, 480 (1988)).
187. *Id.* (Souter, J., dissenting).

Justice Souter also argued public forum jurisprudence is rendered futile when its archetypes are treated as closed categories and when candidates for public forum status are treated so categorically that identification with the archetypes is defeated.[188] He wrote it was not necessary to hold that public fora included all "transportation nodes" in order to find they included certain metropolitan airports.[189] He viewed the inquiry as relating to the particular property at issue, not necessarily to the property's precise classification.[190]

Justice Souter noted that finding certain property does not qualify as a public forum does not foreclose the possibility of other property of that sort from being accorded public forum status.[191] A public forum is classified as any public property "suitable for discourse" in its physical character and where "expressive activity is 'compatible' with the use to which it has actually been put."[192] Applying this test, Justice Souter had "no difficulty concluding that the unleased public areas at airports like the metropolitan New York airports at issue in this case are public forums."[193]

2. *Solicitation Ban*

Justice Souter dissented from the Court's conclusion to uphold the "total ban" on solicitation for immediate payment.[194] He wrote that the solicitation of money by charities is "fully protected as the dissemination of ideas."[195] He considered it axiomatic that "although fraudulent misrepresentation of facts can be regulated, the dissemination of ideas cannot be regulated to prevent it from being unfair or unreasonable."[196]

Even if Justice Souter assumed the regulation was content neutral and merely a restriction on the manner of communication, he would strike it down because of the inadequate government interest, the regulation's failure to narrowly achieve its purpose, and the unavailability of alternative channels of communication.[197] The Port Authority's strongest argument for a government interest was the regulation prevented coercion and fraud.[198]

Justice Souter rejected the coercion argument, labeling it "weak to start with."[199] Pedestrians subjected to coercion can walk away.[200] Furthermore, in a

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188. *Id.* (Souter, J., dissenting).
189. *Id.* (Souter, J., dissenting).
190. *Id.* (Souter, J., dissenting).
191. *Id.* (Souter, J., dissenting).
192. *Id.* (Souter, J., dissenting).
193. *Id.* at 2725 (Souter, J., dissenting).
194. *Id.* (Souter, J., dissenting).
195. *Id.* (Souter, J., dissenting).
196. *Id.* (Souter, J., dissenting).
197. *Id.* (Souter, J., dissenting).
198. *Id.* (Souter, J., dissenting). Justice Souter easily rejected the other claimed interest—avoiding annoyance and congestion—by scrutinizing the regulation with "special care." *Id.* at 2725 n.1 (Souter, J., dissenting).
199. *Id.* at 2725 (Souter, J., dissenting).
200. *Id.* (Souter, J., dissenting).

far more coercive situation,[201] the Court held "'[s]peech does not lose its protected character . . . simply because it may embarrass others or coerce them into action.'"[202] Justice Souter could not uphold the regulation because no evidence of coercion existed beyond "the merely importunated character of the open and public solicitation."[203]

Justice Souter found the presence of fraud insufficient to justify the ban.[204] The Court must view "broad prophylactic rules" as suspect in the area of free expression and require more than a "laudable intent to prevent fraud."[205] The evidence of fraud consisted of an affidavit describing eight unsubstantiated complaints "involving some form of fraud, deception, or larceny" over an eleven year period.[206] Furthermore, no claim of fraud or misrepresentation was made since 1981.[207] Justice Souter labeled the Port Authority's knowledge of ISKCON's misconduct as "precisely the type of vague and unsubstantiated allegation that could never support a restriction on speech."[208] He also rejected restrictions on solicitation by other government entities as evidence of fraudulent conduct.[209]

Even if Justice Souter assumed a substantial government interest, he would strike down the regulation for not being narrowly tailored to achieve its purpose.[210] "Precision of regulation must be the touchstone,"[211] and the Port Authority had not achieved that precision.[212]

Finally, Justice Souter did not believe the regulation left open ample alternative channels of communication.[213] He viewed distributing pre-addressed envelopes as an inadequate alternative because its practical reality "is that it shuts off a uniquely powerful avenue of communication for organizations."[214] He also believed this alternative "may, in effect, completely prohibit unpopular and poorly funded groups from receiving funds in response to protected solicitation."[215]

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201. The context was a black boycott of white stores in Mississippi. *Id.* (Souter, J., dissenting).

202. *Id.* (Souter, J., dissenting) (quoting NAACP v. Claiborne Hardware Co., 458 U.S. 886, 910 (1982)).

203. *Id.* at 2726 (Souter, J., dissenting).

204. *Id.* (Souter, J., dissenting).

205. *Id.* (Souter, J., dissenting).

206. *Id.* (Souter, J., dissenting).

207. *Id.* (Souter, J., dissenting).

208. *Id.* (Souter, J., dissenting).

209. *Id.* (Souter, J., dissenting).

210. *Id.* (Souter, J., dissenting).

211. *Id.* (Souter, J., dissenting).

212. *Id.* at 2726-27 (Souter, J., dissenting).

213. *Id.* at 2727 (Souter, J., dissenting).

214. *Id.* (Souter, J., dissenting).

215. *Id.* (Souter, J., dissenting).

IV. EVOLUTION OF PUBLIC FORUM JURISPRUDENCE

As the Court noted,[216] public forum jurisprudence has its roots in the sweeping dictum of Justice Roberts in *Hague v. CIO.*[217] In distinguishing a case holding that a state's police power gave the legislature absolute control over Boston Common,[218] Justice Roberts wrote:

> 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 of a citizen of the United States to use the streets and parks for communication of views on national questions may be regulated in the interest of all; it is not absolute, but relative, and must be exercised in subordination to the general comfort and convenience, and in consonance with peace and good order; but it must not, in the guise of regulation, be abridged or denied.[219]

The Court did not give precision to the doctrine, however, until the more recent cases of *Perry Education Ass'n v. Perry Local Educators' Ass'n*[220] and *Cornelius v. NAACP Legal Defense & Educational Fund, Inc.*[221] Nevertheless, the development of the doctrine leading up to these cases began almost a decade earlier.[222]

In *Lehman v. City of Shaker Heights,*[223] the Court held the First and Fourteenth Amendments did not require a city to accept political advertising for car cards on public rapid transit vehicles even though it accepted other types of advertising.[224] The Court rejected the argument that the car cards were public fora which "guarantee[d] . . . nondiscriminatory access . . . 'regardless of the primary purpose for which the area is dedicated.'"[225]

The Court wrote that although the First Amendment has striven "to preserve access to public places for purposes of free speech, the nature of the forum and the conflicting interests involved have remained important in determining the

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216. *Id.* at 2706; *see id.* at 2715 (Kennedy, J., concurring).
217. Hague v. CIO, 307 U.S. 496 (1939).
218. *Id.* at 514-15.
219. *Id.* at 515-16.
220. Perry Local Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37 (1983).
221. Cornelius v. NAACP Legal Defense & Educ. Fund, Inc., 473 U.S. 788 (1985); *see* International Soc'y for Krishna Consciousness, Inc. v. Lee, 112 S. Ct. 2701, 2715 (1992) (Kennedy, J., concurring). As of 1984, the Supreme Court used the phrase "public forum" in only thirty-two opinions. Cornelius v. NAACP Legal Defense & Educ. Fund, Inc., 473 U.S. at 833 n.1 (Stevens, J., dissenting). The Supreme Court rendered only two of those decisions before 1970 and rendered 13 of them in the 1980s. *Id.* n.1 (Stevens, J., dissenting).
222. *See* Lehman v. City of Shaker Heights, 418 U.S. 298 (1974).
223. Lehman v. City of Shaker Heights, 418 U.S. 298 (1974).
224. *Id.* at 304.
225. *Id.* at 301-02 (quoting Brief for Petitioner at 14).

degree of protection afforded by the Amendment to the speech in question."[226] The Court noted there were "no open spaces, no meeting hall, park, street corner, or other public thoroughfare."[227] Instead, the car card space was part of a commercial venture by the city.[228]

The Court emphasized the city consciously limited access to advertising space on its transit vehicles "to minimize chances of abuse, the appearance of favoritism, and the risk of imposing upon a captive audience."[229] According to the Court, these were "reasonable legislative objectives advanced by the city in a proprietary capacity."[230] Four members of the Court rendered this opinion.[231]

Four members of the Court dissented.[232] Justice Brennan believed determining whether a piece of public property is a public forum requires balancing "the competing interests of the government, on the one hand, and the speaker and his audience, on the other."[233] The Court must assess "the importance of the primary use to which the public property or facility is committed and the extent to which that use will be disrupted if access for free expression is permitted."[234] The analysis is whether the use of the property is compatible with "free speech, free assembly, and the freedom to petition for redress of grievances."[235]

Justice Brennan believed the city created a public forum because "[b]y accepting commercial and public service advertising, the city effectively waived any argument that advertising in its transit cars is incompatible with the rapid transit system's primary function of providing transportation."[236] He viewed the city's installation of physical facilities for advertising and creation of an administration to regulate access to that space as creating a forum for communication.[237]

Justice Brennan wrote that the government may not restrict speech in a public forum based on subject matter or content.[238] It may, however, use neutral time, place, and manner restrictions "narrowly tailored to protect the government's substantial interest in preserving the viability and utility of the forum itself."[239] Justice Brennan believed the city's policy was neither neutral nor narrowly tailored to achieve a substantial governmental interest.[240]

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226. *Id.* at 302-03.

227. *Id.* at 303. Although the majority did not cite Hague v. CIO, 307 U.S. 496 (1939), Justice Douglas quoted its familiar language in his concurring opinion. Lehman v. City of Shaker Heights, 418 U.S. at 305 (Douglas, J., concurring).

228. *Id.* at 303.

229. *Id.* at 304.

230. *Id.*

231. *Id.* at 298 (Justice Blackmun wrote the plurality opinion, in which Chief Justice Burger, Justices White and Rehnquist joined).

232. *Id.* at 308 (Justice Brennan wrote the dissenting opinion, in which Justices Stewart, Marshall, and Powell joined).

233. *Id.* at 312 (Brennan, J., dissenting).

234. *Id.* (Brennan, J., dissenting).

235. *Id.* at 313 (Brennan, J., dissenting).

236. *Id.* at 314 (Brennan, J., dissenting).

237. *Id.* (Brennan, J., dissenting).

238. *Id.* at 315 (Brennan, J., dissenting).

239. *Id.* at 317 (Brennan, J., dissenting).

240. *Id.* at 317-22 (Brennan, J., dissenting).

Justice Douglas broke the tie by concurring in the judgment of the Court.[241] He contrasted the street car's purpose of transporting people to and from work with that of a park or sidewalk.[242] "Buses are not recreational vehicles used for Sunday chautauquas as a public park might be used on holidays for such a purpose; they are a practical necessity for millions in our urban centers."[243]

Thus, a majority of the Court found similarity to streets, parks, and sidewalks important in defining a public forum.[244] Four members of the Court emphasized the issue of whether the government intentionally opened the property for expressive activity.[245]

Two years later, the Court upheld restrictions on speech and leafleting on a military base in *Greer v. Spock.*[246] Fort Dix was a fifty-five square mile military reservation devoted to combat training.[247] Civilians had access to the paved roads and footpaths running through it, as well as all unrestricted areas.[248]

The Court held government owned and operated property does not become a public forum when the public is freely permitted access.[249] "'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.'"[250] The Court focused on the Constitution's purpose to provide for the common defense in holding the purpose of Fort Dix was to train soldiers, not to provide a public forum.[251] The Court contrasted military reservations with municipal streets and parks and held military reservations traditionally have not served as places for assembly and communication.[252] Finally, the Court emphasized the "considered Fort Dix policy" of separating military activities from "partisan political campaigns of any kind."[253]

As in *Lehman,* a majority of the Court considered similarity to streets, parks, and sidewalks important in defining a public forum.[254] The Court now decided the government's intent to open the property for expressive activity was an important consideration.[255]

Justice Powell joined in the Court's opinion, but wrote separately to stress the importance of a compatibility analysis.[256] The Court should ask "'whether the manner of expression is basically incompatible with the normal activity of a

241. *Id.* at 305-08 (Douglas, J., concurring).
242. *Id.* at 306 (Douglas, J., concurring).
243. *Id.* at 307 (Douglas, J., concurring).
244. *Id.* at 303; *id.* at 305-07 (Douglas, J., concurring).
245. *Id.* at 304.
246. Greer v. Spock, 424 U.S. 828, 840 (1976).
247. *Id.* at 830.
248. *Id.*
249. *Id.* at 836.
250. *Id.* (quoting Adderley v. Florida, 385 U.S. 39, 47 (1966)).
251. *Id.* at 837-38.
252. *Id.* at 838.
253. *Id.* at 839.
254. *Id.* at 838; Lehman v. City of Shaker Heights, 418 U.S. 298, 304 (1974).
255. This view received only four votes in *Lehman. See supra* note 233.
256. Greer v. Spock, 424 U.S. 828, 843 (1976) (Powell, J., concurring).

particular place at a particular time.'"[257] A right to expression should not be denied because the area is dedicated to a purpose other than use as a public forum or because the area's primary business may be disturbed.[258] The Court should carefully balance the intrusion on the area's specific activity against the infringement of private parties' First Amendment rights.[259]

Justice Brennan, this time joined only by Justice Marshall, dissented.[260] He argued property does not have to be categorized as a public forum in order to exercise First Amendment activity, citing cases permitting expression that did not categorize property as a public forum.[261] He highlighted the need for a flexible approach because "rigid characterization" of property as not a public forum may suppress freedom of speech not incompatible with its primary business.[262] Nevertheless, he believed the unrestricted areas of Fort Dix were public fora because they were indistinguishable from the streets in *Hague*.[263]

The Court's next step was to distinguish between traditional public fora and limited public fora in *Heffron v. International Society for Krishna Consciousness, Inc.*[264] The Court upheld a rule requiring any person desiring to sell, exhibit, or distribute materials during the annual state fair to do so from a fixed location.[265] The rule did not prohibit persons from wandering about the fairgrounds and communicating their views to others.[266]

The Court held the state fair was not a traditional public forum due to the significant differences between city streets and fairgrounds.[267] Streets are "continually open, often uncongested, and constitute[ ] not only a necessary conduit in the daily affairs of a locality's citizens, but also a place where people may enjoy the open air or the company of friends and neighbors in a relaxed environment."[268] In contrast, the state fair "is a temporary event attracting great numbers of visitors who come to the event for a short period to see and experience the host of exhibits and attractions at the Fair. The flow of the crowd and demands of safety are more pressing in the context of the Fair."[269]

The Court held the state fair was a limited public forum because it existed "to provide a means for a great number of exhibitors temporarily to present their products or views" whether "commercial, religious, or political, to a large num-

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257. *Id.* (Powell, J., concurring) (quoting Grayned v. City of Rockford, 408 U.S. 104, 116 (1972)).
258. *Id.* (Powell, J., concurring).
259. *Id.* (Powell, J., concurring).
260. *Id.* at 849 (Brennan, J., dissenting).
261. *Id.* at 858-59 (Brennan, J., dissenting).
262. *Id.* at 860 (Brennan, J., dissenting).
263. *Id.* at 861 (Brennan, J., dissenting).
264. Heffron v. International Soc'y for Krishna Consciousness, Inc., 452 U.S. 640 (1981).
265. *Id.* at 654.
266. *Id.* at 643-44.
267. *Id.* at 651.
268. *Id.*
269. *Id.*

ber of people in an efficient fashion."[270] In so holding, the Court considered "the limited functions of the Fair and the combined area within which it operated."[271]

Because the state fair was a limited public forum, the rule was subject to reasonable time, place, and manner restrictions.[272] The restrictions would have to be "justified without reference to the content of the regulated speech, . . . serve a significant governmental interest, and . . . leave open ample alternative channels for communication of the information."[273]

Justice Brennan dissented, arguing the fair was "truly a marketplace of ideas and a public forum for the communication of ideas and information."[274] It is "'congeries of hawkers, vendors of wares and services, and purveyors of ideas, commercial, esthetic, and intellectual.'"[275] It is a natural and proper place for people to disseminate information and opinion, and expression is not incompatible with the fair's normal activity.[276] Justice Brennan agreed the standard was whether the rule was a reasonable time, place, and manner restriction.[277]

By the time the Court decided *Perry Education Ass'n v. Perry Local Educators' Ass'n,*[278] it had categorized property into three classes.[279] Citing the familiar language in *Hague,* the Court defined a quintessential public forum as "places which by long tradition or by government fiat have been devoted to assembly and debate."[280] The government may enforce a content-based restriction if it is narrowly tailored to achieve a compelling state interest, and it may enforce reasonable time, place, and manner restrictions if they are content-neutral, narrowly tailored to serve a significant governmental interest, and leave open ample alternative channels of communication.[281]

The second category consists of public property which the state opens for the public's use as a place for expressive activity.[282] Restrictions on expressive activity must meet the same standards as restrictions on expressive activity in a quintessential public forum.[283]

All other property is governed by different standards.[284] The government may use time, place, and manner restrictions, but in an effort to preserve property for its intended purposes, it may also use regulations that are "reasonable and not

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270. *Id.* at 655.
271. *Id.*
272. *Id.* at 647.
273. *Id.* at 648.
274. *Id.* at 658 n.2 (Brennan, J., concurring in part and dissenting in part).
275. *Id.* (Brennan, J., concurring in part and dissenting in part) (quoting International Soc'y for Krishna Consciousness, Inc. v. State Fair, 461 F. Supp. 719, 721 (N.D. Tex. 1978)).
276. *Id.* (Brennan, J., concurring in part and dissenting in part).
277. *Id.* at 656 (Brennan, J., concurring in part and dissenting in part).
278. Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37 (1983).
279. *Id.*
280. *Id.* at 45.
281. *Id.*
282. *Id.*
283. *Id.* at 45-46.
284. *Id.* at 46.

an effort to suppress expression merely because public officials oppose the speaker's view."[285]

Justice Brennan dissented, but did not reach the public forum issue because he viewed the government regulation as impermissible viewpoint discrimination.[286]

The most vigorous debate concerning public forum jurisprudence surfaced in *Cornelius v. NAACP Legal Defense & Educational Fund, Inc.*[287] The Court upheld an Executive Order limiting participation in the Combined Federal Campaign (CFC), a charity drive aimed at federal employees, to "tax-exempt, nonprofit charitable organizations that were supported by contributions from the public and that provided direct health and welfare services."[288] These organizations would submit a statement of up to thirty words for inclusion in CFC literature distributed to federal employees.[289]

The Court narrowly defined a traditional public forum as property that "'by long tradition or by government fiat have been devoted to assembly and debate,'" a category which includes public streets and parks.[290] A limited public forum is created when government designates "a place or channel of communication for use by the public at large for assembly and speech, for use by certain speakers, or for the discussion of certain subjects."[291]

In further defining a limited public forum, the Court wrote that the government must intentionally open a nontraditional forum for public discourse, which it does not do by inaction or by permitting limited discourse.[292] The Court noted it has examined the government's policy and practice and "the nature of the property and its compatibility with expressive activity."[293] The Court will not find a limited public forum if clear evidence shows a contrary intent by the government, if expressive activity is inconsistent with the nature of the property,[294] or if expressive activity would disrupt the property's principal function.[295]

Applying this analysis, the Court held the CFC was a nonpublic forum.[296] The Court noted the lack of a government policy and practice consistent with an intent to open the CFC to all tax-exempt organizations.[297] Instead, the government's consistent policy was to allow access to the CFC to "appropriate" voluntary agencies and to require those seeking access to obtain permission from

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285. *Id.*
286. *Id.* at 62-63 (Brennan, J., dissenting).
287. Cornelius v. NAACP Legal Defense & Educ. Fund, Inc., 473 U.S. 788 (1985).
288. *Id.* at 792.
289. *Id.* at 791.
290. *Id.* at 802 (quoting Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983)).
291. *Id.*
292. *Id.*
293. *Id.*
294. *Id.* at 803.
295. *Id.* at 804.
296. *Id.* at 805.
297. *Id.* at 804.

federal and local CFC officials.[298] This selective access did not create a public forum.[299]

The history or the CFC did not convince the Court that a public forum was created because the CFC was designed to minimize the workplace disruption caused by "unlimited ad hoc solicitation activities" by lessening expressive activity.[300] The government's purpose in creating the CFC was not to create a forum for expressive activity, and just because some expressive activity occurred in the CFC did not transform it into a public forum.[301]

Justice Blackmun, joined by Justice Brennan, dissented.[302] He believed the Court's opinion was circular in reasoning the CFC was a nonpublic forum because the government intended to limit it to a particular class of speakers.[303] "[W]hen the Government acts as the holder of public 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."[304]

Justice Blackmun first noted the importance of access to government property to those wishing to express themselves.[305] Such property provides space for large gatherings, allows speakers to reach those otherwise difficult to reach, is less costly than other measures, and "'allow[s] challenge to governmental action at its locus.'"[306] Justice Blackmun recognized, however, that such activity may interfere with the property's other activities.[307] The solution is to balance these competing interests.[308]

In performing this balance, the Court should look at "the nature and strength of the various interests, . . . the nature of the property, the relationship between the property and the message the speaker wishes to convey, and any special features of the forum that make it especially desirable or undesirable for the particular expressive activity."[309] One firm guideline is compatibility between expressive activity and the property's purposes.[310]

Thus, the three categories of public fora were merely "analytical shorthand" for balancing the interests the Court must consider in each case.[311] Justice Blackmun forcibly argued the majority "turn[ed] these principles on end."[312] First, the Court saw no need to perform a compatibility analysis on nonpublic

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298. *Id.*
299. *Id.* at 805.
300. *Id.*
301. *Id.*
302. *Id.* at 813 (Blackmun, J., dissenting).
303. *Id.* at 813-14 (Blackmun, J., dissenting).
304. *Id.* at 814 (Blackmun, J., dissenting).
305. *Id.* at 815 (Blackmun, J., dissenting).
306. *Id.* (Blackmun, J., dissenting) (quoting Ronald A. Cass, *First Amendment Access to Government Facilities*, 65 VA. L. REV. 1287, 1288 (1978)).
307. *Id.* (Blackmun, J., dissenting).
308. *Id.* (Blackmun, J., dissenting).
309. *Id.* (Blackmun, J., dissenting).
310. *Id.* (Blackmun, J., dissenting).
311. *Id.* at 820 (Blackmun, J., dissenting).
312. *Id.* (Blackmun, J., dissenting).

fora.[313] Second, the Court did not take into account the nature of the property in balancing the First Amendment interests against those of reserving property for its normal use, but "simply labels the property and dispenses with the balancing."[314]

Other problems arose from the majority's categorization of different fora.[315] Many natural places for expressive activity have no long tradition of such use.[316] Significantly, Justice Blackmun identified airports.[317] Furthermore, any lack of history of expressive use may be due to unjustifiable exclusion.[318]

When the dust settled, however, the majority[319] had the votes it needed to uphold the CFC rule under its rationale. Five years later, this debate arose again in *United States v. Kokinda*[320] with the same result.

V. CONCLUSION

Whether one believes public forum jurisprudence is useful and ought to be retained depends on whether one takes a precedential approach or a First Amendment approach. The Court's decision in *International Society for Krishna Consciousness, Inc. v. Lee*[321] is faithful to the former and detrimental to the latter.

The Court's decisions in this area began with *Hague* and have been analogized to streets, parks, and sidewalks in defining a traditional public forum. The Court recognized from the beginning the importance of the government's intent in creating a forum. The decisions have not wandered far from previous decisions, and one concerned with adherence to precedent would likely find public forum jurisprudence valuable to retain.

Those concerned with First Amendment purposes, however, would have the opposite view. As Justice Kennedy noted, "[t]he right of speech protected by the doctrine, however, comes not from a Supreme Court dictum but from the constitutional recognition that the government cannot impose silence on a free people."[322] One taking this view would be troubled with the Court's lack of a balancing and compatibility analysis and with its categorization of property.

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313. *Id.* at 820-21 (Blackmun, J., dissenting).
314. *Id.* at 821 (Blackmun, J., dissenting).
315. *See id.* (Blackmun, J., dissenting).
316. *Id.* at 822 (Blackmun, J., dissenting).
317. *Id.* (Blackmun, J., dissenting).
318. *Id.* (Blackmun, J., dissenting).
319. The vote was 4 to 3; two justices did not participate. *Id.* at 789.
320. United States v. Kokinda, 110 S. Ct. 3115 (1990).
321. International Soc'y for Krishna Consciousness, Inc. v. Lee, 112 S. Ct. 2701 (1992).
322. *Id.* at 2714 (Kennedy, J., concurring).