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Closing the Door on the Public Forum

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CLOSING THE DOOR ON THE PUBLIC FORUM

The sound of tireless voices is the price we pay for the right to hear the music of our own opinions.[1]

I. INTRODUCTION

When is a street not a street? A sidewalk not a sidewalk? A public bus not open to the public? These are questions for which the United States Supreme Court has formulated an answer. According to the Court, the government may regulate the freedom of speech[2] in nearly any manner, when the freedom is exercised in any public place that the Court does not deem a "public forum"—including certain streets,[3] sidewalks[4] and advertising space on public buses.[5]

Streets, sidewalks and the like are public property. Such property is not owned by private parties who are at liberty to refuse admittance upon their land; rather, it is property owned, funded and maintained by the local, state or federal government. But, may people do whatever they desire on the property simply because it is open to the public? What if one person's activities interfere with another person's right to enjoy the property?

Suppose some citizens of state *X* have grown tired of encountering a particular organization in state *X*'s publicly-owned airport. They say that the group's members ask for donations and pass out literature, and in so doing, the members disrupt the flow of pedestrian traffic in the airport. Others claim they do not like to hear the group's ritualistic chanting. Still others just do not care to see the group's presence, highlighted by their unique attire and unusual appearance. Finally, a portion of the people simply do not like the group itself, the people in it or the beliefs the group holds. The citizens urge the legislature of state *X* to pass a law

1. Adlai E. Stevenson, Address Before the State Committee of the Liberal Party at New York City (Aug. 28, 1952), *in* 4 THE PAPERS OF ADLAI E. STEVENSON 63 (Walter Johnson ed., 1974).

2. The First Amendment to the Constitution provides that "Congress shall make no law . . . abridging the freedom of speech." U.S. CONST. amend. I. The First Amendment freedom of speech applies to state and local governments as well, via the Fourteenth Amendment. *See infra* note 47 and accompanying text.

3. *See* Greer v. Spock, 424 U.S. 828, 835-37 (1976) (streets on military base).

4. *See* United States v. Kokinda, 110 S. Ct. 3115, 3120 (1990) (plurality opinion) (sidewalk in front of United States Post Office).

5. *See* Lehman v. City of Shaker Heights, 418 U.S. 298, 304 (1974) (advertising placard spaces on public buses).

prohibiting soliciting and leafletting in airports. The political pressure builds, motivating the legislature to acquiesce and ban the activity.

But what of the organization? Its members have a right to be in the airport because it is open to the public.[6] Under the First Amendment they also have a right to ask for donations and distribute literature.[7] Nevertheless, do they have a right to exercise their First Amendment freedoms anytime, anywhere and in any manner they wish?

Usher in the public forum doctrine—a seemingly potent panacea that promises to cure the tension between speaker and audience. The public forum, a product of keen judicial invention, is a catch-phrase for a type of public property that a reviewing court considers to be a place where First Amendment rights may be exercised.[8] Hence, if a court determines that First Amendment activity[9] is not appropriate in state *X*'s airport, then state *X* is effectively free to regulate the activity as it sees fit.[10] Consequently, a conflict emerges between those who wish to be heard and those who wish not to hear. For the good of society, whose desire should prevail?

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6. *See* International Soc'y for Krishna Consciousness v. Lee, 112 S. Ct. 2701, 2704 (1992) (stating that airport terminals "are generally accessible to the general public"); *infra* text accompanying notes 72-73.

7. Solicitation of funds and distribution of literature are recognized forms of "speech" protected by the First Amendment. *Lee*, 112 S. Ct. at 2705 (citing Heffron v. International Soc'y for Krishna Consciousness, 452 U.S. 640, 647 (1981)).

8. *See infra* notes 16-38 and accompanying text.

9. "First Amendment activity" in this context refers to expression protected by the Free Speech Clause of the First Amendment. *See supra* note 2. Some expressive activity does not enjoy First Amendment protection. *See, e.g.*, Miller v. California, 413 U.S. 15, 23 (1973) (obscenity); Feiner v. New York, 340 U.S. 315, 321 (1951) (words that incite violence or riot); Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942) (" 'fighting' words").

Likewise, some expressive activity enjoys only limited First Amendment protection. *See, e.g.*, Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 763 (1985) (plurality opinion) (defamation of private individuals); Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n, 447 U.S. 557, 562-63 (1980) (commercial speech); FCC v. Pacifica Found., 438 U.S. 726, 748 (1978) (indecent broadcasting); Young v. American Mini Theatres, Inc., 427 U.S. 50, 61 (1976) (nonobscene pornography); Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748, 771 n.24 (1976) (commercial speech); Gertz v. Robert Welch, Inc., 418 U.S. 323, 346-47 (1974) (defamation of private individuals); New York Times Co. v. Sullivan, 376 U.S. 254, 279-80 (1964) (defamation of "public officials"). Such activity commonly is termed "low-value speech." *See generally* GEOFFREY R. STONE ET AL., CONSTITUTIONAL LAW 1144-257 (2d ed. 1991) (discussing various forms of low-value speech). Analysis of regulations on unprotected speech and low-value speech is beyond the scope of this Note, as it does not invoke the public forum doctrine. *See* Carney R. Shegerian, *A Sign of the Times: The United States Supreme Court Effectively Abolishes the Narrowly Tailored Requirement for Time, Place and Manner Restrictions*, 25 LOY. L.A. L. REV. 453, 470 (1992) (stating that Supreme Court uses " 'sliding scale approach' to First Amendment protection" depending on type of speech).

10. *See infra* notes 93-96 and accompanying text.

The above hypothetical is patterned after an actual case involving the International Society for Krishna Consciousness (ISKCON), a religious group that challenged a regulation prohibiting the group's members from disseminating information about their organization to passersby in New York area airports.[11] This Note analyzes the United States Supreme Court's decision in *International Society for Krishna Consciousness v. Lee*,[12] which held that airports are not public fora.[13] This Note criticizes the manner in which the Supreme Court has incorrectly applied the public forum doctrine in order to proscribe unwanted speech.[14] Finally, this Note explores the real concerns underlying the public forum doctrine and presents an alternative perspective to that advocated by the United States Supreme Court in *Lee*.[15]

II. BACKGROUND

A. A Public Forum Trichotomy

A public forum is "an important facility for public discussion and political process."[16] The notion of what is thought of today as the public forum originated in *Hague v. Committee for Industrial Organization*.[17] However, the foundation for the doctrine predates the term "public forum," which emerged in a line of Supreme Court decisions beginning more than two decades later.[18] By 1983, public forum analysis identified three categories into which all public property could be placed: the traditional public forum, the designated public forum, and the nonpublic forum[19] (or more accurately, the public nonforum).[20]

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11. *Lee*, 112 S. Ct. 2701, 2704 & n.1; *see infra* notes 65-102 and accompanying text.

12. 112 S. Ct. 2701 (1992).

13. *Id.* at 2706; *see infra* notes 65-130 and accompanying text.

14. *See infra* notes 103-30 and accompanying text.

15. *See infra* notes 131-85 and accompanying text.

16. Harry Kalven, Jr., *The Concept of the Public Forum:* Cox v. Louisiana, 1965 SUP. CT. REV. 1, 11-12.

17. 307 U.S. 496, 515-16 (1939).

18. *See* Daniel A. Farber & John E. Nowak, *The Misleading Nature of Public Forum Analysis: Content and Context in First Amendment Adjudication*, 70 VA. L. REV. 1219, 1221 & n.15 (1984). Professors Farber and Nowak note that the term "public forum" was first used in International Association of Machinists v. Street, 367 U.S. 740 (1961), and then later in Griffin v. California, 380 U.S. 609 (1965). Farber & Nowak, *supra*, at 1221 n.15. The present meaning of the term in the constitutional law lexicon was shaped by dozens of subsequent Supreme Court cases, *see id.*, and its evolution perhaps was hastened by Professor Kalven's landmark article in 1965, *see* Kalven, *supra* note 16, at 10-21.

19. Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45-46 (1983); *see* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 12-24, at 987 (2d ed. 1988).

20. *See infra* notes 41-43 and accompanying text.

Traditional or "quintessential public forums"[21] are those types of public property, such as streets and parks, that "have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions."[22] Because the First Amendment demands that government not infringe the right to free speech,[23] governmental regulations on speech in traditional public fora are subject to a high degree of scrutiny by the courts.[24]

The degree to which scrutiny is heightened generally is determined by whether the regulation is content-based or content-neutral.[25] If the regulation restricts the content of the expressive activity, courts subject it to strict scrutiny, requiring that the "regulation [be] necessary to serve a compelling state interest and . . . narrowly drawn to achieve that end."[26]

If the regulation is content-neutral, however, the level of scrutiny further depends upon the following two-part inquiry into the type of regulation. If the regulation acts as a blanket restriction on all speech, it

21. *Perry*, 460 U.S. at 45.

22. *Hague*, 307 U.S. at 515.

23. *See supra* note 2. The First Amendment freedom of speech applies to the state and local governments via the Fourteenth Amendment. *See infra* note 47 and accompanying text.

24. Grayned v. City of Rockford, 408 U.S. 104, 115 (1972) ("The right to use a public place for expressive activity may be restricted only for weighty reasons."); Police Dep't v. Mosley, 408 U.S. 92, 98-99 (1972) ("[J]ustifications for selective exclusions from a public forum must be carefully scrutinized.").

In constitutional analysis, "scrutiny" refers to how closely a court will analyze and question a legislative act. The more a government regulation burdens or restricts an asserted right, and the more importance the court assigns the asserted right, the closer the court will scrutinize the governmental act. That is, the court determines whether the societal interest furthered by the act merits imposing a burden or restriction on an asserted constitutional right and whether the methods used to achieve the interest justify burdening or restricting the asserted right. In First Amendment free speech analysis, courts essentially balance the speaker's asserted interest against the government's asserted interest. *See* TRIBE, *supra* note 19, § 12-2, at 792-93, § 12-24, at 987; *see also* Cornelius v. NAACP Legal Defense & Educ. Fund, 473 U.S. 788, 820 (1985) (Blackmun, J., dissenting) (stating that public forum analysis dictates that "[t]he interests served by the expressive activity must be balanced against the interests served by the uses for which the property was intended and the interests of all citizens to enjoy the property").

25. *Perry*, 460 U.S. at 45. A content-based restriction is one that limits First Amendment activity by focusing on what is being expressed—the message itself. *See, e.g.*, Carey v. Brown, 447 U.S. 455, 461 (1980) (invalidating statute that permitted dissemination of information pertaining to labor disputes but prohibited discussion of all other issues); *Mosley*, 408 U.S. at 100 (invalidating ordinance allowing only labor picketing and not nonlabor picketing). Conversely, a content-neutral restriction governs First Amendment activity by focusing on other factors unrelated to the message. *See, e.g.*, Cox v. Louisiana, 379 U.S. 536, 554 (1965) (demonstration on large street during rush hour); Cox v. New Hampshire, 312 U.S. 569, 576 (1941) (two parades marching simultaneously on same street).

26. *Perry*, 460 U.S. at 45.

still is subject to strict scrutiny—the same level as that applied to content-based restrictions.[27] However, if the regulation restricts only the "time, place, and manner" of expressive activity, the courts will apply mid-level scrutiny.[28] When applying mid-level scrutiny, courts will uphold the regulation only if it is "narrowly-tailored to serve a significant [as opposed to compelling] government interest, and leave[s] open ample alternative channels of communication."[29]

The other type of public forum is termed the designated, "limited purpose or state-created semi-public forum[ ]."[30] This category "consists of public property which the State has opened for use by the public as a place for expressive activity."[31] University meeting facilities, school board meetings and municipal theaters are examples of designated public fora.[32] All restrictions on expression in designated public fora are subject to the same levels of scrutiny applied in traditional public forum analysis, as long as the state "retain[s] the open character of the facility."[33]

The critical difference between traditional and designated public fora is that a traditional public forum is public property of the type that has "been *used* for the purposes of assembly, communicating thoughts between citizens, and discussing public questions,"[34] even though the property was not dedicated for that purpose.[35] Conversely, a designated public forum is public property that the government itself opens up *for the very purpose* of expressive activity.[36] Often a designated public forum is a limited purpose forum, designed to encourage discussion only on a topic of narrow scope. For example, university meeting facilities may be limited to student activities,[37] and school board meetings may be limited to discourse regarding education.[38]

Public property that is neither "by tradition [n]or designation"[39] a

27. Farber & Nowak, *supra* note 18, at 1221.

28. *Perry*, 460 U.S. at 45.

29. *Id.* See Shegarian, *supra* note 9, for an analysis of the current status of time, place and manner restrictions in public forum analysis.

30. TRIBE, *supra* note 19, § 12-24, at 987.

31. *Perry*, 460 U.S. at 45.

32. *Id.*; *see, e.g.*, Widmar v. Vincent, 454 U.S. 263, 267-68 & 267 n.5 (1981) (university meeting facility); Heffron v. International Soc'y for Krishna Consciousness, 452 U.S. 640, 655 (1981) (temporary fair grounds); City of Madison Joint Sch. Dist. v. Wisconsin Employment Relations Comm'n, 429 U.S. 167, 174-76 (1976) (school board meeting).

33. *Perry*, 460 U.S. at 46.

34. *Hague*, 307 U.S. at 515 (emphasis added).

35. *See infra* notes 107-33 and accompanying text.

36. *Perry*, 460 U.S. at 45-46 & 46 n.7.

37. *Widmar*, 454 U.S. at 269.

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

39. *Id.* at 46.

public forum is considered a nonpublic forum.[40] This term is a misnomer, however, because the property is indeed public, but is not considered a forum for First Amendment activity.[41] More appropriately, it is a "public nonforum."[42] Restrictions on speech in a nonforum are subject to low-level scrutiny; that is, the restrictions need only be reasonable and not discriminatory against a particular viewpoint.[43]

B. The Evolution of the Traditional Public Forum

1. *Hague v. Committee for Industrial Organization*

The United States Supreme Court in *Hague v. Committee for Industrial Organization*[44] declared that streets and parks constitute fora traditionally held open to public expression and dissemination of ideas.[45] In his opinion for the Court, Justice Roberts further asserted:

> 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.[46]

This statement contains several pervasive themes. First, it stands for the general proposition that the First Amendment is applicable to the states through the Due Process Clause of the Fourteenth Amendment.[47]

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40. *See* Farber & Nowak, *supra* note 18, at 1221.

41. *See* United States Postal Serv. v. Council of Greenburgh Civic Ass'ns, 453 U.S. 114, 131 (1981) (holding that mailboxes are not fora for First Amendment activity); Greer v. Spock, 424 U.S. 828, 838 (1976) (holding that military installations are not fora for First Amendment activity).

42. This term helps to distinguish public nonfora from private property. The public forum doctrine generally does not apply to private property. *See* International Soc'y for Krishna Consciousness v. Lee, 112 S. Ct. 2701, 2705 (1992) (stating that public forum doctrine is used "for assessing restrictions that the government seeks to place on the use of *its* property" (emphasis added)). *But see* Shegarian, *supra* note 9, at 474 n.176 (noting that "[p]rivate property has occasionally been viewed to be open to the public for First Amendment speech").

43. *Perry*, 460 U.S. at 46.

44. 307 U.S. 496 (1939).

45. *Id.* at 515 (opinion of Roberts, J.); *see supra* text accompanying notes 21-22.

46. *Hague*, 307 U.S. at 515-16 (opinion of Roberts, J.).

47. Section 1 of the Fourteenth Amendment reads in pertinent part: "No state shall make or enforce any law which shall abridge the Privileges or Immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property without Due Process of Law." U.S. CONST. amend. XIV, § 1. The Supreme Court has expressly declared that the

Second, Justice Roberts recognized that although First Amendment protections are not *absolute*, they also may not be denied.[48] This proposition has evolved into the basis for the two-part test stated above:[49] (1) blanket prohibitions are subject to strict scrutiny;[50] and (2) time, place and manner restrictions must pass mid-level scrutiny.[51]

A third important theme is Justice Roberts' reference to "streets and *public places*."[52] The *Hague* opinion makes it apparent that the Court intended its holding to encompass not only streets and parks, but other public places as well. In *Hague*, the Court upheld an injunction restraining police officers from "interfering with [the respondents'] free ac-

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Fourteenth Amendment makes the First Amendment applicable to the states. Young v. American Mini Theatres, 427 U.S. 50, 52 n.1 (1976); Edwards v. South Carolina, 372 U.S. 229, 237 (1963); Schneider v. State, 308 U.S. 147, 160 (1939); *Hague*, 307 U.S. at 519 (opinion of Stone, J.); Gitlow v. New York, 268 U.S. 652, 666 (1925).

Notably, the Supreme Court chose not to make the First Amendment applicable to the states through the Privileges or Immunities Clause of the Fourteenth Amendment. In a separate opinion in *Hague*, Justice Stone maintained:

> It has never been held that either [the freedom of speech or the freedom of assembly] is a privilege or immunity peculiar to citizenship of the United States, to which alone the privileges and [sic] immunities clause refers . . . and neither can be brought within the protection of that clause without enlarging the category of privileges and immunities of United States citizenship as it has hitherto been defined.

307 U.S. at 519 (opinion of Stone, J.) (citations omitted). The distinction lies in the fact "that freedom of speech and of assembly for any lawful purpose are rights of personal liberty secured to all persons, without regard to citizenship, by the due process clause of the Fourteenth Amendment." *Id.* (opinion of Stone, J.). Hence, there are certain rights unique only to American citizens, and those rights are protected by the Privileges or Immunities Clause. *See id.* (opinion of Stone, J.). Because First Amendment freedoms are "secured to all persons, without regard to citizenship," *id.* (opinion of Stone, J.), these freedoms are protected by the broader Due Process Clause, not by the narrower Privileges or Immunities Clause.

48. The theory that First Amendment rights are absolute, making them free from any governmental regulation, was proffered by Justice Hugo Black. *See* Konisberg v. State Bar, 366 U.S. 36, 60 (1961) (Black, J., dissenting); Hugo L. Black, *The Bill of Rights*, 35 N.Y.U. L. REV. 865, 874 (1960). Justice Black's view assumed that the Framers left no room in the First Amendment for any compromises or judicial balancing and was premised on the belief that the Constitution must be read literally.

However, the Supreme Court consistently has rejected Justice Black's "absolutist" view, in favor of balancing First Amendment interests against governmental interests. *See supra* note 24. In *Hague*, Justice Roberts alluded to the need for weighing the interests of both the speaker and the state. *See supra* text accompanying note 46. Thus, there are times when free speech concerns are outweighed by governmental interests. *See infra* notes 142-49 and accompanying text.

49. *See supra* notes 27-33 and accompanying text.

50. *See, e.g.*, Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983); Carey v. Brown, 447 U.S. 455, 461-62 (1980).

51. *See, e.g.*, Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989); *Perry*, 460 U.S. at 45; United States Postal Serv. v. Council of Greenburgh Civic Ass'ns, 453 U.S. 114, 132 (1981); Consolidated Edison Co. v. Public Serv. Comm'n, 447 U.S. 530, 535-36 (1980).

52. *Hague*, 307 U.S. at 515 (opinion of Roberts, J.) (emphasis added).

cess to the *streets, parks, or public places* of the city."[53] Thus, the scope of the holding stretches beyond streets and parks, to "public places" in general. The opinion does not define, however, what constitutes a "public place" for the purpose of public forum analysis.

2. Airport terminals as "public places"

Before the decision in *International Society for Krishna Conciousness v. Lee*,[54] the Supreme Court had never addressed whether an airport terminal constitutes a public forum.[55] When lower federal courts considered the issue, they almost unilaterally determined that airport terminals fell within the realm of public fora.[56] A recurring theme in those opinions was that airport terminals are "comparable to city streets in both physical and conceptual aspects," and like city streets, must be considered public fora.[57]

Nevertheless, in 1991, the Second Circuit Court of Appeals in *International Society for Krishna Consciousness v. Lee*[58] flatly rejected the principle that airports constitute public fora for First Amendment activity.[59] The court determined that airport terminals are nonfora, arguably fearing that the Supreme Court would overturn its decision if it affirmed

53. *Id.* at 517 (opinion of Roberts, J.) (emphasis added).

54. 112 S. Ct. 2701 (1992).

55. International Soc'y for Krishna Consciousness v. Lee, 925 F.2d 576, 580 (2d Cir. 1991), *aff'd*, 112 S. Ct. 2701 (1992).

56. International Soc'y for Krishna Consciousness v. Lee, 721 F. Supp. 572, 576 (S.D.N.Y. 1989), *aff'd in part, rev'd in part*, 925 F.2d 576 (2d Cir. 1991), *aff'd*, 112 S. Ct. 2701 (1992); *see* Jamison v. City of St. Louis, 828 F.2d 1280, 1283 (8th Cir. 1987), *cert. denied*, 485 U.S. 987 (1988); Jews for Jesus v. Board of Airport Comm'rs, 785 F.2d 791, 795 (9th Cir. 1986), *aff'd on other grounds*, 482 U.S. 569 (1987); United States S.W. Africa/Nambia Trade & Cultural Council v. United States, 708 F.2d 760, 764 (D.C. Cir. 1983) [hereinafter *USSW Africa*]; Fernandes v. Limmer, 663 F.2d 619, 627 (5th Cir. 1981), *cert. dismissed*, 458 U.S. 1124 (1982); International Soc'y for Krishna Consciousness v. Rochford, 585 F.2d 263, 268 (7th Cir. 1978); Chicago Area Military Project v. City of Chicago, 508 F.2d 921, 926 (7th Cir.), *cert. denied*, 421 U.S. 992 (1975); Kuszynski v. City of Oakland, 479 F.2d 1130, 1131 (9th Cir. 1973); International Soc'y for Krishna Consciousness v. Wolke, 453 F. Supp. 869, 872 (E.D. Wis. 1978); International Soc'y for Krishna Consciousness v. Engelhardt, 425 F. Supp. 176, 180 (W.D. Mo. 1977); *see also* Gannett Satellite Info. Network v. Berger, 716 F. Supp. 140, 149 (D.N.J. 1989) ("Newark Airport is a public forum."), *aff'd in part, rev'd in part*, 894 F.2d 61 (3d Cir. 1990); *cf.* Wolin v. Port of N.Y. Auth., 392 F.2d 83, 90 (2d Cir.) (holding that bus terminal constitutes public forum), *cert. denied*, 393 U.S. 940 (1968). *But see* International Caucus of Labor Comms. v. Dade County, 724 F. Supp. 917, 923 (S.D. Fla. 1989) (holding that airport terminals are not traditional public fora).

57. *Lee*, 721 F. Supp. at 576; *accord Jamison*, 828 F.2d at 1283; *USSW Africa*, 708 F.2d at 764; *Chicago Area Military Project*, 508 F.2d at 925; *cf. Wolin*, 392 F.2d at 89 (stating that bus terminals are akin to public streets).

58. 925 F.2d 576 (2d Cir. 1991), *aff'd*, 112 S. Ct. 2701 (1992).

59. *Id.* at 580.

the district court's holding that airport terminals constitute public fora.[60] Actually, the Second Circuit "was prepared to follow" the path taken by the federal courts, recognizing the unified view of the circuits.[61] However, analogizing to *United States v. Kokinda*,[62] the Second Circuit declared the airport terminal a nonforum, subject to "reasonable and viewpoint-neutral" restrictions.[63] In a fractured decision, the United States Supreme Court affirmed the Second Circuit's ruling.[64]

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60. The court stated:

> Prior to the decision in *Kokinda*, this panel was prepared to follow the authority established in other circuits. To hold otherwise would have created a conflict among the circuits over an issue that the Supreme Court has declined to address despite numerous opportunities. . . . We believe, however, that *Kokinda* has altered public forum analysis and that we would not be faithful to Supreme Court precedent if we were to follow the other circuits.

Id. "Given the possibility of further review," *id.* at 581, the court then examined the alignment of the Supreme Court's votes in *Kokinda* and attempted to predict how the Supreme Court would rule in *Lee*. *See id.* at 581-82. Thus, it appears that the court of appeals based its decision primarily, if not exclusively, on its apprehension that the Supreme Court would reverse a finding that airports are public fora.

61. *Id.* at 581. While the District Court for the Southern District of Florida earlier had declared that airports are nonfora, International Caucus of Labor Comms. v. Dade County, 724 F. Supp. 917, 920 (S.D. Fla. 1989), this is the only pre-*Lee* decision espousing this position. In *International Caucus of Labor Committees*, the court recognized the weight of authority supporting the notion that airport terminals are public fora, *id.* at 922-23, and then rebuffed that view, *id.* at 923. Judge Zloch inexplicably concluded that airport terminals are "not property that 'by long tradition or by government fiat have been devoted to assembly or debate,' " thus rendering them nonfora. *Id.* (quoting Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983)).

It is unclear why Judge Zloch interpreted *Perry*'s reference to the public forum definition originated by Hague v. Committee for Industrial Organization, 307 U.S. 496, 515 (1939), in a manner contrary to the interpretations of every other circuit. The only authority cited by the opinion that supports Judge Zloch's contention is a one paragraph concurring opinion written by Justice White, joined only by Chief Justice Rehnquist, in Board of Airport Commissioners v. Jews for Jesus, 482 U.S. 569, 577 (1987) (White, J., concurring). In *Jews for Jesus*, a unanimous Court struck down as overbroad a regulation banning all First Amendment activity in Los Angeles International Airport. *Id.* Justice White desired to limit the Court's holding so as not to imply "that a majority of the Court considers the Los Angeles International Airport to be a traditional public forum." *Id.* (White, J., concurring).

That a majority of the Court did not in fact consider the airport to be a traditional public forum is unstated in the Court's opinion; however, seven justices declined to join Justice White's concurrence. It appears that Judge Zloch nevertheless saw the concurrence as an indication that public forum analysis ought not recognize airports as public fora.

62. 110 S. Ct. 3115 (1990).

63. *Lee*, 925 F.2d at 580.

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

III. *INTERNATIONAL SOCIETY FOR KRISHNA CONSCIOUSNESS V. LEE*

A. The Facts

In *International Society for Krishna Consciousness v. Lee*,[65] ISKCON challenged a New York and New Jersey Port Authority regulation that banned leaflet distribution and solicitation of funds anywhere in the three airport terminals controlled by the Port Authority.[66] ISKCON is a religious organization that promotes the beliefs and views of the Krishna religion.[67] This is accomplished through the ritual of *sankirtan*, whereby members solicit funds from and distribute literature to the public.[68] The solicited funds " 'are the very lifeblood and principal means of support of [the] religious movement.' "[69]

The Port Authority of New York and New Jersey owns and operates, among other facilities, three major airports in New York and New Jersey.[70] Most of the space in the airports is leased by commercial airlines.[71] Those portions of the airports not held in leasehold (namely, the interior areas of the terminals) are controlled by the Port Authority[72] and are open to the public.[73] Numerous, varied commercial establishments serve the public there.[74]

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65. 112 S. Ct. 2701 (1992).

66. *Id.* at 2703-04. The regulation provided in relevant part:

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

Lee, 925 F.2d at 578-79 (quoting Port Authority regulation).

67. For a description of the history, beliefs and practices of the Hare Krishnas, see International Soc'y for Krishna Consciousness v. Barber, 650 F.2d 430, 433-34 (2d Cir. 1981).

68. *Lee*, 925 F.2d at 577.

69. *Id.* at 577-78 (alteration in original) (citation omitted).

70. *Id.* at 578. The three airports are John F. Kennedy International Airport, La Guardia Airport and Newark International Airport.

71. *Id.*

72. *Id.*

73. *Id.*

74. *Id.* The court of appeals described the many establishments conducting business in the airport terminals at the time of the trial:

> [T]he lobby of the International Arrivals Building at Kennedy included two restaurants, two snack stands, a bar, a postal substation and postal facility, a bank, a telegraph office, a duty-free boutique, a drug store, a nursery, a barber shop, two currency exchange facilities, a dental office, and an area for the display of art exhibits. Along the east and west corridors of that same building were some ten duty-free shops, five bars, two snack stands, a telegraph office, two bookstores, two newsstands, a bank, four travel insurance facilities, two currency exchanges, two cookie and

In 1988, the Port Authority established a regulation that effectively prohibited *sankirtan* in its terminal buildings.[75] ISKCON brought an action for declaratory and injunctive relief under the Civil Rights Act of 1964.[76] The District Court for the Southern District of New York heard the case in 1989.[77] A magistrate's report declared that the terminal areas were public fora and that the regulation violated ISKCON's First Amendment rights.[78] The district court agreed with the magistrate's findings and held that the regulation was unconstitutional.[79] In accord with all the other circuits in the country that had decided the issue of whether airports are public fora,[80] the court declared the airport terminals are traditional public fora.[81] The Port Authority appealed, and the Court of Appeals for the Second Circuit held that the airport terminals were nonfora and partially reversed the district court ruling.[82] The United States Supreme Court affirmed the Second Circuit's decision, agreeing that airport terminals are nonfora.[83]

B. Reasoning of the Supreme Court

In a relatively curt opinion by Chief Justice Rehnquist, the Supreme Court declared that airport terminals do not constitute public fora.[84]

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candy shops, a cash and traveler's check machine, an India store, and a boutique-sized Bloomingdale's. Similar establishments lined the lobbies and corridors of both the Central Terminal Building at La Guardia and the North Terminal Building at Newark.

Id.

75. International Soc'y for Krishna Consciousness v. Lee, 721 F. Supp. 572, 573 (S.D.N.Y. 1989), *aff'd in part, rev'd in part*, 925 F.2d 576 (2d Cir. 1991), *aff'd*, 112 S. Ct. 2701 (1992). See *supra* note 66 for the text of the regulation.

76. 42 U.S.C. § 1983 (1988). This law protects an individual from deprivation of constitutional rights by any person acting "under color of any statute, ordinance, regulation, custom, or usage, of any state or territory or the District of Columbia." *Id.*

77. *Lee*, 721 F. Supp. at 572.

78. *Id.* at 574.

79. *Id.* at 579.

80. *See supra* note 56 and accompanying text.

81. *Lee*, 721 F. Supp. at 579. The district court recognized that the terminals are "the functional equivalent of public streets," *id.* at 577, and therefore "fit 'well within the notion of traditional public fora,' " *id.* (quoting Plaintiff's Memorandum of Law at 25-26).

82. International Soc'y for Krishna Consciousness v. Lee, 925 F.2d 576, 582 (2d Cir. 1991), *aff'd*, 112 S. Ct. 2701 (1992).

83. International Soc'y for Krishna Consciousness v. Lee, 112 S. Ct. 2701, 2706 (1992).

84. *Id.* Justices White, O'Connor, Scalia and Thomas joined in this determination, forming the five-member majority. *Id.* at 2703. The *Lee* case actually was divided into two cases: Case No. 91-155, in which the International Society for Krishna Consciousness was the Petitioner, *id.* at 2701, and Case No. 91-339, in which Walter Lee, the Superintendent of Port Authority Police, was the Petitioner, Lee v. International Soc'y for Krishna Consciousness, 112 S. Ct. 2709 (1992) (per curiam). The main opinion is Chief Justice Rehnquist's, which appears in Case No. 91-155. *Id.* at 2703. The Court issued a per curiam opinion in Case No.

The Court reasoned that "airport terminals have only recently achieved their contemporary size and character" and thus lack the "tradition" necessary to achieve traditional public forum status.[85] Further, because airport terminals had not been used for expressive activity such as leafletting and soliciting until even more recently, "the tradition of airport activity" has not included expressive activity.[86]

Basing its argument on dictum in *Cornelius v. NAACP Legal Defense & Education Fund*,[87] the Court asserted that a traditional public forum "has as 'a principal purpose . . . the free exchange of ideas.' "[88] The majority then reasoned that if property does not have as a "principal purpose" the free exchange of ideas, it is not a traditional public forum.[89] Because airports are not opened with the *purpose* of encouraging First Amendment activity, they are not traditional public fora.[90]

According to this reasoning, which is flawed at its core,[91] the Supreme Court declared that airport terminals are nonfora.[92] As such, the government may impose reasonable restrictions on speech activity occurring in the terminals.[93] This means the state has virtually unfettered power to regulate speech activity,[94] because in a nonforum, the government need only assert a legitimate interest that will be served by a restriction, and that restriction need only be rationally related to achiev-

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91-339, *id.* at 2710 (per curiam), to which Chief Justice Rehnquist filed a dissenting opinion, joined by Justices White, Scalia and Thomas, *id.* (Rehnquist, C.J., dissenting).

The analysis the Court used to arrive at the per curiam decision was set forth in several separate opinions. Justice O'Connor filed an opinion concurring in both cases, *id.* at 2711 (O'Connor, J., concurring), as did Justice Kennedy, *id.* at 2715 (Kennedy, J., concurring in the judgment). Finally, Justice Souter (joined by Justices Blackmun and Stevens) filed an opinion concurring in Case No. 91-339 (per curiam opinion) and dissenting in Case No. 91-155 (Chief Justice Rehnquist's opinion). *Id.* at 2724 (Souter, J., concurring and dissenting). All of these opinions are published separately from Chief Justice Rehnquist's opinion and the per curiam opinion. *Id.* at 2711. For purposes of clarity and brevity, all full citations made in this Note to any opinion in *Lee* are made to the first page of the case, 112 S. Ct. 2701, and then to any specific page or pages.

85. *Id.* at 2706.

86. *Id.* Given this reasoning, one would have to wonder how many years must pass before an activity becomes bound up in "tradition."

87. 473 U.S. 788 (1985).

88. *Lee*, 112 S. Ct. at 2706 (quoting Cornelius v. NAACP Legal Defense & Educ. Fund, 473 U.S. 788, 800 (1985)).

89. *Id.*

90. *Id.* at 2707.

91. *See id.* at 2716 (Kennedy, J., concurring in judgment). The Court wrongly assumed that the government's purpose in opening up property to the public determines the nature of the forum. *See infra* notes 118-33 and accompanying text.

92. *Lee*, 112 S. Ct. at 2706.

93. *See supra* text accompanying note 43.

94. *See Lee*, 112 S. Ct. at 2719 (Kennedy, J., concurring in judgment).

ing that goal.[95] The Court will give deference to nearly any explanation the government offers.[96]

In keeping with the Supreme Court's recent history of stymieing assertions that certain public property should be left open to expressive activity,[97] the Court streaked through the public forum doctrine on the way to its prefabricated conclusion. Applying the reasonableness standard, the Court had no difficulty upholding the ban on solicitation.[98] The Court opined that the regulation was warranted because solicitation can be disruptive and even coercive.[99] However, Chief Justice Rehnquist's opinion only addressed the issue of solicitation.[100]

A different alignment of five justices addressed the issue of leafletting and struck down the restriction as it pertained to that issue.[101] As a consequence, leafletting is still allowed in the Port Authority's airport terminals because, although terminals are nonfora, to restrict such activity would be unreasonable, absent any rational explanation for the restriction.[102]

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95. *See id.* at 2713 (O'Connor, J., concurring).

96. *See id.* at 2714 (O'Connor, J., concurring); *see also id.* at 2719 (Kennedy, J., concurring in judgment) (implying that only extremely broad restrictions would be struck down under reasonableness standard).

97. *See, e.g.*, United States v. Kokinda, 110 S. Ct. 3115, 3120 (1990) (holding that sidewalk leading to entrance of United States Post Office is not public forum); Cornelius v. NAACP Legal Defense & Educ. Fund, 473 U.S. 788, 806 (1985) (holding that federally implemented charity drive aimed at federal employees is not public forum); Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 46-47 (1983) (holding that public school's internal mail system is not public forum).

98. *Lee*, 112 S. Ct. at 2708.

99. *Id.*

100. *See id.* Chief Justice Rehnquist's separate dissenting opinion stated that the restriction on leafletting should be upheld. *Id.* at 2710 (Rehnquist, C.J., dissenting).

101. *Id.* at 2709-10 (per curiam). Justice Kennedy (joined by Justices Blackmun, Stevens and Souter) and Justice O'Connor each wrote opinions stating that the prohibition of leafletting was invalid. *See id.* at 2715 (Kennedy, J., concurring in judgment); *id.* at 2713 (O'Connor, J., concurring).

102. *Id.* at 2714 (O'Connor, J., concurring). Justice O'Connor stated:

> Because I cannot see how peaceful pamphleteering is incompatible with the multipurpose environment of the Port Authority airports, I cannot accept that a total ban on that activity is reasonable without an explanation as to why such a restriction "preserv[es] the property" for the several uses to which it has been put.

Id. (O'Connor, J., concurring) (alteration in original) (quoting Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 50 (1983)). Justice Kennedy, joined by Justices Blackmun, Stevens and Souter, stated that airport terminals are public fora and that the regulation against leafletting was an invalid time, place and manner restriction. *See id.* at 2719 (Kennedy, J., concurring in judgment).

IV. ANALYSIS

A. *The Erosion of the Traditional Public Forum*

When *Lee* reached the Supreme Court, the Second Circuit's prophecy that the Supreme Court would declare airport terminals to be nonfora[103] came true. Two justices were replaced between the time the Supreme Court decided *United States v. Kokinda*[104] (upon which the court of appeals in *Lee* relied)[105] and the time it decided *Lee*.[106] The newest justice, Justice Thomas, provided the crucial fifth vote forming the majority that declared that airport terminals are nonfora. Hence, the Second Circuit's conclusions were justified. Perhaps the lower court's opinion was more a prediction of the future than an interpretation of the past.

Nevertheless, Chief Justice Rehnquist's majority opinion is marred by logical defects and inaccuracies. One glaring flaw is his assertion that "the government does not create a public forum by inaction."[107] Quoting a passage from *Cornelius v. NAACP Legal Defense & Education Fund*,[108] he claimed that a *traditional* public forum is created only " 'by [the government] intentionally opening a nontraditional forum for public discourse.' "[109] In fact, the passage from *Cornelius* that Chief Justice Rehnquist quoted referred explicitly to *designated* public fora![110] Yet, he

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103. *See supra* note 60 and accompanying text.

104. 110 S. Ct. 3115 (1990).

105. *See supra* notes 62-63 and accompanying text.

106. Justice Souter replaced Justice Brennan after the 1989 term; Justice Thomas replaced Justice Marshall after the 1990 term.

107. *Lee*, 112 S. Ct. at 2706 (citing Cornelius v. NAACP Legal Defense & Educ. Fund, 473 U.S. 788, 802 (1985)).

108. 473 U.S. 788 (1985).

109. *Lee*, 112 S. Ct. at 2706 (quoting Cornelius v. NAACP Legal Defense & Educ. Fund, 473 U.S. 788, 802 (1985)).

110. *Compare id. with Cornelius*, 473 U.S. at 802. In *Cornelius*, Justice O'Connor stated:

> *In addition to traditional public fora*, a public forum may be created *by government designation* of 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. . . .
>
> The government does not create a public forum by inaction or by permitting limited discourse, but only by intentionally opening a *nontraditional* forum for public discourse. . . . Accordingly, the Court has looked to the policy and practice of the government to ascertain whether it intended to *designate* a place *not traditionally open to assembly and debate as a public forum*.

Id. (emphases added) (citations omitted). Thus, Justice O'Connor was explicitly referring only to *designated* public fora, not to traditional public fora as Chief Justice Rehnquist incorrectly inferred. This is evidenced by three factors: (1) Immediately *preceding* the sentence quoted by Chief Justice Rehnquist, Justice O'Connor discussed the subject of *designated* public fora; (2) *in* the quoted sentence, she referred to the *opening up of* "*nontraditional* for[a]," which is how *designated*, not traditional, public fora are created (a traditional public forum would not

used this statement in an attempt to support his argument that, because the government did not intentionally open the airports for public discourse, they are not *traditional* public fora.[111] The Chief Justice's decidedly myopic view of the public forum doctrine apparently led the majority directly past the issue of airports as traditional public fora, and straight to the issue of airports as designated public fora.

In effect, the majority opinion succeeded in so blurring the line between traditional and designated public fora that designated public fora now encompass traditional public fora. The majority opinion asserts that governmental inaction does not a public forum make.[112] However, such an assertion is incorrect.[113] The Court's logic raises the question: If a public forum exists only when the government makes it so, when did the government *open up* streets and parks to be public fora? It never did. Nevertheless, the Court has recognized that these places are traditional public fora.[114] Chief Justice Rehnquist's opinion ignores precedent and misinterprets the public forum doctrine.

In *Hague v. Committee for Industrial Organization*,[115] the Court stated that property such as streets and parks are public fora because they have been "used for purposes of assembly, communicating thoughts between citizens, and discussing public questions."[116] However, Chief Justice Rehnquist merely paid lip-service to this passage, which is the foundation for public forum analysis, and instead based his reasoning on the unfounded belief that the government's purpose in opening up property dictates the nature of the forum.[117] In doing so, the opinion shattered any vitality the already languishing public forum doctrine might have had left.

B. The Fallacy of "Purpose"

Another flaw in the majority opinion is the suggestion that the principal purpose of a given piece of public property is the controlling factor in determining whether the property is a public forum. The Court has

require such governmental action, because it is already "open"); and (3) immediately *following* the quoted sentence, she discussed the government's role in deciding "whether it intend[s] to *designate* a place not traditionally open to assembly and debate as a public forum." *Id.* (emphases added).

111. *See Lee*, 112 S. Ct. at 2706.

112. *Id.*

113. *See supra* notes 34-35 and accompanying text.

114. *See* Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983).

115. 307 U.S. 496 (1939).

116. *Id.* at 515 (opinion of Roberts, J.).

117. *See Lee*, 112 S. Ct. at 2706.

recently placed increased emphasis on the government's purpose in opening up property to the public.[118] The entire issue of purpose derives from a single line in Justice O'Connor's opinion in *Cornelius v. NAACP Legal Defense & Education Fund*:[119] "Because a principal purpose of traditional public fora is the free exchange of ideas, speakers can be excluded from a public forum" only if the restriction survives heightened scrutiny.[120] In other words, the purpose of *recognizing* that certain public property is a public forum is to prevent abridgement of the free exchange of ideas.[121]

Contrary to what Chief Justice Rehnquist's opinion proposes, public property need not have as a principal purpose the free exchange of ideas to be a traditional public forum.[122] If his supposition were true, streets, sidewalks and the like would not be traditional public fora, because their principal purpose—the reason they exist—is not to promote the free exchange of ideas.[123] Chief Justice Rehnquist relied on Justice O'Connor's statement in *Cornelius*[124] to bolster his assertion that the *government* must have as an intended purpose the free exchange of ideas.[125]

In actuality, when Justice O'Connor stated that "[b]ecause a principal purpose of traditional public fora is the free exchange of ideas,"[126] she was referring to the purpose "of those wishing to use the property,"[127] rather than the purpose of the government.[128] That is why she professed that restrictions on speech in public fora must survive heightened scrutiny:[129] because the people who are using the property have

118. *See id.* (stating that "traditional public forum is property that has as 'a principal purpose . . . the free exchange of ideas' ") (quoting Cornelius v. NAACP Legal Defense & Educ. Fund, 473 U.S. 788, 800 (1985)); United States v. Kokinda, 110 S. Ct. 3115, 3120 (1990) (holding that sidewalk was constructed only to facilitate pedestrian traffic to and from post office and thus was nonforum).

119. 473 U.S. 788 (1985).

120. *Id.* at 800. See *supra* notes 25-43 and accompanying text for a discussion of the various levels of scrutiny applied in public forum analysis.

121. *See Cornelius*, 473 U.S. at 800.

122. *See Kokinda*, 110 S. Ct. at 3129 (Brennan, J., dissenting) (stating that postal sidewalk's existence for access purposes is irrelevant because "public sidewalks, parks, and streets have been reserved for public use as forums for speech even though government has not constructed them for expressive purposes"); *supra* notes 31-33 and accompanying text.

123. *See Lee*, 112 S. Ct. at 2717 (Kennedy, J., concurring in judgment) (stating that "the principal purpose of streets and sidewalks, like airports, is to facilitate transportation, not public discourse"); *supra* text accompanying notes 34-35.

124. *See supra* text accompanying note 120.

125. *See Lee*, 112 S. Ct. at 2706.

126. *Cornelius*, 473 U.S. at 800.

127. *Id.*

128. *See id.*

129. *See supra* text accompanying note 120.

constitutionally protected interests in that property—namely, the free exchange of ideas.[130]

Instead of properly interpreting the public forum doctrine to protect rather than proscribe First Amendment activity,[131] the Court has developed a mere cut-and-paste approach to constitutional analysis. By extracting a few choice words (although seemingly innocuous in their original context), twisting their meaning out of context, and reorganizing them until a new doctrine has been created, the Rehnquist majority effectively has drained the public forum doctrine of any meaning or usefulness.[132] Given this direction, it is a challenge indeed to imagine what could possibly qualify as a public forum. Even the forum statuses of streets, sidewalks and parks now lie in question.[133]

C. *Reworking First Amendment Analysis*

The Supreme Court's application of the public forum doctrine, even before *Lee*, has provided commentators with much to criticize.[134] Most of the inquiry has centered on the Supreme Court's unwavering reliance on rigid labeling and de-emphasis of the underlying First Amendment concerns.[135] These analyses have called into question the Court's contemporary application of the doctrine and have raised questions regarding the validity of the concept of the public forum.[136] The Court's latest decision in *Lee* provides an illustration of how the public forum doctrine has been eviscerated, leaving only a hollow shell of a framework. Consequently, the doctrine needs to be revisited by exploring the reasons for its

130. *See Cornelius*, 473 U.S. at 800.

131. *See* United States v. Kokinda, 110 S. Ct. 3115, 3127 (1990) (Brennan, J., dissenting).

132. *See Lee*, 112 S. Ct. at 2724 (Souter, J., concurring and dissenting).

133. *See supra* notes 2-4 and accompanying text.

134. *Kokinda*, 110 S. Ct. at 3127-28 & 3127 n.1 (Brennan, J., dissenting) (citing LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 12-24, at 993 (2d ed. 1988); C. Thomas Dienes, *The Trashing of the Public Forum: Problems in First Amendment Analysis*, 55 GEO. WASH. L. REV. 109, 110 (1986); 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, 1234 (1984); Robert C. Post, *Between Governance and Management: The History and Theory of the Public Forum*, 34 UCLA L. REV. 1713, 1715-16 (1987); Geoffrey R. Stone, *Content-Neutral Restrictions*, 54 U. CHI. L. REV. 46, 93 (1987)).

135. *See* TRIBE, *supra* note 19, § 12-24, at 993; C. Thomas Dienes, *The Trashing of the Public Forum: Problems in First Amendment Analysis*, 55 GEO. WASH. L. REV. 109, 110 (1986); 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, 1234 (1984); Robert C. Post, *Between Governance and Management: The History and Theory of the Public Forum*, 34 UCLA L. REV. 1713, 1715-16 (1987); Geoffrey R. Stone, *Content-Neutral Restrictions*, 54 U. CHI. L. REV. 46, 93 (1987).

136. *See, e.g.*, Dienes, *supra* note 135, at 110 (arguing that frameworks such as public forum doctrine "simply yield an inadequate jurisprudence of labels").

existence and critiquing how well it has furthered its original objective of preserving the freedom of expression.[137]

1. Striking a balance

The public forum doctrine exists because so much of constitutional law, and especially First Amendment law, has been reduced to multi-part tests that theoretically serve as conduits for balancing governmental and individual interests.[138] As mere analytical shorthand, the public forum doctrine emerged as a codification of sorts of the principle set forth by Justice Roberts in *Hague v. Committee for Industrial Organization*.[139]

Did Justice Roberts, with his dicta in *Hague*, ever imagine that his position of championing free speech in public places[140] would evolve into a stringent formula that today has very little to do with preserving First Amendment rights? On the other hand, in making reference to "public places,"[141] did he intend that airport terminals should be included in that group? With an understanding of the policies behind balancing tests, one may appreciate the growing need to reevaluate the public forum doctrine.

In much of constitutional law, balancing tests are the key to interpretation.[142] Because First Amendment rights are not absolute,[143] line-drawing obtains. However, the rights of the individual have been lost in the Court's zeal to create easy, workable formulae into which all constitutional questions may be inserted. As a result, rigid frameworks in general, and the public forum doctrine in particular, ultimately focus on semantic exercises instead of constitutional conflicts.

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137. *See* Kalven, *supra* note 16, at 28 & n.91 (stating that Court should balance competing interests " 'in order to protect, not to destroy, freedom of speech' ") (quoting Cox v. Louisiana, 379 U.S. 536, 578 (1965) (Black, J., concurring and dissenting)).

138. *See, e.g.*, Energy Reserves Group, Inc. v. Kansas Power & Light Co., 459 U.S. 400, 411-12 (1983) (establishing three-part test for resolving Contract Clause cases); Miller v. California 413 U.S. 15, 24 (1973) (establishing three-part test for determining whether certain speech is "obscene"); Lemon v. Kurtzman, 403 U.S. 602 (1971) (establishing three-part test for resolving Establishment Clause cases); United States v. O'Brien, 391 U.S. 367, 377 (1968) (establishing three-part test for determining if restrictions on "symbolic speech" are constitutional); *see also* Cornelius v. NAACP Legal Defense & Educ. Fund, 473 U.S. 788, 820 (1985) (Blackmun, J., dissenting) (stating that public forum doctrine is merely "analytical shorthand for the principles that have guided the Court's decisions regarding claims to access to public property for expressive activity").

139. 307 U.S. 496 (1939); *see supra* text accompanying note 46. *See generally* Kalven, *supra* note 16 (developing concept of public forum to resolve free speech claims).

140. *See supra* text accompanying note 46.

141. *Hague*, 307 U.S. at 515 (opinion of Roberts, J.).

142. *See supra* note 138 and accompanying text.

143. *See supra* note 47 and accompanying text.

The familiar example that falsely yelling fire in a crowded movie theater is not protected speech[144] illustrates this point. By measuring the speaker's relative—not absolute—right to falsely yell fire in a crowded theater against society's interests in prohibiting such speech, the constitutional question is quickly resolved. Few would disagree that society's interest in preventing the panic that likely would ensue far outweighs the speaker's right to yell fire.[145] However, rather than stating that the speech is not "protected speech,"[146] the proper analysis is to recognize that while the right to speak still exists, it is overcome by a compelling governmental interest.

By refusing to allow a speaker to falsely yell fire while not proscribing the speaker's right to laugh or cheer or boo during a movie, the focus is on the impact of the speech. This means speech that causes a degree of danger might be squelched at the point that the danger outweighs the right to speak those words. On the other hand, if there is no danger sufficient to outweigh a particular type of speech, the interest in free speech prevails.[147]

Conversely, the person who yells fire in a *burning* movie theater carries the same right to speak as does the person who falsely yelled fire. However, while the *speaker's* status as speaker has not changed, society's interests have now shifted. Of course, the same danger of panic is present, but, this time, there is an added factor: the benefit conferred on society by being warned of a fire. The speaker's right to speak and society's interest in what is spoken, now outweighs society's interest in preventing panic.

Thus, courts must apply balancing tests with regard not only to what is said, but also to where it is said and to the circumstances under which it is said. Identical speech is not always equally compatible with all places and all times.[148] As Justice Marshall stated: "Although a silent vigil may not unduly interfere with a public library, . . . making a speech in the reading room almost certainly would. That same speech should be perfectly appropriate in a park."[149]

144. Schenck v. United States, 249 U.S. 47, 52 (1919).

145. *See id.*

146. *See supra* note 9.

147. This is the essence of the definition of "balancing test." *See* BLACK'S LAW DICTIONARY 143 (6th ed. 1990).

148. Grayned v. City of Rockford, 408 U.S. 104, 116-17 (1972).

149. *Id.* at 116 (citation omitted).

2. Eliminating the "nonforum"

This discussion of balancing tests leads directly to the public forum doctrine. The doctrine attempts to erect discernible hurdles, in an otherwise murky pathway, that speech restrictions must overcome. More fundamentally, however, the doctrine has developed through judicial (mis)interpretation from "a way of preserving First Amendment rights" to "a means of upholding restrictions on speech."[150]

The problem with the public forum doctrine does not lie in the concept itself, but rather, in the way the Supreme Court, through improper application, has transformed it into a rigid framework.[151] In his dissent in *Cornelius v. NAACP Legal Defense & Educational Fund*,[152] Justice Blackmun asserted that the public forum doctrine is not an end in itself; rather, the categories serve as "but analytical shorthand for the principles that have guided the Court's decisions regarding claims to access to public property for expressive activity."[153] As he saw it, the Court's public forum analysis disregarded any inquiry into the appropriateness of a forum as a place for expressive activity and instead employed the doctrine simply to identify property as nonfora and allow the government to eradicate First Amendment activity taking place therein.[154]

The doctrine's current rigidity has resulted from the advent of the concept of the "nonpublic forum," or "public nonforum."[155] By adhering to the idea of the nonforum, the initial aim of balancing tests is subverted. Under the Court's rationale in cases such as *Cornelius*, the government is effectively free to prohibit protected speech in a public nonforum.[156] The significance of the speaker's interest or society's interest is of no consequence to the Court.[157] Nor is it at all important whether the property at issue might be compatible with First Amendment activity. Consequently, as Justice Brennan stated in his dissent in

150. United States v. Kokinda, 110 S. Ct. 3115, 3127 (1990) (Brennan, J., dissenting).

151. *See id.* (Brennan, J., dissenting) ("I have questioned whether public forum analysis, as the Court has employed it in recent cases, serves to obfuscate rather than clarify the issues at hand."); Cornelius v. NAACP Legal Defense & Educ. Fund, 473 U.S. 788, 821 (1985) (Blackmun, J., dissenting) ("Rather than taking the nature of the property into account in balancing the First Amendment interests of the speaker and society's interests in freedom of speech against the interests served by reserving the property to its normal use, the Court simply labels the property and dispenses with the balancing.").

152. 473 U.S. 788 (1985).

153. *Id.* at 820 (Blackmun, J., dissenting).

154. *See id.* at 820-21 (Blackmun, J., dissenting) (stating that government need only show rational basis for restrictions in nonfora).

155. *See supra* notes 41-43 and accompanying text.

156. *See Cornelius*, 473 U.S. at 821 (Blackmun, J., dissenting).

157. *See id.* (Blackmun, J., dissenting).

United States v. Kokinda,[158] "these public forum categories—originally conceived as a way of *preserving* First Amendment rights—have been used in some of our recent decisions as a means of upholding restrictions on speech."[159] Justice Brennan's comment illuminates the present public forum problem. Accompanying changes in the makeup of the Supreme Court over the last two decades[160] is the Court's increased willingness to label public property as nonfora, thereby eliminating the right to speak in many public places.

One conspicuous example of this is the plurality decision in *Lehman v. City of Shaker Heights*.[161] In *Lehman*, a plurality of the Court held that advertising space on city-owned buses was a nonforum.[162] The city had opened poster card spaces on its buses for advertisements, but it did not allow political advertisements.[163] Thus, while the government opened a forum for the principal purpose of expressive activity, it discriminated on the basis of content by prohibiting political messages.

As stated previously,[164] when the government opens a public place—such as placard space on a public bus—for the purpose of expressive activity—such as advertising, whether or not commercial in nature—it creates a designated or limited public forum.[165] Ironically, the Court in *Lehman* declared the card space a nonforum,[166] thus upholding a restriction on what some consider to be the highest order of expressive activity—political speech.[167] As Justice Brennan stated in his dissent: "A forum for communication was voluntarily established when the city installed the physical facilities for the advertisements and . . . created the necessary administrative machinery for regulating access to that forum."[168]

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158. 110 S. Ct. 3115 (1990).

159. *Id.* at 3127 (Brennan, J., dissenting) (citation omitted).

160. Since 1969, 10 justices have been elevated to the Supreme Court, and all have been appointed by Republican Presidents. *See* DAVID G. SAVAGE, TURNING RIGHT: THE MAKING OF THE REHNQUIST SUPREME COURT 4, 453 (1992). This has resulted in a shift in the Court's collective First Amendment ideology—from "liberal" (broadly interpreting First Amendment rights) to "conservative" (narrowly interpreting First Amendment rights). *See generally id.* at 453-56 (stating that Court, especially during Reagan and Bush years, has increasingly taken to narrowly construing Bill of Rights).

161. 418 U.S. 298 (1974).

162. *Id.* at 304 (plurality opinion).

163. *Id.* at 299-300 (plurality opinion).

164. *See supra* text accompanying note 31.

165. *See supra* text accompanying notes 31-38.

166. *Lehman*, 418 U.S. at 304 (plurality opinion).

167. *See, e.g.*, Garrison v. Louisiana, 379 U.S. 64, 74-75 (1964) ("For speech concerning public affairs is more than self-expression; it is the essence of self-government.").

168. *Lehman*, 418 U.S. at 314 (Brennan, J., dissenting).

Instead of weighing the competing interests claimed by the speaker and the government, the Court in *Lehman* simply labeled the property as a nonforum and facilitated virtually unrestricted government interference with the speaker's rights.[169] This approach ignores free speech interests while elevating the government's interests. Instead, courts should balance free speech interests and governmental interests with regard to *any* public property to which access is sought, thereby conducting a complete inquiry into the validity of a law. Justice Blackmun recognized that, by weighing the speaker's rights and society's interest in promoting free speech "against the 'other interests inhering in the uses to which the public property is normally put,' " First Amendment concerns are adequately addressed and analyzed.[170]

Necessarily, the public forum doctrine has no room for the public nonforum category, because *all* public property has the potential to be a public forum. The concept of the "nonforum" serves no purpose in First Amendment analysis. It actually subverts the very purpose of the First Amendment; for where the First Amendment is an encumbrance on the government's power to restrict speech, the concept of the nonforum exists solely to impede the individual's right to speak.[171]

Because the government may not abridge free speech,[172] unless its interest in doing so sufficiently outweighs the speaker's and society's interest in free speech,[173] whether the speech takes place in a "public forum" or "nonforum" is irrelevant. *All* public property is property subject to governmental regulation, and all governmental regulations are subject to the United States Constitution.[174] Because proper constitu-

169. *See id.* at 304 (plurality opinion).

170. *See* Cornelius v. NAACP Legal Defense & Educ. Fund, 473 U.S. 788, 816 (1985) (Blackmun, J., dissenting) (quoting Adderley v. Florida, 385 U.S. 39, 54 (1966) (Douglas, J., dissenting)). Justice Blackmun then detailed what ought to be considered in conducting a proper balancing test:

> The result of such balancing will depend, of course, upon the nature and strength of the various interests, which in turn depend upon such factors as 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.

Id. (Blackmun, J., dissenting). Thus, while the nature of the property—its physical character—is to be considered in balancing, it is only one of many factors. Physical character should not be dispositive in resolving a First Amendment challenge to a regulation restricting speech on the property. United States v. Kokinda, 110 S. Ct. 3115, 3120 (1990) (plurality opinion) ("The mere physical characteristics of the property cannot dictate forum analysis.").

171. *See supra* notes 155-60 and accompanying text.

172. U.S. CONST. amend. I; *see supra* note 2.

173. *See supra* notes 142-49 and accompanying text.

174. U.S. CONST. art. VI, § 2 ("This Constitution and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land.").

tional interpretation requires balancing competing interests,[175] drawing false lines between types of property is inappropriate.

V. RECOMMENDATION

The public forum doctrine should be abandoned in its entirety. Pigeonholing different types of property into one of three categories only diverts attention away from, and "confuses the development of[,] First Amendment principles."[176] By recognizing that *any* restrictions on speech in *any* public property should be subjected to balancing tests instead of type-of-forum tests, the emerging analysis would be more rational, logical and attuned to the concerns of *all* parties involved in a dispute, including the speaker, the audience, the government and society. Professor Tribe notes that "[o]ften, the central issue is . . . the nature of the restriction, not the forum."[177] Yet, the Court's persistent focus on the type of forum has caused expressive activity to be trampled underfoot by an illogical bright-line test.[178]

In applying a balancing test, instead of the public forum doctrine, to the regulation at issue in *International Society for Krishna Consciousness v. Lee*,[179] the broad proscription on speech must fail. The regulation prohibited all forms of selling and distributing literature and soliciting funds.[180] Of course, there is little doubt that unrestricted expressive activity has the potential to create substantial pedestrian traffic problems in any busy milieu, be it a street, sidewalk or airport terminal, and society has an interest in preventing such problems. However, a complete prohibition is neither necessary nor reasonable.[181]

For example, by merely restricting such activity to certain areas of an airport terminal, any disruptive effect on pedestrian traffic likely would be relieved.[182] How this might be accomplished depends, of course, on the circumstances involved in the particular situation. The size of the group, the type of activity and the location of the areas that can accommodate expressive activity are all relevant considerations.[183] After all, freedom of expression in public fora "is not absolute, but rela-

175. *See supra* notes 142-49 and accompanying text.
176. Farber & Nowak, *supra* note 18, at 1223.
177. TRIBE, *supra* note 19, § 12-24, at 993 n.41.
178. *See id.* § 12-24, at 993.
179. 112 S. Ct. 2701 (1992).
180. See *supra* note 66 for the text of the regulation.
181. *See Lee*, 112 S. Ct. at 2719 (Kennedy, J., concurring in judgment).
182. *See id.* (Kennedy, J., concurring in judgment) (advocating use of reasonable time, place and manner restrictions rather than flat prohibitions).
183. *See supra* note 170.

tive, 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."[184]

Labeling property is unnecessary and irrelevant in resolving free speech claims. Rather, courts should direct attention to the competing interests of speaker, audience, government and society. By examining these interests and then scrutinizing the severity of the restriction on speech, such cases may be properly resolved. The nature of the forum is only germane to the issue of the government's interest in preserving the property for its intended uses, and this interest must be further balanced against the interests of the speaker and society.

In his seminal article, Professor Kalven suggested the implementation of, "in effect[,] a set of Robert's Rules of Order for the new uses of the public forum."[185] The employment of narrowly tailored time, place and manner restrictions serves this aim. The government must allow for expressive activity on public property, to the extent that such activity does not unduly hamper the flow of other activity on the property. Because expressive activity may have the potential to interfere with other activity, and because the government certainly has an interest in preserving its property, time, place and manner restrictions may be promulgated to relieve such burdens. Only through time, place and manner restrictions may a true balance be struck. Blanket proscriptions on speech ignore the speaker's undeniable rights; no restrictions lead to chaos and mob rule.

VI. CONCLUSION

Not everyone enjoys being approached by a person who wishes to impart his or her views to the public's eyes and ears. Nonetheless, tolerance of others is an essential quality in a free society that supposedly encourages an "uninhibited, robust, and wide-open"[186] exchange of ideas and viewpoints. When the government encroaches on our most jealously guarded right—the right to express one's self freely—we must question not the speaker's actions, but rather, the government's actions.

It is simple to believe that the government is acting for the common good by prohibiting expressive activity when it perceives performance of that activity to be a threat to peace and order. Protecting public harmony is a worthy endeavor for the government to undertake, and the

184. Hague v. Committee for Indus. Org., 307 U.S. 496, 516 (1939) (opinion of Roberts, J.).
185. Kalven, *supra* note 16, at 12.
186. New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964).

legislature's role is to bow to the will of the majority. On the other hand, it is vitally important to preserve the rights of the individual, and the function of the courts is to protect the individual's constitutionally guaranteed freedoms from oppression by the majority. Consequently, the judiciary must not be quick to assume that the legislature is acting properly when lawmakers foreclose the rights of the unpopular.[187] The day may come when the masses arrive at the steps of a "public forum" to express their views, only to find the door has been closed, and they are without the key.

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187. *See generally* David Goldberger, *Judicial Scrutiny in Public Forum Cases: Misplaced Trust in the Judgment of Public Officials*, 32 BUFF. L. REV. 175 (1983) (arguing that public officials often overregulate out of fear of public disruption and controversial viewpoints).

* I dedicate this Note to my parents, Robert and Marcia Scherago—without whom, nothing would be possible, and because of whom, nothing is impossible.