

Modifications to the Traditional Public Forum Doctrine: *United States v. Kokinda* and Its Aftermath

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Introduction

In June 1990, the United States Supreme Court in *United States v. Kokinda* upheld the conviction of two National Democratic Policy Committee volunteer workers for soliciting contributions on a sidewalk adjacent to the Bowie, Maryland, United States Post Office.¹ The defendants argued that the United States Postal Service regulation prohibiting solicitation on post office property violated their First Amendment rights to free speech in a public forum.² Writing for the plurality, Justice O'Connor determined that the sidewalk connecting the post office parking lot to the post office building is a nonpublic forum.³ The Court found that the United States Postal Service regulation was reasonable as applied to defendants' expressive activities in a nonpublic forum.⁴ Justice Kennedy, concurring in the judgment, found the regulation as a reasonable restriction on the time, place, and manner of expression on post office sidewalks regardless of the sidewalk's First Amendment status.⁵ Writing for the dissent, Justice Brennan argued in favor of striking down the regulation after reaching the opposite conclusion that a post office sidewalk, like a street sidewalk, is a traditional public forum.⁶

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1. 110 S. Ct. 3115 (1990). See *infra* Part II for analysis of *Kokinda*.

2. *Kokinda*, 110 S. Ct. at 3118. See *infra* Part I for general analysis of First Amendment public forum jurisprudence.

3. *Kokinda*, 110 S. Ct. at 3120-21. Chief Justice Rehnquist, and Justices White and Scalia joined the plurality opinion. See *infra* notes 34-43 and accompanying text for discussion of the nonpublic forum doctrine.

4. *Kokinda*, 110 S. Ct. at 3121-25.

5. *Id.* at 3125-26 (Kennedy, J., concurring).

6. *Id.* at 3127-39 (Brennan, J., dissenting). Justices Marshall, Blackmun, and Stevens joined the dissenting opinion. See *infra* notes 14-23 and accompanying text for discussion of the traditional public forum doctrine.

Kokinda is the Court's most recent application of the First Amendment public forum doctrines. The public forum doctrines calibrate the level of judicial review imposed on government regulations of expressive activity according to the type of public property on which a speaker expresses him or herself.⁷ Prior to *Kokinda*, the Court had found municipal sidewalks and streets to be traditional public forums.⁸ The traditional public forum test as applied in these cases focused on objectively determined traditional and historical uses of public places by citizens.⁹

Kokinda modifies the traditional public forum test by analyzing government's subjective purposes behind the construction and maintenance of a post office sidewalk in order to determine whether or not it is a traditional public forum.¹⁰ In this respect, *Kokinda* adds highly restrictive criteria to the public forum calculus. Fewer public places can classify as traditional public forums when a court is required to focus on government's subjective purposes for building and maintaining particular public places. *Kokinda*'s shift of criteria in analyzing public forums signals a more restrictive notion of what constitutes a traditional public forum.

Eight months after *Kokinda* was decided, in *International Society for Krishna Consciousness, Inc. (ISKCON) v. Lee*, the United States Court of Appeals for the Second Circuit held that *Kokinda* alters First Amendment traditional public forum analysis.¹¹ The *Lee* court applied the *Kokinda* public forum calculus to determine that lobbies within the Kennedy, LaGuardia, and Newark Airports are not traditional public forums.¹² Prior to *Kokinda*, five circuit courts had found airport terminals to be traditional public forums.¹³ *Lee* demonstrates that *Kokinda* effects

7. See *infra* Part I.

8. See *Frisby v. Shultz*, 487 U.S. 474 (1988) (streets and sidewalks in a residential neighborhood are public forums), *Boos v. Barry*, 485 U.S. 312 (1988) (sidewalks in front of embassies in Washington, D.C. are public forums), and *United States v. Grace*, 461 U.S. 171 (1983) (sidewalks in front of the United States Supreme Courthouse are public forums). See *infra* notes 134-43 and accompanying text for analysis of these cases.

9. *Frisby*, 487 U.S. 474; *Boos*, 485 U.S. 312; *Grace*, 461 U.S. 171.

10. *Kokinda*, 110 S. Ct. at 3119-21.

11. *International Soc'y for Krishna Consciousness, Inc. (ISKCON) v. Lee*, 925 F.2d 576 (2d Cir. 1991), *cert. granted*, 60 U.S.L.W. 3464 (U.S. Jan. 10, 1992) (No. 91-155). See *infra* notes 151-70 and accompanying text for analysis of *Lee*. See also *infra* note 208.

12. *Lee*, 925 F.2d at 581-82.

13. See *Jamison v. City of St. Louis*, 828 F.2d 1280 (8th Cir. 1987), *cert. denied*, 485 U.S. 987 (1988) (Lambert-St. Louis International Airport terminals are public forums); *United States Southwest Africa/Namibia Trade and Cultural Council v. United States*, 708 F.2d 760, 763-65 (D.C. Cir. 1983) (National and Dulles Airport terminals are public forums); *Fernandes v. Limmer*, 663 F.2d 619, 626 (5th Cir. 1981) (Dallas/Ft. Worth Airport terminals are public forums); *Chicago Area Military Project v. City of Chicago*, 508 F.2d 921, 925-26 (7th Cir. 1975), *cert. denied*, 421 U.S. 992 (1975) (O'Hare Airport terminals are public forums); Kus-

a retrenchment on the First Amendment public forum doctrines and limits citizens' ability to express themselves on various types of publicly owned property.

Part I of this Article describes briefly the contours of the First Amendment public forum doctrines prior to *Kokinda*. Part II outlines the application of the public forum doctrines in *Kokinda*. Part III analyzes how *Kokinda* modifies the traditional public forum doctrine and offers the recent opinion in *ISKCON v. Lee* as an illustration of its future implications. Part IV critically assesses *Kokinda*'s changes to the traditional public forum test and suggests an alternative method to balance the interests of government and speakers without resorting to a narrower conception of a traditional public forum.

I. Categorizations Under the First Amendment Public Forum Doctrines Prior to *United States v. Kokinda*

The Supreme Court's First Amendment public forum doctrine has its conceptual origin in an oft-quoted portion of Justice Roberts' opinion in *Hague v. Committee for Industrial Organization*.¹⁴ In *Hague*, the Court held that city officials could not interfere with the Congress of Industrial Organization's assemblies, speeches and distribution of literature concerning the National Labor Relations Act on city streets and parks.¹⁵ Justice Roberts, in famous dictum, reasoned 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. Such use of the streets and public places . . . 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.¹⁶

Justice Roberts' argument that certain public places are protected by the Constitution in trust for expressive uses—irrespective of government consent or attempts to interfere with speech—soon became an essential

zynski v. City of Oakland, 479 F.2d 1130, 1131 (9th Cir. 1973) (per curiam) (City of Oakland Airport terminals are public forums). Cf. *Jews for Jesus, Inc. v. Board of Airport Comm'rs*, 785 F.2d 791, 793-5 (9th Cir. 1986), *aff'd on other grounds*, 482 U.S. 569 (1987) (court avoids passing on the public forum status of Los Angeles International Airport terminals).

14. 307 U.S. 496 (1939).

15. *Hague*, 307 U.S. at 501-07.

16. *Id.* at 515-16.

feature of public forum analysis.¹⁷

The Court first formalized its existing categories of public and non-public forums in the 1983 opinion of *Perry Education Ass'n v. Perry Local Educators' Ass'n*.¹⁸ Writing for the majority in *Perry*, Justice White divided public property into what were later called "traditional public" forums, "designated public" forums, and "nonpublic" forums for First Amendment purposes.¹⁹ *Perry* defined these three categories and allocated to each a level of judicial scrutiny for government regulation of speech.²⁰

Perry declared that streets and parks are traditional public forums. Harkening back to *Hague*, Justice White observed that streets and parks are places "which by long tradition or by government fiat have been devoted to assembly and debate"²¹ In these traditional public forums, government may enforce "content-based" restrictions on speaker access only if it can show that its regulation "is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end."²² Few government regulations can satisfy the requirements of this strict level of judicial review.²³

Perry's second category is the designated public forum,²⁴ which is a

17. Justice Roberts' dictum was given "impressive content" just months later in *Schneider v. Irvington*, 308 U.S. 147 (1939). WILLIAM B. LOCKHART ET AL., *CONSTITUTIONAL LAW* 867 (6th ed. 1986). In *Schneider*, Justice Roberts, writing for the majority, struck down ordinances prohibiting leafleting on public streets because "streets are natural and proper places for the dissemination of information and opinion" 308 U.S. at 163. See *infra* note 60 for further discussion of *Schneider*.

Since *Schneider*, the principles of *Hague* have been invoked consistently by the Court in First Amendment cases. See, e.g., *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983), *Shuttlesworth v. City of Birmingham*, 394 U.S. 149, 152-53 (1969), *Jamison v. Texas*, 318 U.S. 413, 416 (1943).

See Robert C. Post, *Between Governance and Management: The History and Theory of the Public Forum*, 34 *UCLA L. REV.* 1713, 1718-58 (1987) for a summary of the rapid evolution of the First Amendment public forum doctrines.

18. 460 U.S. 37, 45-6 (1983); see also *United States v. Kokinda*, 110 S. Ct. 3115, 3119 (1990). The phrase "public forum" was coined in an important article written by Professor Harry Kalven, Jr., *The Concept of the Public Forum: Cox v. Louisiana*, *SUP. CT. REV.* 1 (Philip B. Kurland, ed. 1965). See *infra* note 181 and accompanying text.

19. *Perry*, 460 U.S. at 45-46.

20. *Id.*

21. *Id.* at 45 (citing *Hague v. Committee for Indus. Org.*, 307 U.S. 469, 515 (1939)).

22. *Id.*

23. See, e.g., *Texas v. Johnson*, 491 U.S. 397, 412 (1989) (strict scrutiny is the "most exacting" form of judicial review under the First Amendment); accord *Boos v. Barry*, 485 U.S. 312, 321 (1988). See *Near v. Minnesota*, 283 U.S. 697, 716 (1931) (citing several "exceptional" circumstances, including the disclosure during wartime of military deployments, when the government interests at stake would be sufficiently compelling to justify content-based suppression of speech).

24. *Perry*, 460 U.S. at 46-47.

public place that government has "opened for use by the public as a place for expressive activity."²⁵ Designated public forums include university meeting facilities,²⁶ school board meetings,²⁷ and municipal theaters.²⁸ They are functionally equivalent to traditional public forums. Strict scrutiny applies to regulations restricting access to these places.²⁹

The Court made an important qualification to its definition of a designated public forum two years later in *Cornelius v. NAACP Legal Defense and Education Fund*.³⁰ Writing for the majority, Justice O'Connor stated that "government does not create a public forum by inaction or by permitting limited discourse, but only by intentionally opening a non-traditional forum for public discourse."³¹ *Cornelius* greatly contracted the range of designated public forums by requiring a showing of clear intent behind government's management of its property. Justice O'Connor wrote, "[w]e will not find that a public forum has been created in the face of clear evidence of a contrary intent . . . nor will we infer that the government intended to create a public forum when the nature of the property is inconsistent with expressive activity."³² *Cornelius* thus made clear that the Court would rarely find the existence of designated public forums.³³

The nonpublic forum is the third category of property established in *Perry*.³⁴ *Perry* defined a nonpublic forum as any place not falling within the traditional or designated public forum classifications.³⁵ Jails,³⁶ military bases,³⁷ public bus advertising spaces,³⁸ home mailboxes,³⁹ utility

25. *Id.* at 45.

26. *Widmar v. Vincent*, 454 U.S. 263 (1981).

27. *City of Madison Joint Sch. Dist. v. Wisconsin Employment Relations Comm'n*, 429 U.S. 167 (1976).

28. *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546 (1975).

29. *Perry*, 460 U.S. at 45-46.

30. 473 U.S. 788 (1985).

31. *Id.* at 802.

32. *Id.* at 803.

33. *See Post, supra* note 17, at 1756-57, where the author argues that the *Cornelius* intent test is the *coup de grace* for the designated public forum category. "*Cornelius* shrinks the limited public forum to such insignificance that it is difficult to imagine how a plaintiff could ever successfully prosecute a lawsuit to gain access to such a forum." *Id.* at 1757. *See infra* note 118 and accompanying text.

34. *Perry Educ. Ass'n. v. Perry Local Educators' Ass'n.*, 460 U.S. 37, 46 (1983).

35. *Id.*

36. *Adderly v. Florida*, 385 U.S. 39 (1966).

37. *Greer v. Spock*, 424 U.S. 828 (1976).

38. *Lehman v. City of Shaker Heights*, 418 U.S. 298 (1974).

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

poles,⁴⁰ internal school mail systems,⁴¹ and federal employee charity drives⁴² all fall under this rubric. Speaker access regulations for nonpublic forums are reviewed by the Court under a reasonableness test.⁴³

While the Court calls its public forum framework "tripartite,"⁴⁴ commentators include a fourth category called the "limited-purpose" or the "*Perry* footnote 7" forum.⁴⁵ In footnote 7 of *Perry*, the Court recognized that a place opened for "a limited [expressive] purpose or for the discussion of certain subjects" would receive a higher level of judicial review.⁴⁶ These places are a subset of the designated public forum class because clear government intent to open the forum for expressive activities is required. Examples of limited-purpose public forums are school board meetings or access to university rooms by student groups.⁴⁷ To the extent that a limited-purpose public forum is open to expressive activities, government regulations will be reviewed with strict scrutiny.⁴⁸

The Court has not fully clarified the line between public and nonpublic uses of limited-purpose public forums. There are two types of limited-purpose public forums. The first is temporally delineated as a place that becomes a full-fledged public forum during a particular period of time. An example of a temporally limited-purpose public forum is the school board meeting in *City of Madison Joint School District v. Wisconsin Employment Relations Commission*.⁴⁹ During the scheduled meeting time, the meeting room was a designated public forum.

The second type of limited-purpose forum is conceptually delineated as a place that becomes a public forum for specific expressive uses. The Court has not yet squarely ruled on the status of the conceptually limited-purpose public forum, but a likely example is a municipal bandshell dedicated to the performing arts.⁵⁰ Public officials must make decisions

40. *City Council v. Taxpayers for Vincent*, 466 U.S. 789 (1984).

41. *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 37 (1983).

42. *Cornelius v. NAACP Legal Defense and Educ. Fund*, 473 U.S. 788, 788 (1985).

43. *Perry*, 460 U.S. at 46 ("the State may reserve the [nonpublic] forum for its intended purposes, communicative or otherwise, as long as the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view").

44. *United States v. Kokinda*, 110 S. Ct. 3115, 3119 (1990).

45. LOCKHART, *supra* note 17, at 883; LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 12-24, at 986-97 (2d ed. 1988); *Perry*, 460 U.S. at 46 n.7.

46. *Perry*, 460 U.S. at 46 n.7.

47. *Id.*

48. *Id.* at 45-46.

49. 429 U.S. 167 (1976).

50. *See Ward v. Rock Against Racism*, 491 U.S. 781 (1989) ("We need not here discuss whether a municipality which owns a bandstand or stage facility may exercise, in some circumstances, a proprietary right to select performances and control quality."). *Id.* at 790. *See infra* notes 119-21 and accompanying text.

concerning who should be permitted access according to the dedicated purposes of the forum. For example, bandshell officials might decide to permit access to a symphony orchestra wishing to perform Mozart, but not to a paramilitary band wanting to perform the Iraqi national anthem. In *Perry*, the Court said government could limit access to these places to speakers of similar "character."⁵¹ However, *Perry* did not indicate what level of judicial review these access decisions should receive.⁵² As a result, two alternative treatments for conceptually limited-purpose public forums have been proposed by the lower federal courts.⁵³

Regardless of the classification of the forum, the Court will apply strict scrutiny to any government regulation if it is aimed at suppressing the viewpoint of a speaker.⁵⁴ Government may also set reasonable, content-neutral restrictions on the time, place, and manner of expression for any public place. These restrictions must be " 'narrowly tailored to serve a significant governmental interest, and . . . leave open ample alternative channels of communication of the information.' "⁵⁵ Thus, classification of public property under the public forum doctrines is relevant only to content-based restrictions.

51. *Perry*, 460 U.S. at 48.

52. *Id.*

53. In *Deeper Life Christian Fellowship v. Board of Educ.*, 852 F.2d 676, 679-80 (2d Cir. 1988) (citations omitted), the court stated that "[u]nder the limited public forum analysis, property remains a nonpublic forum as to all unspecified uses and exclusion of uses—even if based upon subject matter or the speaker's identity—need only be reasonable and viewpoint neutral to pass constitutional muster." Thus, the nonpublic forum standard of review would apply to access decisions made at a conceptually limited-purpose public forum.

Toward *A Gayer Bicentennial Comm. v. Rhode Island Bicentennial Found.*, 417 F. Supp. 632 (D.R.I. 1976) takes a different approach. The court stated that government officials could restrict access to a conceptually limited-purpose public forum only after using "precise and clear standards even-handedly applied." *Id.* at 640. Otherwise, the "unbridled" discretion of government officials would violate the First Amendment under a prior restraint theory. *Id.* at 640-41.

A second open question is whether such access restrictions impose unconstitutional conditions or penalties on speech, *see, e.g.*, *Speiser v. Randall*, 357 U.S. 513 (1958), or instead regulate permissible selective government subsidies of speech, *see e.g.*, *Regan v. Taxation With Representation*, 461 U.S. 540 (1983). *See* Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1415 (1989) for an excellent analysis of this topic.

54. *United States v. Kokinda*, 110 S. Ct. 3115, 3119-25 (1990); *see* Note, *The Content Distinction In Free Speech Analysis After Renton*, 102 HARV. L. REV. 1904, 1913-17 (1989), for an examination of the troublesome distinctions among subject matter, content, and viewpoint discrimination of speech; *see also* Geoffrey R. Stone, *Content-Neutral Restrictions*, 54 U. CHI. L. REV. 46 (1987), for an examination of the nature of content-neutral judicial review.

55. *Ward v. Rock Against Racism*, 481 U.S. 781, 791 (1989) (quoting *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 243 (1984)). *See* Note, *supra* note 54, at 1908; *see also infra* notes 197-207 and accompanying text for further discussion of the time, place, and manner of expression standard of judicial review.

The designated, limited-purpose, and nonpublic forum classifications are based on an analogy "to a private property owner exercising broad dominion over his property."⁵⁶ The 1897 opinion of *Davis v. Massachusetts* succinctly lays out this relationship: "For the legislature to absolutely or conditionally forbid public speaking in a highway or public park is no more an infringement of the rights of a member of the public than for the owner of a private house to forbid it in his house."⁵⁷ Classifications are made on the basis of government's level of control over its property. Clear evidence of government's waiver of its power to make content-based speaker exclusions from public property is necessary to create a designated or limited-purpose public forum.⁵⁸ In the absence of a waiver of property rights, government power in these public places resembles that of a private property owner.

The *Hague* conception of a traditional public forum is the only category that does not require outright government permission or intent to establish a public forum.⁵⁹ Rather, objectively determined, historical, and traditional uses establish traditional public forums.⁶⁰ The private property-based rationales of the other categories do not apply to the traditional public forum. As such, the traditional public forum is the only category of First Amendment public forum jurisprudence that can provide access to speakers independent of government authority.

II. Application of the Public Forum Doctrine in *United States v. Kokinda*

On August 6, 1986, Marsha Kokinda and Kevin Pearl, both volunteer workers for the National Democratic Policy Committee, set up a

56. C. Thomas Dienes, *The Trashing of the Public Forum: Problems in First Amendment Analysis*, 55 GEO. WASH. L. REV. 109, 111 (1986).

57. *Davis v. Massachusetts*, 167 U.S. 43, 47 (1897). See, e.g., *United States Postal Serv. v. Council of Greenburgh Civic Ass'ns*, 453 U.S. 114 (1981) ("[t]he state, no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated.") (quoting *Greer v. Spock*, 424 U.S. 828 (1976) and *Adderly v. State of Florida*, 385 U.S. 39, 47 (1966)).

58. *Cornelius v. NAACP Legal Defense and Educ. Fund*, 473 U.S. 788, 803 (1985).

59. *Hague v. Committee for Indus. Org.*, 307 U.S. 496 (1939). See also *supra* notes 14-16 and accompanying text.

60. See, e.g., *Schneider v. Irvington*, 308 U.S. 147 (1939), striking down ordinances prohibiting leafleting on public streets under the *Hague* public forum theory set out just months earlier. *Schneider* recognized that the "primary purpose to which . . . streets are dedicated" is for the "movement of people and property." *Id.* at 160. Despite government's acknowledged purposes for operating streets, *Hague's* objective criteria led the Court to invalidate the regulation because "streets are the natural and proper places for the dissemination of information and opinion. . . ." *Id.* at 163. See *supra* notes 14-17 and accompanying text for discussion of the *Hague* public forum theory.

card table on the sidewalk in front of the Bowie, Maryland, United States Post Office.⁶¹ From this table, Kokinda and Pearl distributed literature to and solicited contributions from passers-by on behalf of the political organization.⁶² The table was situated on a seven-foot wide sidewalk that runs along the entire length of the post office and separates it from its parking lot. Nearby, a second sidewalk separates the parking lot from Route 197, the road adjacent to the Bowie Post Office.⁶³

Between forty or fifty Bowie Post Office patrons complained about the presence of Kokinda and Pearl to Post Office employees.⁶⁴ The Bowie Postmaster requested that Kokinda and Pearl leave, but they refused to do so. Postal Inspectors then arrested them for violating 39 Code of Federal Regulations (C.F.R.) section 232.1(h)(1) (1989), a United States Post Office regulation aimed at curbing solicitation on post office property.⁶⁵ The regulation reads in pertinent part: “[S]oliciting alms and contributions, campaigning for election to any public office, collecting private debts, commercial soliciting and vending, and displaying or distributing commercial advertising on postal premises are prohibited.”⁶⁶

Kokinda and Pearl were tried and convicted of violating 39 C.F.R. section 232.1(h)(1) by a United States magistrate in the United States District Court for the District of Maryland.⁶⁷ The defendants appealed their convictions to the district court, arguing that the regulation vio-

61. *United States v. Kokinda*, 110 S. Ct. 3115, 3116 (1990).

62. *Id.* Political and charitable solicitation are forms of expression recognized under the First Amendment. See *Riley v. National Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 788-89 (1988), *Secretary of State of Md. v. Joseph H. Munson Co.*, 467 U.S. 947, 959-61 (1984), *Schaumburg v. Citizens for a Better Env't*, 444 U.S. 620, 628-29 (1980).

In contrast, whether begging is a form of expression protected by the First Amendment is an unresolved question. Cf. *Young v. New York City Transit Auth.*, 903 F.2d 146, 154, *cert. denied*, 111 S. Ct. 516 (“[t]he only message . . . common to all acts of begging is that beggars want to exact money from those whom they accost . . . [and this] . . . falls far outside the scope of protected speech under the First Amendment”) and *Blair v. Shanahan*, No. C-89-4176 WHO, 1991 U.S. Dist. Lexis 15300, at *19-21 (N.D. Cal. 1991) (“[b]egging can promote the very speech values that entitle charitable appeals to constitutional protection. . . . That the beggar represents himself and not an organized charity should not render his speech unprotected”). See Helen Hershkoff and Adam S. Cohen, *Begging to Differ: The First Amendment and the Right to Beg*, 104 HARV. L. REV. 896 (1991), for the argument that begging should be protected under the First Amendment.

63. *Kokinda*, 110 S. Ct. at 3117-18; see also Brief for the United States at 4-5, *United States v. Kokinda*, 110 S. Ct. 3115 (1990) (No. 88-2031).

64. *Kokinda*, 110 S. Ct. at 3118.

65. 39 C.F.R. § 232.1(h)(1) (1990).

66. *Id.*; see also *Kokinda*, 110 S. Ct. at 3118.

67. *Kokinda*, 110 S. Ct. at 3118. They were also convicted of refusing to comply with the lawful directives of postal authorities to leave postal service property under 39 C.F.R. § 232.1(d) (1990).

lated the First Amendment as applied to speakers expressing themselves in a public forum. The district court affirmed the convictions.⁶⁸ Kokinda received a ten day prison sentence and a fine of \$50. Pearl received a thirty day suspended sentence and a fine of \$100.⁶⁹

The United States Court of Appeals for the Fourth Circuit reversed the convictions after holding that the post office sidewalk on which the defendants solicited is a traditional public forum.⁷⁰ The court explicitly declined to make "intricate" distinctions between various types of public sidewalks.⁷¹ The court reasoned that both post office sidewalks and municipal sidewalks are public thoroughfares because they direct and channel pedestrian traffic and are open and accessible to anyone.⁷² Harkening back to the trust theory of *Hague*,⁷³ the Fourth Circuit recounted how historically sidewalks have been the site of picketing, demonstrations, and other forms of political protest.⁷⁴ To the Fourth Circuit, a public sidewalk is a public sidewalk, and citizens should not have to "wonder" about its First Amendment status.⁷⁵

Applying the strict scrutiny standard of judicial review to 39 C.F.R. section 232.1(h)(1), the court found that the regulation banned an entire category of protected speech—political solicitation—from post office property. This categorical ban was too broad to satisfy the "narrowly tailored" requirement of strict scrutiny review for public forums.⁷⁶ The Fourth Circuit alternatively held that the regulation was not a valid restriction on the time, place, and manner of expression for the same reasons.⁷⁷

The Fourth Circuit's decision that post office sidewalks are traditional public forums conflicted with the rulings of two other circuits. The Eleventh Circuit in *United States v. Belsky*,⁷⁸ and the Third Circuit in *United States v. Bjerke*,⁷⁹ held that post office sidewalks are nonpublic forums, and affirmed convictions based on 39 C.F.R. section 232.1(h)(1).

68. *Kokinda*, 110 S. Ct. at 3118.

69. *Id.*

70. *United States v. Kokinda*, 866 F.2d 699, 701-03 (4th Cir. 1989).

71. *Id.* at 702.

72. *Id.*

73. See *supra* notes 14-17 and accompanying text.

74. *Kokinda*, 866 F.2d at 701. See *infra* note 180 and accompanying text.

75. *Id.* at 702.

76. *Id.* at 705. See *supra* notes 22-23 and accompanying text.

77. *Id.* See *supra* notes 54-55 and accompanying text.

78. 799 F.2d 1485 (11th Cir. 1986). Note that the defendants in *Belsky* were also soliciting on behalf of the National Democratic Policy Committee. *Id.* at 1487.

79. 796 F.2d 643 (3d Cir. 1986). The defendants in *Bjerke* were also soliciting on behalf of the National Democratic Policy Committee. *Id.* at 645.

The United States Supreme Court granted the United States' petition for a writ of certiorari in *Kokinda* because of the conflict among the Third, Fourth, and Eleventh Circuits.⁸⁰

The Supreme Court reversed the Fourth Circuit's decision and reinstated the convictions of Kokinda and Pearl.⁸¹ Justice O'Connor, writing for the plurality of Chief Justice Rehnquist and Justices White and Scalia, decided that the Bowie, Maryland, Post Office sidewalk is neither a traditional nor a designated public forum.⁸² Justice O'Connor hinted that the postal sidewalk might be a limited-purpose public forum, but not for the purposes of political solicitation.⁸³ Consequently, the postal sidewalk fell into the nonpublic forum category, and the Post Office regulation passed the reasonableness standard of judicial review for a nonpublic forum.⁸⁴

The plurality said that the post office sidewalk is not a traditional public forum.⁸⁵ Justice O'Connor argued that the sidewalk "does not have the characteristics of public sidewalks traditionally open to expressive activity."⁸⁶ The Court had previously held that public sidewalks in front of the Supreme Court,⁸⁷ embassies in Washington, D.C.,⁸⁸ and in residential neighborhoods,⁸⁹ were traditional public forums. The Court distinguished *Kokinda* from these cases by arguing that "mere" physical similarities between the post office sidewalk and the municipal sidewalk nearby "cannot dictate forum analysis."⁹⁰ Unlike municipal public sidewalks, the post office sidewalk leads only from the parking lot to an entrance of the post office.⁹¹ Postal sidewalks are "constructed solely to

80. The Ninth Circuit in 1987 held that a post office sidewalk was a nonpublic forum in *Monterey County Democratic Central Comm. v. United States Postal Serv.*, 812 F.2d 1194 (9th Cir. 1987). The Supreme Court presumably did not cite *Monterey County* in *Kokinda* because it dealt with Post Office guidelines governing voter registration drives on post office property. The Seventh Circuit considered but declined to decide whether a post office sidewalk is a public forum in *National Anti-Drug Coalition v. Bolger*, 737 F.2d 717, 723 (7th Cir. 1984).

81. *United States v. Kokinda*, 110 S. Ct. 3115, 3125 (1990).

82. *Id.* at 3119-21.

83. *Id.* at 3121. *See infra* notes 119-21 and accompanying text.

84. *Kokinda*, 110 S. Ct. at 3121-25.

85. *Id.* at 3120-21.

86. *Id.* at 3120.

87. *United States v. Grace*, 461 U.S. 171 (1983). *See infra* notes 134-36 and accompanying text.

88. *Boos v. Barry*, 485 U.S. 312 (1988). *See infra* notes 137-39 and accompanying text.

89. *Frisby v. Schultz*, 487 U.S. 474 (1988). *See infra* notes 140-43 and accompanying text.

90. *Kokinda*, 110 S. Ct. at 3120.

91. *Id.*; compare *United States v. Bjerke*, 796 F.2d 643 (3d Cir. 1986) in which the court wrote that the post office sidewalk is within an "enclave separated from the public thoroughfare." *Id.* at 649. *Bjerke* then analogized the post office sidewalk to the nonpublic forum mili-

provide for the passage of individuals engaged in postal business.”⁹² Traditional public forum sidewalks, in contrast, more closely function as public streets and thoroughfares. The plurality concluded under this reasoning that the postal sidewalk is not a traditional public forum.⁹³

The Supreme Court in *Kokinda* modified the traditional public forum test and diverged sharply from the Fourth Circuit’s methodology. As stated in Part I, the traditional public forum test is grounded in the trust theory set out in *Hague*, which does not turn on whether government intends specifically to designate a public space for a particular use.⁹⁴ *Hague* rests instead on traditional uses of public property by citizens.⁹⁵ The *Kokinda* plurality glossed over the *Hague* principle by discounting the Fourth Circuit’s analysis concerning traditional uses of public sidewalks and amici brief descriptions of the multi-faceted historical uses of post office property.⁹⁶ Instead, the Court used government’s subjective purposes for having postal sidewalks to determine that they are not traditional public forums.⁹⁷ Justice O’Connor wrote that the Postal Service built the sidewalk “solely” for the purpose of providing access for post office patrons.⁹⁸ Furthermore, the Court later remarked that the “purpose of the forum in this case is to accomplish the most efficient and effective postal delivery system.”⁹⁹

tary reservation in *Greer v. Spock*, 424 U.S. 828 (1976). See *infra* notes 126-31 and accompanying text.

92. *Kokinda*, 110 S. Ct. at 3120.

93. The Court wrote that the postal sidewalk is not “the traditional public forum sidewalk referred to in *Perry*.” *Id.* at 3120. In fact, *Perry* does not concern a sidewalk; rather, it analyzed the First Amendment status of internal school mailboxes. *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37 (1983).

94. *Hague v. Committee for Indus. Org.*, 307 U.S. 496 (1939). See also *supra* notes 14-17 and accompanying text.

95. *Id.* at 515-16. See *infra* notes 125-43 for description of prior Supreme Court cases applying *Hague*’s objective analysis to sidewalks and streets.

96. See *United States v. Kokinda*, 866 F.2d 699, 701-02 (4th Cir. 1989); see also Amicus Curiae Brief of Newport News Daily Press & Times Herald, Richmond Times-Dispatch and News Leader, USA Today, and The Washington Post in Support of the Respondents at 7-8, *United States v. Kokinda*, 110 S. Ct. 3115 (1990) (No. 88-2031), describing how post offices have served as regional gathering places for news dissemination, distribution of newspapers, general stores, and pubs. Today, many United States Post Offices have facsimile machines, automatic teller machines, and selective service and passport processing capabilities. The amici thus argued that while the functions of federal post offices change, they remain multi-faceted and reach well beyond the scope of mail delivery.

97. *United States v. Kokinda*, 110 S. Ct. 3115, 3120 (1990); compare *United States v. Belsky*, 799 F.2d 1485, 1489 (11th Cir. 1986), in which the court wrote, “the ingress and egress walkways . . . are intended to accommodate traffic to and from the post office and have not traditionally been sites for expressive conduct.”

98. *Kokinda*, 110 S. Ct. at 3120.

99. *Id.* at 3122.

Justice Brennan in *Kokinda*, writing one of his last dissenting opinions as an Associate Justice of the Supreme Court, noted this inconsistency with *Hague*. He observed, “why the sidewalk was built is not salient” under the traditional public forum definition.¹⁰⁰ Justice Brennan also asserted that under *Hague*, the “architectural idiosyncracies” of the Bowie Post Office and its access sidewalks are not determinative of its status as a traditional public forum.¹⁰¹ The plurality’s attempt to distinguish among different types of sidewalks and streets on the basis of their respective architectural features is only a roundabout way of showing government’s subjective purposes behind building them in the first place.¹⁰² Open public access and traditional historical uses of a public place are the objective criteria underlying the *Hague* rule. To the dissent, an outdoor post office sidewalk is properly classified as a traditional public forum under the parameters of *Hague*.¹⁰³

Justice Kennedy, although concurring with the plurality, agreed with Justice Brennan’s observation that the plurality opinion threatens the *Hague* traditional public forum test. He warned 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 case.”¹⁰⁴ Justice Kennedy’s reference here to the objective criteria of the *Hague* test indicates that he disapproves of the *Kokinda* plurality’s inclusion of government’s subjective intent in the traditional public forum calculus. However, because Justice Kennedy thought 39 C.F.R. section 232.1(h)(1) was a reasonable restriction on the time, place, and manner of expression, he avoided passing on the public forum status of the sidewalk.¹⁰⁵

Kokinda also decided whether the post office sidewalk is a designated public forum.¹⁰⁶ Designated public forums exist only when the government clearly intended to create them.¹⁰⁷ The Court had little trouble dispensing with this issue in relation to the post office sidewalk. The respondents could put forth no evidence that the United States Postal Service expressly intended to create access sidewalks for solicitation.¹⁰⁸ The Court consequently held that the sidewalk does not fall

100. *Id.* at 3129 (Brennan, J., dissenting).

101. *Id.*

102. *Id.*

103. *Id.* at 3128-32.

104. *Id.* at 3125.

105. *Id.* at 3125-26; 39 C.F.R. § 232.1 (h)(1) (1989).

106. *Kokinda*, 110 S. Ct. at 3121.

107. *See supra* notes 24-33 and accompanying text.

108. *Kokinda*, 110 S. Ct. at 3121. *See supra* notes 32, 58 and accompanying text.

within this category.¹⁰⁹

Since *Cornelius*, the designated public forum test is so narrow that even an official "practice of allowing some speech activities on postal property does not add up to the dedication of postal property to speech activities."¹¹⁰ Prior to 1978, the Postal Service allowed certain groups to use postal facilities for fund-raising and solicitation.¹¹¹ 39 C.F.R. section 232.1(h)(1) banned solicitation from postal premises in 1978. This regulatory change was sufficient reason for the Court to conclude that the Postal Service does not presently intend to open up its sidewalks for solicitation.¹¹² This aspect of *Kokinda* illustrates the extent to which the Court, in applying the public forum doctrines, emphasized the proprietary interests of government.¹¹³

Nevertheless, Post Office regulations do permit other types of First Amendment activities on Post Office sidewalks. For example, 39 C.F.R. section 232.1(h)(1) does not ban pure speech or the distribution of printed political leaflets on postal property.¹¹⁴ But, as one commentator has observed, the "policy of selective access . . . itself becomes evidence that government did not intend open access . . ." at the forum.¹¹⁵ The *Kokinda* dissent criticized the plurality for applying "self-justifying"¹¹⁶ logic because "[t]he very fact that the Government denied access to the speaker indicates that the Government did not intend to provide an open forum for expressive activity, and under the Court's analysis that fact alone would demonstrate that the forum is not a limited public forum."¹¹⁷ That the *Cornelius* intent test amounted to the *coup de grace* for the designated public forum is substantiated by this portion of *Kokinda*.¹¹⁸

Because postal sidewalks are open to certain kinds of expressive activity, but not to solicitation, the *Kokinda* plurality limited the reach of its holding to solicitation. Justice O'Connor remarked, "[e]ven conceding

109. *Kokinda*, 110 S. Ct. at 3121.

110. *Id.*

111. See Brief for the United States at 14, *United States v. Kokinda*, 110 U.S. 47 (1989) (No. 88-2031).

112. *Kokinda*, 110 S. Ct. at 3121-22. It is simply unclear how much speech on public property government would have to permit before it rises to the level of government intent as required in *Cornelius*. See *supra* notes 30-33 and accompanying text.

113. See *supra* notes 56-58 and accompanying text.

114. Moreover, 39 C.F.R. § 232.1(o) allows posting public notices on certain post office bulletin boards. 39 C.F.R. § 232.1(o) (1989).

115. Dienes, *supra* note 56, at 119.

116. *Kokinda*, 110 S. Ct. at 3132.

117. *Id.* at 3133 (quoting *Cornelius v. NAACP*, 473 U.S. 788, 825 (1985) (Blackmun, J., dissenting)).

118. Post, *supra* note 17, at 1757. See *supra* note 33.

that the forum here has been dedicated to some First Amendment uses, and thus is not a purely non-public forum, under *Perry*, regulation of the reserved non-public uses would still require application of the reasonableness test."¹¹⁹ *Kokinda* draws conceptual distinctions among categories of expressive activity—such as solicitation versus political leafleting—and analyzes each with respect to government's clear intent behind creation and maintenance of the public place in question. Thus, the postal sidewalk might very well be a designated public forum for political speech, but not for political solicitation. This reasoning resembles the description of a limited-purpose public forum alluded to in footnote 7 of *Perry*.¹²⁰ While not expressly classifying the postal sidewalk as such, *Kokinda* appears to mark the first Supreme Court decision, since the formal inception of the public forum categories in *Perry*, to find the existence of a conceptually limited-purpose public forum.¹²¹

Having ruled out the traditional and designated forum categories, the Court held ipso facto that the postal sidewalk is a nonpublic forum.¹²² This classification places a postal sidewalk on a par with military bases, jails and other nonpublic forums.¹²³ Government's power is greatest to regulate speech in nonpublic forums because judicial review polices only for unreasonable regulations. The Court had no difficulty in finding that 39 C.F.R. section 232.1(h)(1) is a reasonable regulation of speech on non-public forum property.¹²⁴

III. *United States v. Kokinda's* Modifications to the Traditional Public Forum Doctrine and Their Aftermath

Government intent behind construction or maintenance of a public place did not, until *Kokinda*, figure into the traditional public forum calculus. The *Hague* public forum definition, not cited by the plurality in *Kokinda*, focuses on the uses of property rather than the purposes behind its existence.¹²⁵ Thus, *Kokinda* signals a shift toward a more restrictive understanding of the traditional public forum concept. A brief survey of prior Supreme Court cases dealing with the First Amendment status of streets and sidewalks substantiates the observation that *Kokinda* adds highly restrictive subjective criteria to the traditional public forum test.

119. *Kokinda*, 110 S. Ct. at 3121.

120. *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 46 n.7 (1983). See *supra* notes 44-48 and accompanying text.

121. See *supra* notes 50-53 and accompanying text.

122. *Kokinda*, 110 S. Ct. at 3121.

123. See *supra* notes 34-43 and accompanying text.

124. *Kokinda*, 110 S. Ct. at 3121-25.

125. *Hague v. Committee for Indus. Org.*, 307 U.S. 496, 515-16 (1939).

In *Greer v. Spock*, the Court held that the military enclave of Fort Dix, New Jersey, is a nonpublic forum.¹²⁶ The defendants were evicted and barred from re-entering the Fort Dix Military Reservation pursuant to military regulations prohibiting political activities there.¹²⁷ The defendants, who were political campaign volunteers, argued that streets and sidewalks within the enclave were public forums because Fort Dix had permitted access to civilians.¹²⁸ The Court was quick to dismiss this claim because under *Hague*, the “notion that federal military reservations, like municipal streets and parks, have traditionally served as a place for free public assembly and communication [is] . . . historically and constitutionally false.”¹²⁹ *Greer* stressed the special constitutional status of military functions to reach this conclusion.¹³⁰

As one commentator has written, *Greer* “did not examine the particular attributes of Fort Dix, but rather inquired into abstract properties of military installations. Its conclusion was therefore generic: a ‘military installation like Fort Dix’ was not a public forum.”¹³¹ The *Greer* decision did not focus on the Fort Dix sidewalks or streets, but rather on the abstract First Amendment status of military bases in general. The purposes behind the construction of the walkways within Fort Dix were irrelevant to *Greer*’s traditional public forum analysis.

Similarly, the Court relied on the *Hague* concept of historical and traditional uses of public places in *Heffron v. International Society for Krishna Consciousness, Inc. (ISKCON)*, which upheld as reasonable a time, place, and manner of expression restriction on solicitation at the Minnesota State Fair.¹³² In distinguishing fairground passageways from streets, *Heffron* described a public street as “continually open, often uncongested, . . . a necessary conduit in the daily affairs of a locality’s citizens, . . . a place where people may enjoy the open air or the company of friends and neighbors in a relaxed environment.”¹³³ *Heffron* focused on the objectively ascertained, traditional public uses of streets and sidewalks by citizens rather than on government’s subjective motivations for building them.

126. 424 U.S. 828 (1976).

127. *Id.* at 828-34.

128. *Id.* at 835-37.

129. *Id.* at 838.

130. *Id.*

131. Post, *supra* note 17, at 1741.

132. 452 U.S. 640 (1981). See *infra* notes 201-04 and accompanying text for further discussion of *Heffron*.

133. *Heffron*, 452 U.S. at 651.

The Court continued to apply *Hague*'s traditional use analysis in *United States v. Grace*, which invalidated a statute prohibiting all leafletting and picketing on the sidewalk adjacent to the Supreme Court building in Washington, D.C.¹³⁴ *Grace* concluded that the Supreme Court sidewalk was, like any other sidewalk, a traditional public forum.¹³⁵ Justice White remarked, "[s]idewalks, of course, are among those areas of public property that traditionally have been held open to the public for expressive activities and are clearly within those areas of public property that may be considered, generally without further inquiry, to be public forum property."¹³⁶ Once again, the Court did not enter into an inquiry concerning the purposes behind the construction of municipal sidewalks in front of the Supreme Court to reach this decision.

In *Boos v. Barry*, the Court partially invalidated a Washington, D.C. ordinance prohibiting the display of any sign within 500 feet of a foreign embassy that tends to bring the foreign government into "public odium" or "public disrepute."¹³⁷ In a majority opinion written by Justice O'Connor, *Boos* held that the public streets and sidewalks outside embassies are traditional public forums.¹³⁸ As in *Greer*, *Heffron*, and *Grace*, *Boos* did not factor into its traditional public forum determination the purposes behind government operation of these sidewalks and streets.¹³⁹

Most importantly, the Court in 1988 rejected an invitation to analyze the specific purposes and functions of a particular public street or sidewalk in *Frisby v. Shultz*.¹⁴⁰ *Frisby* upheld a Brookfield, Wisconsin, ordinance prohibiting picketing "before or about" any residence.¹⁴¹ Writing for the majority, Justice O'Connor stated, "[n]o particularized inquiry into the precise nature of a specific street is necessary; all public streets are held in the public trust and are properly considered traditional public fora."¹⁴² Justice O'Connor emphasized that since the *Hague* rule is based on historical understandings of the uses of streets, "a public street does not lose its status as a traditional public forum simply because it runs through a residential neighborhood" . . . or because it is physically narrow.¹⁴³

134. 461 U.S. 171 (1983).

135. *Id.* at 171-72.

136. *Id.* at 179.

137. 485 U.S. 312 (1988).

138. *Id.*

139. *Id.*

140. 487 U.S. 474, 481 (1988).

141. *Id.* at 477.

142. *Id.* at 481.

143. *Id.* at 480.

These factually similar precedents demonstrate that the essential features of the traditional public forum test, until *Kokinda*, were the traditional and historical uses of public property. *Kokinda*, written by Justice O'Connor just two years after her majority opinion in *Frisby*, instead directs its analysis to the purposes, architectural characteristics, and functions behind specific public places. Justice Brennan pointed out in his dissent that even public streets and parks could be reclassified under these criteria because they are not built for the purpose of expressive activity.¹⁴⁴ *Kokinda*'s modification of the traditional public forum doctrine could substantially curtail the types of places classified as traditional public forums if taken to its logical conclusion.

Kokinda borrows from the criteria of the designated public forum test because it relies heavily on government's subjective intent and purposes behind construction of a public place. As described in Part I, the designated public forum test turns on government's intent behind creation of a particular public place.¹⁴⁵ Examining the purposes behind and architectural functions of a postal sidewalk is an indirect way of applying the intent-based analysis of the designated public forum test. Thus, the *Kokinda* plurality fused the subjectively based strictures of the designated forum test into the objectively based traditional public forum calculus.

As stated in Part I, the designated, limited-purpose, and nonpublic forum categories are based on analogies to private property rights of exclusion.¹⁴⁶ *Kokinda* carried over these private property-based rationales as it fused the definitions of the designated and traditional public forum. The plurality repeatedly emphasized the commercial, private property-like interests of the Postal Service in reaching its holding. For example, the Court prefaced its opinion by characterizing Post Office activities as government functioning not as a lawmaker or licensor, but rather as a "proprietor."¹⁴⁷ The Court later observed, "[t]he purpose of the forum in this case is to accomplish the most efficient and effective postal delivery system."¹⁴⁸ Moreover, the lower federal court postal sidewalk cases expressed similar concerns that the Postal Service be able to carry out its

144. *United States v. Kokinda*, 110 S. Ct. 3115, 3129 (1990). To illustrate this point further, the public street described in *Heffron* is not constructed and maintained by a municipality so that "people [could] enjoy the open air or the company of friends and neighbors in a relaxed environment." *Heffron v. ISKCON*, 452 U.S. 640, 651 (1981). See also *supra* note 60 and accompanying text.

145. See *supra* notes 24-33 and accompanying text.

146. See *supra* notes 56-57 and accompanying text.

147. *Kokinda*, 110 S. Ct. at 3119. See *infra* notes 175-92 and accompanying text.

148. *Kokinda*, 110 S. Ct. at 3122.

commercial functions without serious disruption.¹⁴⁹

By borrowing from the designated forum test, the *Kokinda* plurality relied heavily on its correlative private property-based rationales. These rationales helped to justify the Court's goal of insulating the post offices from commercial "disruption" and "delay" caused by solicitors on post office sidewalks.¹⁵⁰ This explanation accounts for *Kokinda*'s merger of the designated public forum test into the *Hague* traditional public forum classification.

In February 1991, the Court of Appeals for the Second Circuit in *ISKCON v. Lee* observed that *Kokinda* "alters" public forum analysis by engaging in a "detailed" analysis of the purposes behind the construction and maintenance of particular public places.¹⁵¹ *Lee* applied *Kokinda*'s modified traditional public forum test and held that airport terminal lobbies are not traditional public forums for solicitation purposes. Like the *Kokinda* plurality, *Lee* deferred to the government when acting as a proprietor over commercially dedicated public space.¹⁵² The Second Circuit justified its use of a subjective purpose test as part of First Amendment traditional public forum analysis on the basis of private property-based analogies.¹⁵³

In *Lee*, ISKCON contended that the lobbies in the Port Authority of New York and New Jersey airports, including John F. Kennedy, La Guardia, and Newark International Airports, are traditional public forums.¹⁵⁴ ISKCON, whose devotees wished to solicit religious contributions from airport pedestrians, argued that Port Authority regulations prohibiting the distribution of literature and the solicitation and receipt of funds inside air terminals should not withstand strict judicial

149. See *United States v. Bjerke*, 796 F.2d 643, 649 (3d Cir. 1986) and *United States v. Belsky*, 799 F.2d 1485, 1489 (11th Cir. 1986).

150. *Kokinda*, 110 S. Ct. at 3124.

151. 925 F.2d 576, 580-81 (2d Cir. 1991), *cert. granted*, 60 U.S.L.W. 3464 (U.S. Jan. 10, 1992) (No. 91-155).

152. *Id.* at 580-82.

153. *Id.* at 581-82. See *infra* notes 162-70 and accompanying text.

154. The Port Authority of New York and New Jersey (Port Authority) is a bi-state agency created in 1921 by an interstate compact approved by Congress to develop interstate public transportation and commerce. Act of Aug. 23, 1921, ch. 77, 42 Stat. 174 (1921), consenting to 1921 N.J. Laws 151 and 1921 N.Y. Laws 154. The Port Authority owns and operates the John F. Kennedy International Airport, LaGuardia Airport, and Newark International Airport. Walter Lee, the late Superintendent of the Port Authority Police, was officially charged with enforcement of Port Authority regulations. Lee remains designated as defendant-appellant because a permanent replacement has not been appointed.

scrutiny.¹⁵⁵

The United States District Court for the Southern District of New York found that air terminal lobbies are traditional public forums because they “possess the characteristics of a bustling metropolitan boulevard.”¹⁵⁶ The court struck down the Port Authority regulations by applying strict scrutiny.¹⁵⁷ The Port Authority appealed, and the Second Circuit reversed the decision with respect to solicitation.¹⁵⁸

Kokinda was so influential in the Second Circuit’s reversal that the court remarked, that but for the decision “this panel was prepared to follow the authority established in other circuits” concerning the First Amendment status of airport terminals.¹⁵⁹ For example, in *Fernandes v. Limmer*, the Fifth Circuit held that the Dallas/Ft. Worth Airport terminal lobbies are traditional public forums, reasoning that “[t]he parallel between public streets and . . . the central concourses of the D[allas]/F[t.] W[orth] terminal buildings, where air travellers as well as the general public may shop, dine, imbibe, and sightsee, is clear and powerful”¹⁶⁰ Similarly, in *Chicago Area Military Project v. City of Chicago*, the Seventh Circuit wrote that airport terminals are “spacious, city-owned common areas which resemble those public thoroughfares which have been long recognized to be particularly appropriate places for the exercise of constitutionally protected rights to communicate ideas and information.”¹⁶¹ The Second Circuit argued that *Kokinda* discarded the

155. *Lee*, 925 F.2d at 578-79. ISKCON challenged Airport Rules and Regulations, The Port Authority of New York and New Jersey, Chapter III, as amended by resolution dated February 11, 1988, which read in pertinent part:

B. Non-commercial activity at Port Authority air terminals which are not occupied by a lessee, licensee or permittee is subject to the following conditions and restrictions:

(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: . . .

(b) The sale or distribution of flyers, brochures, pamphlets, books or any other printed or written material.

(c) The solicitation and receipt of funds.

156. *ISKCON v. Lee*, 721 F.Supp. 572, 576 (S.D.N.Y. 1989).

157. *Id.* at 579.

158. *Lee*, 925 F.2d at 582. *Lee* affirmed the portion of the district court’s holding that the Port Authority regulation prohibiting the distribution of literature violated the First Amendment. *Id.* See *Longo v. United States Postal Serv.*, 761 F. Supp. 220 (D. Conn. 1991) (relying in part on this portion of *Lee* to strike down 39 C.F.R. § 232.1(h)(1), prohibiting political campaigning on post office property, as an unreasonable regulation against expressive activity on a nonpublic forum post office sidewalk).

159. *Lee*, 925 F.2d at 580. See *supra* note 13 for a list of circuit court cases conflicting with *Lee*.

160. *Fernandes v. Limmer*, 663 F.2d 619, 627 (5th Cir. 1981).

161. *Chicago Area Military Project v. City of Chicago*, 508 F.2d 921, 925 (7th Cir. 1975).

traditional public forum methodology of cases like *Fernandes*, *Chicago Area Military Project*, and *Frisby* in favor of a detailed inquiry into the purposes behind public places.¹⁶²

Lee determined that the numerous similarities between a prototypical public street and the Port Authority airport lobbies—which have banks, restaurants, boutiques, shops, and art exhibits—cannot influence traditional public forum analysis.¹⁶³ Rather, the purpose behind creation of the air terminals controls the traditional public forum test.¹⁶⁴ *Lee* characterized Port Authority airports as commercial enterprises by stating that “Kennedy, La Guardia and Newark are funded by user fees and operated so as to make a regulated profit.”¹⁶⁵ The *Lee* court concluded that the terminals are “intended solely to facilitate a particular type of transaction—air travel—unrelated to protected expression.”¹⁶⁶ With such a proprietary/commercial purpose in mind, the terminals were held to be nonpublic forums for solicitation by ISKCON devotees.¹⁶⁷

The similarities between *Kokinda* and *Lee* are significant. Both opinions focused on government’s subjective intent behind operating public spaces. Like *Kokinda*, *Lee*’s First Amendment traditional public forum analysis was dominated by government’s interests as a commercial proprietor. Both cases merged the subjective purpose test of the designated public forum into the objective analysis formerly reserved for the traditional public forum. The government-as-proprietor rationale—in the *Lee* case with government acting as airport terminal proprietor—is the driving force behind these changes in First Amendment jurisprudence.

In anticipation of Supreme Court review, the Second Circuit further elaborated its reliance on *Kokinda*.¹⁶⁸ *Lee*’s restatement of *Kokinda* provides a useful summary of many of the changes to the traditional public forum doctrine described in this Article:

We read the plurality opinion of Justice O’Connor to distinguish between passageways or other facilities that exist solely to facilitate the public’s carrying on of a particular endeavor—subway or air travel for example—and passageways or facilities that enable the public to carry out the multitude of purposes persons pursue in their daily life—the typical Main Street. . . . [W]here the particular purpose is such that the public uses them as a matter of necessity,

162. *Lee*, 925 F.2d at 579-82.

163. *Id.* at 578, 580-82.

164. *Id.* at 580-82.

165. *Id.* at 581.

166. *Id.*

167. *Id.* at 582.

168. *Id.* at 581-82. See *supra* note 13.

or at least great convenience, we read the plurality opinion to allow the prohibition of in-person solicitation of funds to prevent disruption of [the] public.¹⁶⁹

The Second Circuit interprets *Kokinda* to redefine the traditional public forum test according to the purposes behind the existence of particular public passageways and thoroughfares. *Kokinda* instructs that public passageways are not traditional public forums when these purposes are tied to commercial or private property-like goals.¹⁷⁰

IV. Protecting the Traditional Public Forum Concept: An Alternative Approach to *United States v. Kokinda*

The public forum paradigm is a relatively new development in the Supreme Court's First Amendment jurisprudence. The framework has come under strong attack from commentators since its formal inception in *Perry* in 1983.¹⁷¹ At least four Justices in *Kokinda* criticize the public forum doctrines largely because they function as "wooden" pigeonholes into which a variety of public places either fit or do not.¹⁷² As one commentator has written, the Court's "myopic focus on formalistic labels . . . serves only to distract attention from the real stakes in these disputes."¹⁷³ These commentators believe that the public forum categories ignore almost entirely the competing interests and social value of speakers utilizing public spaces to convey their messages.¹⁷⁴

Thus, it is not surprising that the public forum doctrines are in a state of flux. The sharp contrast between the visions of the traditional public forum in *Frisby* and *Kokinda*, both written by Justice O'Connor within a span of two years, is a vivid example of this doctrinal instability. Within a larger context, *Kokinda* stands as an example of the Court's

169. *Lee*, 925 F.2d at 581-82.

170. *Id.* at 581 ("It is true that the various commercial establishments and art exhibits at the three airports create an appearance similar to a busy downtown street. It is also true, however, that the facilities in question exist solely to accommodate the needs of air travelers, just as the post office and sidewalk in *Kokinda* existed solely to facilitate the use of postal services.").

171. See Dienes, *supra* note 56; 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 (1984); Post, *supra* note 17; Stone, *supra* note 54; TRIBE, *supra* note 45, § 12-24.

172. These are Justices Brennan, Marshall, Blackmun and Stevens. *United States v. Kokinda*, 110 S. Ct. 3115, 3129 (1990) (Brennan, J., dissenting). See Geoffrey R. Stone, *Justice Brennan and the Freedom of Speech: A First Amendment Odyssey*, 139 U. PA. L. REV. 1333, 1350 (1991), for the observation that Justice Brennan's dissent in *Kokinda* is an example of his long-standing criticism of the formalized public forum framework.

173. Stone, *supra* note 54, at 93.

174. See, e.g., Dienes, *supra* note 56, at 110; TRIBE, *supra* note 45, § 12-24, at 986-97, 993 n.41.

difficult struggle to forge categorical definitions suitable for an extraordinarily broad range of public places. *Kokinda* may indicate that formalized public forum analysis, just years in the making, is evolving from formal categories into a series of fact-specific decisions lacking clear guidelines.

In the midst of this uncertainty, *Kokinda* indisputably moves toward a more restrictive conception of the traditional public forum. *Lee* demonstrates that at least one federal circuit court of appeals explicitly agrees with this assessment.¹⁷⁵ Private property-based rationales are the driving force behind this change because it entails fusing the designated forum test into traditional public forum analysis.¹⁷⁶ *Kokinda* justified its public forum determination largely on the basis of protecting the efficiency of proprietary functions of government.¹⁷⁷ The interests of speakers and First Amendment values are severely compromised in the process because incorporating a subjective purpose component into the traditional public forum test threatens its future vitality as a category.¹⁷⁸

175. Other courts have implicitly followed *Kokinda's* more restrictive traditional public forum test. In *Sentinel Communications Co. v. Watts*, 936 F.2d 1189, 1201-05 (11th Cir. 1991), the court held that interstate highway rest areas are nonpublic forums. Applying *Kokinda*, the court analyzed the traditional public forum status of the rest areas according to government's subjective intent behind constructing them. The court reasoned that "rest areas have never existed independently of the Interstate [highway] System; they are optional appendages that are *intended*, as part of the System, to facilitate safe and efficient travel by motorists along the System's highways. At the outset, then, it seems clear to us that rest areas are nontraditional public fora." *Id.* at 1203 (emphasis added).

See also *Longo v. United States Postal Serv.*, 761 F. Supp. 220 (D. Conn. 1991) (holding that post office sidewalks are nonpublic forums); *International Caucus of Labor Comm. v. Maryland Dep't of Transp.*, 745 F. Supp. 323, 328 (D. Md. 1990) (citing government's purpose behind construction of interior walkways within the Maryland Motor Vehicle Agency buildings as a factor in its holding that these walkways are nonpublic forums).

176. *See* Nadine Strossen, *Michigan Department of State Police v. Sitz: A Roadblock to Meaningful Judicial Enforcement of Constitutional Rights*, 42 HASTINGS L.J. 285, 376-81 (1991), for the argument that *Kokinda's* "distortion" of the public forum doctrine is part of a larger trend in recent Supreme Court decisions to "overemphasize an egalitarian concept of relative protection at the expense of a libertarian concept of absolute protection."

The author's analysis of *Kokinda* turns on the assumption that public access to government property is the critical factor in traditional public forum analysis. While access helps illuminate an objective assessment of traditional and historical uses of property, it is by no means the determinative factor under the *Hague* test. *See, e.g., United States v. Grace*, 461 U.S. 171, 177 (despite the holding that sidewalks in front of the Supreme Court are traditional public forums, the Court observed that "[p]ublicly owned or operated property does not become a 'public forum' simply because members of the public are permitted to come and go at will"); *Greer v. Spock*, 424 U.S. 828, 836 (1976), ("the principle that whenever members of the public are permitted freely to visit a place owned or operated by the Government, then that place becomes a 'public forum' for purposes of the First Amendment . . . has never existed, and does not exist now").

177. *See supra* notes 146-49 and accompanying text.

178. *See United States v. Kokinda*, 110 S. Ct. 3115, 3125 (1990) (Kennedy, J., concurring).

The traditional public forum is the only type of public place where speech receives heightened First Amendment protection irrespective of government consent or attempts to interfere.¹⁷⁹ These “safe zones” where citizens can speak out protected by a First Amendment shield against government reprisal have an important historical legacy in promoting democratic change.¹⁸⁰ Furthermore, as Professor Harry Kalven, Jr. argued in his seminal article, *The Concept of the Public Forum: Cox v. Louisiana*,

. . . in an open democratic society the streets, the parks, and other public places are an important facility for public discussion and political process. They are in brief a public forum that the citizen can commandeer; the generosity and empathy with which such facilities are made is an index of freedom.¹⁸¹

For these reasons, *Kokinda*'s reliance on the notion of government's role as a proprietor in reducing the scope of the traditional public forum test should be evaluated carefully.

Protecting government when it acts in its “proprietary capacity” at the expense of the *Hague* traditional public forum test is an ill-conceived way to accommodate the competing interests in speakers' First Amendment liberties and in government efficiency.¹⁸² Distinguishing between traditional governmental and proprietary functions is itself problematic. The Court itself recently acknowledged how unprincipled and “unworkable” this distinction is in reviewing its confused legacy in the Ninth Amendment intergovernmental tax immunity and Tenth Amendment “traditional governmental functions” doctrines.¹⁸³ Resurrecting the governmental/proprietary distinction as a rationale for constricting the scope of the traditional public forum doctrine in the future would no doubt prove as unprincipled for First Amendment jurisprudence as it has for other areas of federal constitutional law.¹⁸⁴

179. See *supra* notes 15-17 and accompanying text.

180. See, e.g., David Goldberger, *A Reconsideration of Cox v. New Hampshire: Can Demonstrators be Required to Pay the Costs of Using America's Public Forums*, 62 TEX. L. REV. 403, 403-04 (1983) (“[d]uring the 1940's, Jehovah's Witnesses proselytized on the streets, . . . [d]uring the 1950's and early 1960's, the civil rights movement brought its cause to the attention of an entire nation by marching and demonstrating in streets and parks, . . . [and] . . . [d]uring the late 1960's and early 1970's, antiwar protestors used streets, sidewalks, and parks to demand a change in American policy toward the war in Vietnam.”). See *supra* note 74 and accompanying text.

181. Kalven, *supra* note 18, at 11-12.

182. *Kokinda*, 110 S. Ct. at 3119.

183. *Garcia v. San Antonio Metro Transit Auth.*, 469 U.S. 528, 539-47 (1985).

184. See *Kokinda*, 110 S. Ct. at 3130 n.4 (Brennan, J., dissenting) (noting the “blurry concept of government *qua* proprietor” as figuring into the plurality decision). Cf. *Ward v. Rock Against Racism*, 491 U.S. 781, 790 (1989) (indicating in dictum the unresolved question

Kokinda illustrates this problem of characterization. Congress' power to create the United States Postal Service is derived from Article I, Section 8 of the Constitution which states, "The Congress shall have Power . . . To Establish Post Offices and Post Roads."¹⁸⁵ Known as the Postal Clause, this grant of constitutional authority designates postal activities as an enumerated function of the federal government.¹⁸⁶ Beginning in 1792¹⁸⁷ and culminating in 1845,¹⁸⁸ Congress passed statutes pursuant to the Postal Clause formalizing a "monopoly over the carriage of letters in and from the United States."¹⁸⁹ Indeed, federal control of postal activities has been a uniquely "sovereign function"¹⁹⁰ since the Articles of Confederation period.¹⁹¹ Clearly, operation of post offices is as much of a traditional governmental function as it is a proprietary activity.

Precedent for minimizing First Amendment judicial review when government appears to act like a proprietor is virtually nonexistent. *Kokinda* erroneously suggested that "long-settled principle[s]" of First Amendment case law permit a lower level of judicial review when government acts as a "proprietor . . . manag[ing] [its] internal operation[s]. . . ."¹⁹² *Kokinda* cited the 1961 decision *Cafeteria and Restaurant Workers v. McElroy* for this proposition. However, *McElroy* is a Fifth Amendment Due Process Clause case and did not concern the First

whether a municipality owning a bandshell might have a "proprietary right to select performances and control their quality").

185. U.S. CONST., art. I, § 8.

186. *Ex Parte Jackson*, 96 U.S. 727, 732 (1878); see *TRIBE*, *supra* note 45, § 5-11, at 326.

187. Act of Feb. 20, 1792, ch. 7, § 14, 1 Stat. 236; see *Board of Regents of the Univ. of Cal. v. Public Employment Relations Bd.*, 485 U.S. 589, 594 (1988).

188. Act of March 3, 1845, ch. 43, § 9, 5 Stat. 735 (codified at 18 U.S.C. § 1696); see *United States Postal Serv. v. Council of Greenburgh Civic Ass'ns*, 453 U.S. 118, 123 (1981).

189. *Air Courier Conference of Am. v. American Postal Workers Union*, 111 S. Ct. 913, 915 (1991). The postal monopoly statutes are codified at 18 U.S.C. §§ 1693-1699 (1988) and 39 U.S.C. §§ 601-606 (1988).

190. *Council of Greenburgh Civic Ass'ns*, 453 U.S. at 122.

191. *Board of Regents of the Univ. of Cal.*, 485 U.S. at 594; see Act of Oct. 18, 1782, reprinted in 23 J. CONTINENTAL CONG. 672-673 (G. Hunt ed. 1914); see Articles of Confederation, art. IX ("The United States in Congress assembled shall also have the sole and exclusive right and power of . . . establishing and regulating post-offices . . . throughout the United States.").

192. *Kokinda*, 110 S. Ct. at 3119 (quoting *Cafeteria and Restaurant Workers v. McElroy*, 367 U.S. 886, 896 (1961)). *Kokinda* quotes *McElroy* out of context. The passage in *McElroy* quoted in *Kokinda* reads—without ellipses—as follows: "Moreover, the governmental function operating here was not the power to regulate or license, as lawmaker, an entire trade or profession, or to control an entire branch of private business, but, rather, as proprietor, to manage the internal operation of an *important federal military establishment*." *Id.* at 896 (emphasis added).

Amendment.¹⁹³ *Kokinda* also cited the 1971 decision *Lehman v. City of Shaker Heights*, in which a divided Court held that the First Amendment permitted a ban on political advertising on the interior spaces of public buses.¹⁹⁴ While the *Lehman* plurality mentioned the commercial role of a municipality in operating buses, a five-vote majority was reached exclusively under the reasoning that bus riders were “captive viewers or listeners” where political advertising would be “forced” on them.¹⁹⁵ *Kokinda* provides no authority for its government-as-proprietor argument under the First Amendment other than the questionable citation of *McElroy* and the plurality view in *Lehman*.

Most importantly, *Kokinda*'s injection of a government-purpose test into the traditional public forum calculus is an unnecessarily excessive way to protect government's interests in managing its property. The objective criteria of the *Hague* public forum concept insure that a historically significant class of public places will remain beyond the reach of government attempts to interfere with speech.¹⁹⁶ *Kokinda* threatens to make the traditional public forum virtually indistinguishable from the designated and limited-purpose forum categories by removing *Hague*'s objective look at public places. Government consent would be a prerequisite for a finding that any public place is a public forum. Courts can achieve a balance less threatening to the status of traditional public forums by shifting the focus of judicial inquiry more toward the time, place, and manner of expression at hand.

As argued in Parts II and III, *Kokinda* emphasized its concern that solicitation “[would] impede the normal flow of traffic” at post office sidewalks because of solicitor “confrontations” with patrons.¹⁹⁷ The Postal Service justified its regulation as a way to prevent disruption of postal business.¹⁹⁸ The crucial factor to the *Kokinda* Court was the perceived secondary effect of solicitation on patron access—not with the substance of various political, religious, or charitable messages that might be conveyed through solicitation. Given this concern, the Postal

193. *McElroy* decided whether a civilian employee working at a United States Navy installation could have her security access badge revoked and employment terminated for security reasons without a hearing. 367 U.S. at 886.

194. *Lehman v. City of Shaker Heights*, 418 U.S. 298 (1974).

195. *Lehman v. City of Shaker Heights*, 418 U.S. 298, 307 (1974) (Douglas, J., concurring); see *United States v. Kokinda*, 110 S. Ct. 3115, 3131 n.4 (1990) (Brennan, J., dissenting); see also *TRIBE*, *supra* note 45, § 15-18, at 1409. See Marcy Strauss, *Redefining the Captive Audience Doctrine*, 19 HASTINGS CONST. L.Q. 85 (1991), for a critique of the captive audience doctrine.

196. See *supra* notes 15-17 and accompanying text.

197. *Kokinda*, 110 S. Ct. at 3123. See *supra* notes 92, 148-50 and accompanying text.

198. *Kokinda*, 110 S. Ct. at 3123.

Service could have issued time, place, and manner regulations against solicitation in order to protect customer access to the sidewalk and post office door.¹⁹⁹ The superior feature of time, place, and manner regulations is that courts need not pass on the public forum status of public property when reviewing the regulations' constitutionality under the First Amendment.²⁰⁰

In *Heffron*, regulations limiting the solicitation, distribution, and sale of literature to designated booths within the Minnesota State Fair grounds were upheld as content-neutral, reasonable time, place and manner regulations.²⁰¹ *Heffron* found that the regulations were reasonable and served the "substantial" interest of the state in protecting the "orderly movement and control" of individuals at the fair.²⁰² Similarly, the Postal Service could designate areas along its sidewalks, or in the parking lot adjacent to the sidewalk, for solicitation in such a way that customer access to the post office would not be impeded.²⁰³

Heffron-type time, place, and manner regulations offer a preferable alternative to the *Kokinda* model because they accommodate both the

199. As stated in Part I, government can issue reasonable content-neutral time, place, and manner of expression regulations that are "narrowly tailored to serve a significant governmental interest, . . . leav[ing] open ample alternative channels for communication of the information," regardless of the status of the forum. *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (quoting *Clark v. Community for Creative Non-Violence*, 468 U.S. 288 (1984)). See *supra* note 55 and accompanying text.

200. *Ward*, 491 U.S. at 791 ("[o]ur cases make clear . . . that even in a public forum the government may impose reasonable restrictions on the time, place, or manner of protected speech . . ."). See *supra* note 55 and accompanying text.

See William E. Lee, *Lonely Pamphleteers, Little People, and the Supreme Court: The Doctrine of Time, Place, and Manner Regulations of Expression*, 54 GEO. WASH. L. REV. 756 (1986), for a critical examination of the Court's application of the time, place, and manner standard of judicial review.

201. *Heffron v. ISKCON*, 452 U.S. 640, 649 (1981). The regulation was content-neutral because it applied "evenhandedly to all who wish to distribute and sell written materials or to solicit funds." *Id.* For similar reasons, the *Kokinda* plurality held that the Postal Service regulation banning solicitation was content-neutral. *Kokinda*, 110 S. Ct. at 3124. Cf. *Ward*, 491 U.S. at 791 (quoting *Community for Creative Non-Violence*, 468 U.S. at 293) ("Government regulation of expressive activity is content-neutral so long as it is 'justified without reference to the content of the regulated speech.'").

Justice Kennedy, concurring with the plurality on this point, interpreted the Postal Service regulation as a valid time, place, and manner provision. *Kokinda*, 110 S. Ct. at 3125-26 (Kennedy, J., concurring). However, Justice Kennedy stands alone on the Court in his belief that the Postal Service's categorical ban on solicitation is narrowly tailored. *Id.* at 3134-35. See *infra* note 205.

202. *Heffron*, 452 U.S. at 650.

203. The Postal Service already designates interior bulletin boards for public notices. See *supra* note 114 and accompanying text.

interests of speakers and government.²⁰⁴ The functional standard of review for time, place, and manner regulations takes into account government's purposes, and public uses and access to a forum without categorically denying access to classes of speakers. Moreover, the narrow tailoring requirement of the standard polices against excessively broad restrictions at the forum.²⁰⁵ In sharp contrast, the *Kokinda* public forum methodology provides an all-or-nothing result for speakers' claims. Under *Kokinda*, the forum is classified as a threshold matter on the basis of government's purposes behind maintaining a public place.²⁰⁶

204. See *ISKCON v. Lee*, 925 F.2d 576, 586-87 (2d Cir. 1991) (Oakes, C.J., dissenting), cert. granted, 60 U.S.L.W. 3464 (U.S. Jan. 10, 1992) (No. 91-155), for a similar argument that the Port Authority could have issued time, place, and manner of expression regulations that "for example, require permits or badges for solicitors, or that limit the number of solicitors permitted, or that restrict the locations within the terminal buildings where solicitors may conduct their activities"

The Port Authority has suspended enforcement of its solicitation and literature distribution bans until the *Lee* case is fully adjudicated. Instead, the Port Authority has established an informal set of procedures to control the secondary effects of solicitation similar to those recommended by Chief Judge Oakes. Solicitors in the building are told to remain in designated areas outside the main pedestrian walkways so as not to interfere with traffic flows. They are also instructed to wear identification tags. Security personnel limit the number of solicitors each morning based on a first-come, first-served sign-up sheet. Solicitors will be expelled from the building pursuant to the regulation prohibiting solicitation if they do not follow these "rules."

Similarly styled time, place, and manner restrictions against solicitation and distribution of literature in public airport concourses have been upheld for use in the Atlanta International Airport, *ISKCON v. Eaves*, 601 F.2d 809, 828-30 (5th Cir. 1979), and in the Miami International Airport, *International Caucus of Labor Comms. v. Metropolitan Dade County*, 724 F. Supp. 917 (S.D. Fla 1989).

205. *Ward*, 491 U.S. at 797-800, revised the narrow tailoring requirement by stating that the regulation need not be the least-restrictive or least-intrusive means of achieving the governmental interest at stake. Rather, the means chosen must not be "substantially broader than necessary to achieve the government's interest" *Id.* at 800.

Several commentators argue that the *Ward* narrow tailoring test is "quite close to the rational basis applied to regulations that do not affect fundamental rights" because it does not require the least-restrictive form of government regulation. Susan H. Williams, *Content Discrimination and the First Amendment*, 139 U. PA. L. REV. 615, 644 (1991); accord Richard B. Saphire, *Reconsidering the Public Forum Doctrine*, 59 U. CIN. L. REV. 739, 784-88 (1991). *Kokinda* refutes this interpretation of the *Ward* test. A majority of the Justices in *Kokinda* agreed that the solicitation ban was content-neutral. *Kokinda*, 110 S. Ct. at 3124, 3126 (Kennedy, J., concurring); see *supra* note 201. The government asked the Court to uphold the ban as a content-neutral time, place, and manner of expression regulation. Brief for Petitioner United States of America at Section C, *United States v. Kokinda* 110 S. Ct. 3115 (1990) (No. 88-2031). If the *Ward* narrow tailoring requirement were as deferential to government authority as these commentators contend, the Court could have upheld the solicitation ban exclusively on this basis. However, only Justice Kennedy, concurring in the result in *Kokinda*, argued that the Post Office's categorical ban on solicitation is narrowly tailored under *Ward*. *Kokinda*, 110 S. Ct. at 3125-26 (Kennedy, J. concurring); see *supra* notes 104-05 and 201 and accompanying text.

206. *Kokinda*, 110 S. Ct. at 3119. See *supra* Parts II and III.

This methodology provides no opportunity for balancing the interests of speakers because it focuses exclusively on government's designs for its property.

The *Hague* traditional public forum test could remain intact if government were obligated to fashion time, place, and manner regulations for public places like post office sidewalks and airport terminal lobbies. Under this view, an exterior post office sidewalk and an airport terminal concourse would qualify as traditional public forums because government's subjective purposes behind building and maintaining them would not be factors in the analysis. Thus, regulations banning solicitation on postal sidewalks and in airport terminal lobbies would be invalid under the First Amendment. However, government would still have the power to curb the perceived secondary effects of solicitors on post office or airport patrons by issuing time, place, and manner of expression restrictions.²⁰⁷

Whether *Kokinda*'s interpretation of the First Amendment will have far-reaching effects on a speaker's access to various public places remains for future cases. *Lee*, by creating a conflict among federal circuit courts over the public forum status of airport terminals, provides the Supreme Court with a forthcoming opportunity to reexamine its legal analysis in *Kokinda*.²⁰⁸ Since the Court has granted a writ of certiorari to the United States Court of Appeals for the Second Circuit in *Lee*, newly appointed Justices David Souter and Clarence Thomas are likely to cast deciding votes among a Court sharply divided over the future of the traditional public forum.²⁰⁹

207. In *Hague*, Justice Roberts alluded to this balance by arguing that expressive activities at streets and parks must be "exercised in subordination to the general comfort and convenience, and in consonance with peace and good order" *Hague v. Committee for Indus. Org.*, 307 U.S. 496, 516 (1939). See *supra* note 16 and accompanying text. See also *supra* notes 197-98 and 204 and accompanying text.

208. See *Lee*, 925 F.2d 576, cert. granted, 60 U.S.L.W. 3464 (U.S. Jan. 10, 1992) (No. 91-155). The Court consolidated ISKCON's petition concerning the Second Circuit's reversal of the district court judgment invalidating the restriction on solicitation with the Port Authority's cross-petition concerning the Second Circuit's affirmation of the district court judgment invalidating the restriction on the distribution of literature. See also *supra* notes 13, 158-59 and accompanying text.

209. See *State v. Hodgkiss*, 565 A.2d 1059 (N.H. 1989) (upholding an ordinance prohibiting encumbrances on public sidewalks against a First Amendment challenge) for Justice Souter's application of the First Amendment public forum doctrines while presiding as a Justice of the Supreme Court of New Hampshire. See *National Treasury Employees Union v. United States*, 927 F.2d 1253 (D.C. Cir. 1991) (affirming district court's denial of a preliminary injunction against enforcement of the Ethics Reform Act pending a First Amendment challenge) for Justice Clarence Thomas's only reported decision involving the First Amendment while presiding as a Judge on the United States Court of Appeals for the District of Columbia Circuit.

