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International Society for Krishna Consciousness, Inc. v. Lee: Public Forum Analysis of Airport Restrictions on Speech

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INTERNATIONAL SOCIETY FOR KRISHNA CONSCIOUSNESS, INC. v. LEE: PUBLIC FORUM ANALYSIS OF AIRPORT RESTRICTIONS ON SPEECH

> It is hoped that the government authorities will cooperate . . . enabling us to perform sankirana [chanting] on the streets. To do this it is necessary that we be able to chant . . . dance, play . . . the drum, request donations, [and] sell our society's journal. As devotees of Lord Krsna, it is our duty to teach the people how to love God and worship him in their daily life. This is the aim and destination of human life.[1]

The practice of sankirtan, chanting and soliciting donations in public places, is a basic belief of the International Society of Krishna Consciousness which followers are required to observe.[2] But should limitations exist as to where this ritual may be practiced? In the interest of democracy,[3] the first amendment[4] re-

[1] LARRY D. SHINN, THE DARK LORD, CULT IMAGES AND THE HARE KRISHNAS IN AMERICA 81 (1987) (quoting THE KRSNA CONSCIOUSNESS HANDBOOK: FOR THE YEAR 484, CAITANYA ERA 108-09 (March 24, 1970 - March 12, 1971)).

[2] *See id.*

[3] *See* Terminiello v. Chicago, 337 U.S. 1, 4 (1949) ("it is only through free debate and free exchange of ideas that government remains responsive to the will of the people . . . ."); Thomas v. Collins, 323 U.S. 516, 530 (1945) (freedom of speech is "indispensable democratic freedom[ ]"); Bridges v. California, 314 U.S. 252, 270 (1941) ("it is a prized American privilege to speak one's mind"); Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) ("the ultimate good desired is better reached by free trade in ideas . . . [and] the best test of truth is the power of the thought to get itself accepted in the competition of the market . . . ."); Rosen v. Port of Portland, 641 F.2d 1243, 1250 (9th Cir. 1981) (first amendment rights are heart of democratic government). *See generally* L. TRIBE, AMERICAN CONSTITUTIONAL LAW §12-1, at 788 (2d ed. 1988) ("freedom of speech is . . . central to the workings of a tolerably responsive and responsible democracy . . . ."); Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L.J. 877, 955 (1963) (conditions in modern democratic society demand deliberate, affirmative, and even aggressive effort be made to support free expression).

Some theorists "defend free speech as crucial to the polity in a representative system

quires that the right to free public expression be zealously safeguarded.[5] However, citizens cannot express themselves whenever

. . . ." TRIBE, *supra*, at 787 ("political participation is valuable . . . because it enhances personal growth and self realization") (citing J.S. MILL, CONSIDERATIONS ON REPRESENTATIVE GOVERNMENT 203 (1882)).

Free expression "(1) assur[es] individual self-fulfillment, (2) [i]s a means of attaining the truth, (3) [i]s a method of securing participation by the members of society in social, including political decision-making, and (4) . . . maintain[s] the balance between stability and change in the society." Emerson, *supra*, at 878-79.

[4] *See* U.S. CONST. amend. I. The first amendment provides: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." *Id.*

The general purpose of the first amendment is to protect free speech by inviting debates and exchanges of ideas. *See* Texas v. Johnson, 491 U.S. 397, 408 (1989) (right of free speech invites dispute); Board of Educ., Island Trees Union Free School Dist. No. 26 v. Pico, 457 U.S. 853, 867 (1982) (first amendment protects right to recover information and ideas); Smith v. Arkansas State Highway Employees, Local 1315, 441 U.S. 463, 464 (1979) (first amendment protects free speech, right to advocate ideas, associate with others, and petition government for redress); Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 390 (1969) (first amendment preserves "uninhibited marketplace of ideas"); Muir v. Alabama Educ. Television Comm'n, 688 F.2d 1033, 1037-38 (5th Cir. 1982) (first amendment prohibits governmental restrictions on flow of information and ideas), *cert. denied*, 460 U.S. 1023 (1983); Grass Roots Organizing Workshop v. Campbell, 704 F. Supp. 644, 647 (D.S.C. 1988) (first amendment protects individual's right to advocate ideas).

[5] *See* Greer v. Spock, 424 U.S. 828, 843 (1976) (any significant restriction of first amendment freedoms carries heavy burden of justification); Murdock v. Pennsylvania, 319 U.S. 105, 115 (1943) (freedom of press, freedom of speech, freedom of religion are in preferred position.); United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938) (may be narrower operative scope for presumption of constitutionality when legislation facially appears to be within specific prohibition of Constitution, such as first ten amendments). *But see* Kovacs v. Cooper, 336 U.S. 77, 90 (1949) (Frankfurter, J., concurring) (preferred position of freedom of speech is mischievous phrase if it carries thought that any law touching communication is infected with presumptive invalidity). *See generally* McKay, *The Preference for Freedom*, 34 N.Y.U. L. REV. 1182, 1184 (1959) (freedoms embodied in first amendment hold preferred position).

The United States Supreme Court has not espoused an absolutist view of the first amendment, but has engaged in a balancing of interests to determine whether there has been an infringement upon free speech. *See* Konigsberg v. State Bar of California, 366 U.S. 36, 50-51 (1961) (determining constitutionality of regulation involves weighing of governmental interest involved). *See generally* Farber & Nowack, *Justice Harlan and the First Amendment*, 2 CONST. COMMENTARY 425 (1985). *But see* Street v. New York, 394 U.S. 576, 610 (1969) (Black, J., dissenting) (declines to balance away first amendment mandate that speech not be abridged in any fashion whatsoever).

More often than not, a regulation infringing upon an individual's right to free speech will be upheld if the government can show a compelling state interest exists and that the restriction is no greater than that which is essential to further that interest. *See* Sable Comm. of California, Inc. v. FCC, 492 U.S. 115, 126 (1989) (government may regulate content of constitutionally protected speech only to promote compelling interest, provided it uses least restrictive means to achieve it); Wayte v. United States, 470 U.S. 598, 611 (1985) (government regulation justified when substantial governmental interest exists and when restriction is no greater than necessary to further that interest) (quoting United

States v. O'Brien, 391 U.S. 367, 377 (1968)); United States v. Grace, 461 U.S. 171, 177 (1983) (to prohibit particular type of expression government most prove compelling state interest and that restriction is narrowly drawn to achieve that end); Felix v. Rolan, 833 F.2d 517, 519 (5th Cir. 1987) (restrictions on first amendment rights are constitutional only if no greater than necessary to further substantial state interests); Gibson v. Florida Bar, 798 F.2d 1564, 1569 (11th Cir. 1986) (two-part test applied to all first amendment challenges: compelling interest and least restrictive means of achieving that interest). Certain basic principles factor into the weighing process, as, for example, the requirement that permissible regulations not be overbroad so as to infringe upon protected activity. *See* Cantwell v. Connecticut, 310 U.S. 296, 304 (1940) (state's "power to regulate must be so exercised as not, in attaining a permissible end, unduly to infringe the protected freedom"). However, the Court has been less willing to invoke the overbreadth doctrine. *See* Note, *The First Amendment Overbreadth Doctrine*, 83 HARV. L. REV. 844, 918 (1970) (suggesting statute should be struck down only where substantially overbroad to avoid inhibitory impact).

Governmental restrictions on free speech are imposed in two ways: 1) restrictions based on content, either because of the ideas and information expressed, or because of the general subject matter or, 2) the government seeks to avoid an evil unrelated to the content of the regulation of which incidentally interferes with speech. "The first form of abridgement . . . encompass[es] government actions aimed at communicative impact; the second . . . encompass[es] government actions aimed at noncommunicative impact but nonetheless having adverse communicative opportunity." *Id.* (citing Ely, *Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis*, 88 HARV. L. REV. 1482 (1975)); *see* Nimmer, *The Meaning of Symbolic Speech Under the First Amendment*, 21 U.C.L.A. L. REV. 29 (1973); Scanlon, *A Theory of Freedom of Expression*, 1 PHIL. & PUB. AFF. 204 (1972).

For cases applying these two types of restrictions, see Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 750-52 (1976) (prohibition against advertising prescription drug prices); *Kovacs*, 336 U.S. at 85 (examining ordinance which bars vehicles, emitting loud and raucous noises, from public streets); Martin v. Struthers, 319 U.S. 141, 143-44 (1943) (discussing ordinance preventing distribution of leaflets regardless of content); Debs v. United States, 249 U.S. 211 (1919) (examining statute making it unlawful to obstruct recruiting and enlistment service of United States).

Courts restrict governmental intrusion on first amendment rights by denying attempts to impose regulations on free speech. *See, e.g.*, Texas v. Johnson, 491 U.S. 397, 397 (1989) (struck down Texas prohibition against burning American flag); Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 512-13 (1981) (struck down ordinance prohibiting billboards containing noncommercial messages); Carey v. Population Servs. Int'l, 431 U.S. 678, 701-02 (1977) (invalidated prohibition against advertising or display of contraceptives); Cohen v. California, 403 U.S. 15, 16, 22-26 (1971) (struck down states right to ban offensive language on jacket back); Mills v. Alabama, 384 U.S. 214, 218-20 (1966) (invalidated prohibition against discussing political candidate on last day of election); Lovell v City of Griffin, 303 U.S. 444, 450-53 (1938) (holding unconstitutional an ordinance forbidding distribution of literature without permit). *But see, e.g.*, Ward v. Rock Against Racism, 491 U.S. 781, 797-802 (1989) (upheld requirement that rock performers use only city provided sound equipment); Heffron v. International Soc'y for Krishna Consciousness, Inc., 452 U.S. 640, 643-45, 655-56 (1981) (upheld regulation requiring anyone soliciting funds at state fair do so only from assigned booth); Lehman v. City of Shaker Heights, 418 U.S. 298, 304 (1974) (upheld city's right to reject political advertising on buses); *Kovacs*, 336 U.S. at 89 (upheld ban on use of amplification devices emitting loud noise in public places); Gitlow v. New York, 268 U.S. 652, 654-55, 672 (1925) (upheld statute banning overthrow of government); Schenck v. United States, 249 U.S. 47, 52-53 (1919) (upheld statute prohibiting mailing of circulars that obstructed draft).

and wherever they choose[6]— reasonable time, place and manner restrictions may be imposed.[7] In determining the constitutionality

[6] *See Carey*, 431 U.S. at 716 (Stevens, J., concurring) (speech not wholly immune from state regulation); Eldrod v. Burns, 427 U.S. 347, 360 (1976) (no absolute prohibition on encroachment of first amendment protections); *Cohen*, 403 U.S. at 19 (first amendment does not "give absolute protection to every individual to speak whenever or wherever he pleases, or to use any form of address in any circumstances that he chooses"); Cox v. Louisiana, 379 U.S 536, 554 (1965) (rights of free speech are not without limitations). *See also* B. SCHWARTZ, CONSTITUTIONAL LAW § 8.1 (2d ed. 1979) (exercise of first amendment freedoms "must be compatible with the preservation of other essential rights"); Emerson, *supra* note 3, at 907 (any theory of freedom of expression must account for other values, such as public order, justice, equality and moral progress).

When a communication presents a clear and present danger to society, abridgement of the freedom of expression is justifiable. *See Schenck*, 249 U.S. at 52.

> The most stringent protection of free speech would not protect a man in falsely shouting fire in a theater . . . . The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree.

Id.; *see also* Abrams v. United States, 250 U.S. 616, 628 (1919) (Holmes, J., dissenting) (government may restrict speech where there is present danger of immediate evil or intent to bring it about).

The Supreme Court has set forth the standard for determining the constitutionality of statutes which prohibit the advocacy of the use of force or of law violation. *See* Hess v. Indiana, 414 U.S. 105, 108 (1973). The government may prohibit such speech where such advocacy is intended to incite or produce *imminent* lawless action and is likely to result in such action. *Id.* (emphasis in original) (citing Brandenburg v. Ohio, 395 U.S. 444, 447 (1969)). *See generally* Gunther, *Learned Hand and the Origins of Modern First Amendment Doctrine: Some Fragments of History*, 27 STAN. L. REV. 719 (1975) (discussion of Justice Learned Hand's position on free speech); Redish, *Advocacy of Unlawful Conduct and the First Amendment: In Defense of Clear and Present Danger*, 70 CALIF. L. REV. 1159 (1982).

The right of the government to regulate speech is also greater when the speech is characterized as obscene. *See* Miller v. California, 413 U.S. 15, 23-24 (1973) (current status of obscenity in constitutional framework); Roth v. United States, 354 U.S. 476, 485 (1957) (obscenity not constitutionally protected speech); Chaplinsky v. New Hampshire, 315 U.S. 568, 571-72 (1942) (regulation of lewd and obscene speech has not posed constitutional problem). *See generally* Lockhart & McClure, *Obscenity Censorship: The Core Constitutional Issue — What is Obscene?*, 7 UTAH L. REV. 289 (1961) (discussing constitutional developments in law relating to censorship of obscenity); Lockhart & McClure, *Censorship of Obscenity: Developing Constitutional Standards*, 45 MINN. L. REV. 5 (1960) (defining obscenity and examining censorship of it).

[7] *See* Clark v. Community for Creative Non-Violence, 468 U.S. 288, 293 (1984). The *Clark* Court stressed that expression, in any form, is subject to reasonable time, place and manner restrictions. *Id.* As such, that Court upheld an ordinance that limited the manner in which a demonstration could be carried out in a public park. *Id.* at 294. Specifically, the ordinance prohibited camping on park lands. *Id.* The Court upheld the ordinance since there were established areas for camping, the ordinance was content-neutral and was narrowly tailored to achieve the government's substantial interest in maintaining the parks for public enjoyment. *Id.* at 295-96.

The terms "time" and "place" are unambiguous. *See* Lee, *Lonely Pamphleteers, Little People and the Supreme Court: The Doctrine of Time, Place, and Manner Regulations of Expression*, 54 GEO. WASH. L. REV. 757, 757 n.2 (1986). The term "manner," however, may refer to

of these restrictions, the type of forum in which the speech occurs must be classified as either public or nonpublic.[8] If the forum is classified as public, time, place and manner restrictions on speech will be upheld, provided they are content-neutral, narrowly tai-

the medium or method of communication, the communicator's behavior, the physical attributes of the medium, or the use of particular words or symbols as a means of expression. *Id.* (citations omitted). *Cf.* Brown v. Louisiana, 383 U.S. 131, 136 (1966) (sit-in used to protest constitutional violations).

[8] *See* Cornelius v. NAACP Legal Defense and Educ. Fund, Inc., 473 U.S. 788, 800-01 (1985) (court must identify nature of forum that speech was presented in to determine level of government-imposed access limitations).

As early as 1897, the Supreme Court addressed the public forum issue in *Davis v. Massachusetts*, where it upheld an ordinance that forbade public address on public property without a permit. 167 U.S. 43, 48 (1897). In 1939 the Court addressed the public forum issue again, distinguishing the *Davis* restriction on free speech. *See* Hague v. Committee for Indus. Org., 307 U.S. 496, 515-16 (1939). The *Hague* Court stated that:

> [w]herever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, . . . have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions. Such use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens.

Id. at 515. Although this often-cited statement is dictum, it has played a major role in the evolution of public forum theory, and "has come to be the cornerstone of the public forum doctrine." Note, *Public Forum Analysis After* Perry Education Association v. Perry Local Educators' Ass'n — *A Conceptual Approach to Claims of First Amendment Access to Publicly Owned Property*, 54 FORDHAM L. REV. 545, 547 n.17 (1986) [hereinafter *Public Forum Analysis After Perry*]. *See generally* Kalven *The Concept of the Public Forum:* Cox v. Louisiana, 1965 SUP. CT. REV. 1 (1965) (in-depth discussion of term "public forum"); Stone, *Fora Americana: Speech in Public Places*, 1974 SUP. CT. REV. 233 (general discussion and history of public forum doctrine). In 1983, the Court decided *Perry Education Association v. Perry Local Educators' Association*, classifying a forum into one of three categories: traditional public, designated public, nonpublic. 460 U.S. 37, 45-46 (1983). The method of analysis delineated in *Perry*, although frequently utilized, has been criticized for not enumerating characteristics inherent to traditional public forums. *See Public Forum Analysis After Perry*, *supra*, at 551-54. Additionally, there is a growing amount of criticism of the utilization of public/nonpublic forum analysis, as it can be confusing and manipulative. *See, e.g.*, TRIBE, *supra* note 3, §12-24 at 992-96 (whether place is public forum is less important than restriction placed on speech); Dienes, *The Trashing of the Public Forum; Problems in First Amendment Analysis*, 55 GEO. WASH. L. REV. 109, 122 (1986) (noting deficiencies in public/nonpublic analysis); Farber & Nowack, *supra* note 5, at 1234 (classification of public places as various types of forums has confused judicial opinions); *see also* Post, *Between Governance and Management: The History and Theory of the Public Forum*, 34 UCLA L. REV. 1713, 1764 (1987) (public forum doctrine is blank check for government control of public access to nonpublic forum for communicative purposes); Stone, *Content-Neutral Restrictions*, 54 U. CHI. L. REV. 46, 93 (1987) (distinction between public and nonpublic forums is artificial); Note, *Forum over Substance:* Cornelius v. NAACP Legal Defense & Education Fund, 35 CATH. U.L. REV. 307, 310 (1985) (*Perry* distinction misleading if used to analyze since it implies that government may restrict expression in some places simply because it intends to restrict expression in those places); Comment, Board of Airport Commissioners v. Jews for Jesus, Inc.: *A Missed Opportunity to Restore Fundamental Fairness to Public Forum Analysis*, 8 PACE L. REV. 607, 607-08 (1988) (public/nonpublic forum distinction inherently unfair).

lored to serve a significant governmental interest and leave open alternative channels of communication.[9] Courts generally apply this standard when considering the constitutionality of regulations that restrict freedom of expression in public airports.[10] Recently, however, in *International Society for Krishna Consciousness, Inc. v. Lee*,[11] the Court of Appeals for the Second Circuit applied a less demanding standard and upheld an airport regulation which prohibited the solicitation of funds in the airport, finding that the terminals are nonpublic forums.[12]

The International Society for Krishna Consciousness ("ISK-

[9] *See Grace*, 461 U.S. at 177; *O'Brien*, 391 U.S. at 377. In *O'Brien*, the Court stated:

> [g]overnment regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.

Id.

The requirement that time, place and manner restrictions on speech be narrowly tailored does not mandate that the government use the least restrictive means to achieve its purpose. *See Rock Against Racism*, 491 U.S. at 782-83. "[T]he requirement of narrow tailoring is satisfied 'so long as the . . . regulation promotes a substantial government interest that would be achieved less effectively absent the regulation,' . . . and the means chosen are not substantially broader than necessary to achieve [that interest]" *Id.* (quoting United States v. Abertini, 472 U.S. 675, 689 (1985)); *see also* Regan v. Time, Inc., 468 U.S. 641, 657 (1984) (less-restrictive-alternative analysis inapplicable to inquiry into validity of time, place and manner regulation). *But see* Frisby v. Schultz, 487 U.S. 474, 485 (1988) (complete ban can be narrowly tailored, but only if each activity within proscription's scope is appropriately targeted evil).

[10] *See, e.g.*, Jamison v. City of St. Louis, 828 F.2d 1280, 1282-84 (8th Cir. 1987) (airports character and pattern of activity similar to city street makes it appropriate place for communication of views), *cert. denied*, 485 U.S. 987 (1988); Jews for Jesus, Inc. v. Board of Airport Comm'rs, 785 F.2d 791, 794-95 (9th Cir. 1986) (followed prior opinions holding airports to be traditional public forums), *aff'd on other grounds*, 482 U.S. 569, 572 (1987); Fernandes v. Limmer, 663 F.2d 619, 626-27 (5th Cir. 1981) (constant traffic flow in terminals not compelling enough reason to justify exclusion of speakers), *cert. dismissed*, 458 U.S. 1124 (1982); Rosen v. Port of Portland, 641 F.2d 1243, 1250 (9th Cir. 1981) (prior registration requirement unconstitutional); Chicago Area Military Project v. City of Chicago, 508 F.2d 921, 926 (7th Cir.) (regulation of public places must be narrowly drawn to protect government interest with least possible limitations placed on free speech), *cert. denied*, 421 U.S. 992 (1975); Kuszynski v. City of Oakland, 479 F.2d 1130, 1131 (9th Cir. 1973) (regulations on free speech in public airports must be narrowly drawn to serve legitimate public interests); International Soc'y for Krishna Consciousness, Inc. v. Wolke, 453 F. Supp. 869, 872-74 (E.D. Wis. 1978) (concluding that terminal building at General Mitchell Field is public forum). *See also* Comment, *First Amendment Protection of Free Speech in Public Airports*, 55 J. AIR L. & COM. 1075, 1080 (1990) (majority of federal courts addressing this issue have determined that municipal airports are public forums).

[11] 925 F.2d 576 (2d Cir. 1991).

[12] *See id.* at 580-82.

CON") is a non-profit religious organization.[13] One of ISKCON's rituals is sankirtan, whereby members are required to go to public places, hand out religious literature and solicit funds to support the organization.[14] Performance of sankirtan lies at the theological heart of ISKCON's religion and is a central duty of its faith.[15]

In *ISKCON v. Lee,* ISKCON challenged a regulation, promulgated by the Port Authority,[16] which prohibited the solicitation of money and the distribution of literature in three New York metropolitan area airports, thereby restricting ISKCON members from performing sankirtan.[17] ISKCON moved for summary judgment, arguing that the Port Authority regulation unconstitutionally restricted group members from exercising their first amend-

[13] *See id.* at 577. This international group follows the views of Krishna Consciousness, a branch of Hinduism. *See* International Soc'y for Krishna Consciousness, Inc. v. Barber, 650 F.2d 430, 433 (2d Cir. 1981). The American Krishna Consciousness movement members are purportedly instructed to spread the teachings of their religion to the "spiritually impure." *Id.* at 434. Members "can best serve their spiritual masters if they conduct themselves as ideal persons, spreading the religion's teachings by example." *Id.* United States v. Silberman, 464 F. Supp. 866, 870 (M.D. Fla. 1979). Members of the movement "surrender their material possessions, change their diet, lifestyle and appearance, and devote themselves to service of their Lord."

[14] *See ISKCON v. Lee,* 925 F.2d at 577. The sankirtan ritual has three purposes: "(1) to spread the religious information which the Hare Krishna religion deems to be truth; (2) to proselytize and attract new members; and (3) to generate funds to support the religious activities of the movement." *Silberman,* 464 F. Supp. at 870.

[15] *See Barber,* 650 F.2d at 433 (citing People v. Woody, 61 Cal.2d 716, 394 P.2d 813, 818, 40 Cal. Rptr. 69, 74 (1964)). Although not all members perform sankirtan, it is considered central to the religion. *See id.* In fact, donations and book sales are the principle means of support of the religious movement. *See* International Soc'y for Krishna Consciousness v. Engelhardt, 425 F. Supp. 176, 178 n.2 (W.D. Mo. 1977) (citing Plaintiff's Affidavit).

[16] *See ISKCON v. Lee,* 925 F.2d at 578-79. The Port Authority, an interstate agency of New York and New Jersey, operates the three New York metropolitan area airports—John F. Kennedy, LaGuardia, and Newark International Airports. *See id.* at 578. Although much of the airport space is leased by airlines and is primarily under the airlines' control, the unleased portions of the airports, such as the International Arrivals Building at Kennedy, are within the control of the Port Authority. *See id.*

[17] *See id.* at 578-79. The Port Authority regulation reads in pertinent 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) The solicitation and receipt of funds.

Id.

ment right to free speech in airports.[18] The United States District Court for the Southern District of New York struck down the Port Authority regulation and granted ISKCON's motion for summary judgment, holding that "the airports' character, pattern of activity, and nature of purpose . . . place them squarely within the public forum family," thus making them appropriate places for first amendment activity.[19]

On appeal, the United States Court of Appeals for the Second Circuit, affirming in part and reversing in part,[20] concluded that airport terminals are nonpublic forums and, therefore, upheld the Port Authority's ban on solicitation for funds.[21] Writing for the majority, Judge Winter stated that reversal was dictated by the recent Supreme Court decision, *United States v. Kokinda*.[22] In *Kokinda*,[23] a plurality of the Court held that a sidewalk outside a post office, which was not connected to a public street, was a nonpublic forum.[24] The Court reasoned that the sidewalk served merely as a conduit between the post office and parking lot,[25] and

[18] *See* International Soc'y for Krishna Consciousness, Inc. 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).

Although the regulations do not appear to restrict performance of sankirtan in the exterior portions of the airports, ISKCON has "consistently limited their demands for access to the interior of the terminal buildings only." *Id.* at 573-74. In addition, "[p]laintiffs do not seek to perform *sankirtan* in any private offices, ticket counters and lines, check-in areas, [or] baggage claim areas . . . ." *Id.* at 578 n.9.

[19] *Id.* at 579.

Initially, plaintiffs sought access to both airline and port authority controlled property, but had named only the Port Authority and its police superintendent Lee as defendants. *See id.* at 573. Lee, now deceased, was responsible for enforcing the regulation. *ISKCON*, 925 F.2d at 577. Since the district court found the airline to be an indispensable party to the litigation, it denied plaintiff's motion for preliminary injunctive relief. *See ISKCON*, 721 F. Supp. at 573. Plaintiff's amended their complaint to include several of the airlines as defendants. *See id.* The airlines moved for summary judgment, arguing that their prohibitions did not constitute state action. *See id.* The district court denied the airline's motion for summary judgment and certified the state action question to the Court of Appeals for the Second Circuit. *See id.* The Second Circuit remanded the case for "further discovery and development of the evidentiary record." *Id.* After a settlement agreement with the airlines, the Port Authority police superintendant remained the sole defendant. *See Id.* The Port Authority had been dismissed as a defendant in 1977. *See id.*

[20] *See ISKCON v. Lee*, 925 F.2d at 582.

[21] *See id.* The court draws the distinction between the distribution of literature and solicitation for funds, holding that the latter is a greater inconvenience. *See id.*

[22] *See id.*

[23] United States v. Kokinda, 110 S. Ct. 3115 (1990).

[24] *See id.* at 3118.

[25] *See id.*

that solicitation interfered with this purpose.[26]

Drawing analogy to the *Kokinda* decision, the court in *ISKCON v. Lee,* reasoned that in-person solicitation in airports interfered with the intended functioning of the air terminals by inconveniencing passengers in already congested terminals,[27] just as solicitation at the post office in *Kokinda* disrupted postal service business.[28] Furthermore, the court noted that since airports are funded by user-fees and are operated to make a regulated profit, the Port Authority has an interest in protecting users from in-person solicitations,[29] which have the potential "for evoking highly personal and subjective reactions" likely to cause people to avoid the facilities.[30] The court concluded that virtually everyone who enters the terminal does so in connection with air-travel and not for a purpose related to protected expression.[31] Finally, the court distinguished solicitation of funds from distribution of literature and ordered the Port Authority to provide reasonable access to the terminals for such distribution.[32]

Writing for the dissent, Chief Judge Oakes argued that *Kokinda* was misapplied by the majority since it did not "announce[] a new rule that changes a forum's purpose from being an important factor in public forum analysis to being the sole determinant of a forum's status."[33] The dissent asserted that "purpose analysis" alone cannot dictate a forum's status,[34] but rather, it is essential to balance the "purposes of the forum . . . the tradition of public access to that forum, and the interests of those who wish to use the forum for another purpose . . . ."[35] The dissent was not persuaded by the Port Authority's arguments that the terminals dif-

[26] *See id.* at 3123.

[27] *See ISKCON v. Lee,* 925 F.2d at 581-82. The court distinguished the airport terminals from downtown streets (traditional public forums) by noting that persons in the airport are not engaged in the purposes for which downtown streets are used. *See id.*

[28] *See id.* at 581. *See also Kokinda,* 110 S. Ct. at 3123. ("Soliciting . . . has as its objective an immediate act of charity" requiring postal patrons to stop, block the flow of traffic, and decide whether or not to contribute).

[29] *See ISKCON v. Lee,* 925 F.2d at 581.

[30] *Kokinda,* 110 S. Ct. at 3123-24.

[31] *See ISKCON v. Lee,* 925 F.2d at 578.

[32] *See id.* at 582.

[33] *Id.* at 584 (Oakes, C.J., dissenting).

[34] *See id.* at 582-83.

[35] *Id.* at 584.

fer from the traditional public forum because of their design, usage, congestion, security problems, user-fee financing and captive audiences,[36] concluding that the airport terminals resemble and function as public streets and thoroughfares and, therefore, should be categorized as public forums.[37]

Part I of this Comment will examine the different standards of review applicable to restrictions on speech in public and nonpublic forums. Part II will analyze two methods of determining forum status: physical characteristic analysis and purpose analysis. Part III will suggest that the court's reliance upon the *Kokinda* decision in *ISKCON v. Lee* was inappropriate. Finally, Part IV will assert that the court's designation of the airport terminals as nonpublic forums in *ISKCON v. Lee* was unnecessary because the airport regulation is capable of withstanding the more demanding level of scrutiny applicable to time, place and manner restrictions on speech in public forums.

I. The Standards of Review Applied to Restrictions on Speech in Public and Nonpublic Forums

Necessity and convenience often prompt the enactment of restrictions on the time, place and manner of speech.[38] To be constitutionally sound, these regulations must operate without reference

[36] *See ISKCON v. Lee*, 925 F.2d at 585.

[37] *See id.* at 585-86.

[38] *See, e.g.*, United States v. Albertini, 472 U.S. 675, 687 (1985) (protection of military property); Regan v. Time, Inc., 468 U.S. 641, 656 (1984) (prevention of counterfeiting); Clark v. Community for Creative Non-Violence, 468 U.S. 288, 293 (1984) (protection of national park); Heffron v. International Soc'y for Krishna Consciousness, Inc., 452 U.S. 640, 648 (1981) (maintenance of orderliness at state fair grounds); FCC v. Pacifica Found., 438 U.S. 726, 749 (1978) (protection of well-being of children); Cameron v. Johnson, 390 U.S. 611, 616-17 (1968) (prevention of obstruction to courthouse entrance from picketing); Breard v. Alexandria, 341 U.S. 622, 644-45 (1951) (protection of privacy of citizens); Kovacs v. Cooper, 336 U.S. 77, 89 (1949) (prevention of noise pollution); Cox v. New Hampshire, 312 U.S. 569, 576 (1941) (maintenance of order at parade). *See also* Note, *The Search for Valid Governmental Regulations: A Review of the Judicial Response to Municipal Policies Regarding First Amendment Activities*, 63 Notre Dame L. Rev. 561, 570-71 (1988) Discussing various governmental interests served by restrictions on speech, one commentator notes that "in light of the numerous decisions in the first amendment area and the complexity of the Supreme Court's analysis, a government official's ad hoc determination of the reasonableness of a specific regulation is grossly inadequate." *Id.* at 572. Therefore, it is said, "officials should select policies affecting first amendment rights conservatively, keeping in mind the complexity and unpredictability of the judicial process." *Id.*

to the content of the speech.[39] Once a court determines that a time, place and manner regulation is content-neutral, it applies the appropriate standard of review for determining the regulation's propriety.[40] The level of scrutiny applicable to the regulation is dependent upon the nature of the forum in which the speech is restricted.[41] A forum may be characterized as a traditional public forum, a designated public forum or a nonpublic forum.[42]

Traditional public forums, such as parks and streets, are those properties that have long been regarded as the most suitable channels for public communication.[43] Designated public forums are areas that the government has voluntarily opened to the public as appropriate for first amendment expression.[44] Nonpublic fo-

[39] *See* NOWAK, ROTUNDA & YOUNG, CONSTITUTIONAL LAW § 16.47(a) (3d ed. 1986). If time, place and manner restrictions on speech did not have to be content-neutral, "the state would be able to cloak restrictions on speech itself in the guise of regulations of the mode of speech or the place — the streets, the parks, public buildings — which is used for the speech." *Id.* Content-based regulations which limit expression based on the particular message conveyed, however, have been upheld. *See, e.g.*, New York v. Ferber, 458 U.S. 747, 763 (1982) (ban on child pornography); Gertz v. Welch, Inc., 418 U.S. 323, 340 (1974) (prohibition against false statements of fact); Miller v. California, 413 U.S. 15, 18-19 (1973) (ban on obscenity); Dennis v. United States, 341 U.S. 494, 545 (1951) (prohibition of advocating violent overthrow of government); Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942) (ban on fighting words). *See generally* Stone, *Restrictions of Speech Because of its Content: The Peculiar Case of Subject Matter Restrictions*, 46 U. CHI. L. REV. 81, 100-07 (1978) (discussing special dangers of content-based restrictions); Note, *The Content Distinction in Free Speech Analysis After* Renton, 102 HARV. L. REV. 1904, 1913-17 (1989) (suggesting that content-neutral/content-based distinction is made to prevent discrimination against particular viewpoints).

[40] *See* Stone, *Content-Neutral Restrictions*, 54 U. CHI. L. REV. 46, 48-50 (1987) (identifying "at least seven seemingly distinct standards of review").

[41] *See* Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45-46 (1983) (setting forth three distinct standards of review for each type of forum).

[42] *See id.; see also The Supreme Court — Leading Cases*, 99 HARV. L. REV. 120, 207-09 (1985) (discussing Supreme Court's redefinition of categories of forum).

[43] *See* Hague v. Committee for Indust. Org., 307 U.S. 496, 515 (1939). The designation of an area as a traditional public forum "guarantees that speakers will have access to such sites without burdensome restrictions." 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, 418 (1983). *See also* United States v. Grace, 461 U.S. 171, 180, 183 (1983) (invalidating prohibition against carrying signs on sidewalks surrounding court building because "traditional public forum property occupies a special position in terms of First Amendment protection"); Jamison v. Texas, 318 U.S. 413, 416 (1943) (voiding flat ban on leaflet distribution because one rightfully on street has right to express views in orderly fashion); Schneider v. State, 308 U.S. 147, 165 (1939) (same).

[44] *See Perry Educ. Ass'n*, 460 U.S. at 45. *See, e.g.*, Widmar v. Vincent, 454 U.S. 263, 267 (1981) (university created designated public forum by making facilities available for meet-

rums, by contrast, are places which are not traditionally utilized for expressive activity.[45] The differences between the forums require the application of different standards for reviewing the constitutionality of time, place and manner restrictions on speech.[46]

Time, place and manner restrictions on speech in traditional public forums must be narrowly tailored to serve a significant governmental interest and must leave open alternative channels of communication.[47] Like restrictions on speech in designated public forums, similarly, must be narrowly drawn to achieve a compelling state interest.[48] In nonpublic forums, regulations of expressive ac-

ings of registered students); City of Madison Joint School Dist. No. 8 v. Wisconsin Employment Relations Comm'n, 429 U.S. 167, 175 (1976) (designated public forum established when state opened school board meeting for citizen involvement); Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 555 (1975) (municipal theater is public forum "designed for and dedicated to expressive activities").

[45] *See Perry Educ. Ass'n*, 460 U.S. at 46. *See, e.g.*, United States Postal Serv. v. Counsel of Greenburgh Civic Ass'n, 453 U.S. 114, 128 (1981) (letterbox is not public forum); Greer v. Spock, 424 U.S. 828, 838 (1976) (federal military reservation does not serve as place for free expression); Lehman v. City of Shaker Heights, 418 U.S. 298, 304 (1974) (advertising space on city's transit system is not first amendment forum).

[46] *See supra* notes 40 and 41 (noting several standards of review). *See also* Cornelius v. NAACP Legal Defense and Educ. Fund, Inc., 473 U.S. 788, 800 (1985).

> [T]he Court has adopted a forum analysis as a means of determining when the Government's interest in limiting the use of its property to its intended purpose outweighs the interest of those wishing to use the property for other purposes. Accordingly, the extent to which the Government can control access depends on the nature of the relevant forum.

Id.

One commentator notes that the labeling of forums as public or nonpublic to determine the appropriate standard of review minimizes the deference to first amendment values. *See* Dienes, *The Trashing of the Public Forum: Problems in First Amendment Analysis*, 55 GEO. WASH. L. REV. 109, 120 (1986). "The nonpublic forum cases reflect a disposition to decide First Amendment cases through labeling." *Id.*

[47] *See Cornelius*, 473 U.S. at 800; Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983). *See, e.g.*, Consolidated Edison Co. v. Public Serv. Comm'n, 447 U.S. 530, 544 (1980) (ban on bill inserts that discuss controversial issues of public policy not valid time, place manner restriction); Linmark Assocs., Inc. v. Willingboro, 431 U.S. 85, 93 (1977) (prohibition of 'For Sale' signs does not leave open satisfactory alternative channels of communication); Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 769-70 (1976) (governmental interest not sufficient to warrant ban on advertising prescription drug prices). *See also* Horning, *The First Amendment Right to a Public Forum*, 1969 DUKE L.J. 931, 937 (1969) (suggesting government's "constitutional obligation" to provide facilities for mass communication).

[48] *See Cornelius*, 473 U.S. at 800; *Perry Educ. Ass'n*, 460 U.S. at 45-46. "The Constitution forbids a State to enforce certain exclusions from a forum generally open to the public even if it was not required to create the forum in the first place." *Id.* at 45. *See also* Smolla, *Preserving the Bill of Rights in the Modern Administrative-Industrial State*, 31 WM. & MARY L. REV. 321, 341 (1990) (suggesting only difference between traditional and designated public forum "is that the government has no control over the status of a traditional forum").

tivity need only be reasonable, provided they do not substantially interfere with communication.[49]

These varying standards of review highlight the importance of properly designating the forum in which speech is being restricted.[50] Indeed, the development of a uniform approach for determining whether an area is a public or nonpublic forum has been the focus of many decisions examining the constitutionality of time, place and manner restrictions on speech.[51]

II. Forum Analysis: A Two-Part Test for Determining Forum Status

A. *Physical Characteristic Analysis*

Although the physical characteristics of property alone cannot dictate forum status, they are factors essential to forum analysis.[52] If an area is characteristically open, is a public thoroughfare and/or is frequented by many people, the implication is that the area is a traditional public forum.[53] Additionally, a location's physical resemblance to a street[54] or its geographical separation is relevant in granting or denying public forum status.[55]

[49] *See Cornelius*, 473 U.S. at 806; *Perry Educ. Ass'n*, 460 U.S. at 46. *See also* Dienes, *supra* note 44, at 117 (suggesting reasonableness standard of review for nonpublic forums is "essentially no review at all").

[50] *See Dienes, supra* note 46, at 118. "Given the largely outcome-determinative character of the nonpublic-forum label, the standard for assigning property to this category is of obvious importance." *Id.*

[51] *See infra* notes 52-59 and accompanying text.

[52] *See* United States v. Kokinda, 110 S. Ct. 3115, 3120 (1990) (physical characteristics alone do not dictate forum status); *ISKCON v. Lee*, 925 F.2d 576, 584 (2d Cir. 1991) (Oakes, C.J., dissenting) (traditional public forum status does not depend upon any single factor/characteristic); Wolin v. Port of New York Auth., 392 F.2d 83, 89 (2d Cir.) (factors for determining public forum status: character of place, usual activity, essential purpose, people who frequent forum), *cert. denied*, 393 U.S. 940 (1968); *Public Forum Analysis After Perry, supra* note 8, at 555-62 (proposal of five characteristics used to determine forum status: openness, public thoroughfare, populousness, private capacity, voluntariness). *See also* Southeastern Promotions Ltd. v. West Palm Beach, 457 F.2d 1016, 1019 (5th Cir. 1972) (citing *Wolin* factors).

[53] *See Public Forum Analysis After Perry, supra* note 8, at 555. This Note additionally suggests examining whether the people present are there as private citizens and voluntarily. *See id. See also* United States Labor Party v. Knox, 430 F. Supp. 1359, 1361 (W.D.N.C. 1977) (historically solicitation common in areas frequented by many people).

[54] *See infra* note 80 (street and airport similarities).

[55] *See* United States v. Grace, 461 U.S. 171, 179-180 (1983) (sidewalks on outer limits of court's grounds not geographically separated from other sidewalks in Washington D.C. and

B. Purpose Analysis

Ascertaining the purpose of a particular area has long aided the determination of forum status.[56] It is important to examine the compatibility of the expressive activity with the nature of the area when determining the "purpose" of a forum.[57] While purpose alone cannot dictate forum status,[58] "the nature [and essential purpose] of the forum and the conflicting interests involved have remained important in determining the degree of protection afforded by the [first] Amendment to the speech in question."[59]

In *United States v. Kokinda*,[60] two volunteers for the National

should not be treated differently when determining type of forum). *See also* Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 44 (1983) (restrictions of speech may be struck down depending on nature of forum where restriction imposed); *Wolin*, 392 F.2d at 89-90. In *Wolin*, the court identified the character of a place as one of the factors to consider in determining whether property should be a public forum. *See id.* The court stated that the character of the Port Authority terminal was clearly a thoroughfare used by many people everyday, and that it is improper to say "that the mere presence of a roof alters the character of the place, or makes the Terminal an inappropriate place for expression." *Id.* Classic examples of forums which have been rendered nonpublic because of their location and physical characteristics are military bases and jailhouse grounds. *See, e.g.*, Greer v. Spock, 424 U.S. 828, 836-38 (1976) (streets through enclosed and highly restricted military base are nonpublic); Adderley v. Florida, 385 U.S. 39, 47 (1966) (like private owners, state may preserve jailhouse property under its control, for its intended purpose).

[56] *See, e.g., Perry Educ. Ass'n.*, 460 U.S. at 45 (designated public forums are those which state opened for use by public for purpose of expressive activity); United States Postal Serv. v. Council of Greenburgh Civic Ass'ns, 453 U.S. 114, 129 (1981) (Court emphasizes purpose of letterboxes, to "protect mail revenues while at the same time facilitating the secure and efficient delivery of the mails."); Hague v. Committee for Indus. Org., 307 U.S. 496, 515 (1939) (streets and parks, traditional public forums, "have been used for purposes of communicating thoughts between citizens, and discussing public questions").

[57] *See* Widmar v. Vincent, 454 U.S. 263, 273-75 (1981) (allowing religious groups access to University's facilities would not violate University's policy of not advancing religion). *See also* Z. CHAFEE, FREE SPEECH IN THE UNITED STATES 418 (1941) (although parks and streets serve diverse purpose of traffic and recreation, they must allow some access for free expression).

[58] *See ISKCON v. Lee*, 925 F.2d at 584 (Oakes, C.J., dissenting). "[T]raditional public forum status does not turn on any single factor or characteristic. Rather, a more complex balancing determination is necessary. . . ." *Id. See also supra* notes 56-57 and accompanying text (discussing characteristics used to determine forum status).

[59] Lehman v. City of Shaker Heights, 418 U.S. 298, 302-03 (1973) (city bus ad space not public forum). *See Greer*, 424 U.S. at 837-38 (national security purpose of military post favors finding that Fort Dix is not public forum); *Adderley*, 385 U.S. at 41 (jails built for security purposes not traditionally open to public); Edwards v. South Carolina, 372 U.S. 229, 237 (1963) (state capitol grounds open to public for protest); U.S. S.W. Africa/Namibia Trade and Cultural Council v. United States, 708 F.2d 760, 764 (D.C. Cir. 1983) (to appraise forum's character, court must evaluate nature of airport terminals).

[60] 110 S. Ct. 3115 (1990).

Democratic Policy Committee set up a table on the sidewalk of a Maryland post office to solicit funds and distribute political literature.[61] The volunteers were convicted for violating a law that prohibited solicitation on postal premises.[62] A plurality of the Court examined the nature of the post office sidewalk and determined that it was not expressly dedicated to any free speech activity.[63] In determining that the area was not a public forum, the plurality asserted that the purpose of the sidewalk was to provide a passageway for individuals using the post office[64] and "not to facilitate the daily commerce and life of the neighborhood or city."[65] Because the government had not expressly dedicated the property to first amendment activities, the plurality concluded that the sidewalk was a nonpublic forum whose regulation would be examined only for reasonableness.[66] It further concluded that the purpose of the forum was to achieve efficient and effective postal delivery,[67] and because solicitation interfered with this goal, it should not be permitted.[68]

III. *ISKCON v. Lee* Incorrectly Designates Airports Nonpublic Forums

Contrary to the prevailing view that airports are public forums,[69] the majority in *ISKCON v. Lee* determined that the recent

[61] *See id.* at 3117-18.

[62] *See id.* at 3118.

[63] *See id.* at 3121. (Brennan, J., Marshall, J., Stevens, J., & Blackmun, J., dissenting). The post office provided for only one means of communication, posting public notices on bulletin boards. *See id.*

[64] *See id.* at 3120. (Brennan, J., Marshall, J., Stevens, J., & Blackmun, J., dissenting).

[65] *Kokinda*, 110 S. Ct. at 3120. The Kokinda dissent, in contrast, dismissed this reasoning and argued that the plurality afforded the purpose of the sidewalk too much significance, stating that "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." *Id.* at 3129. (Brennan, J., Marshall, J., Stevens, J., & Blackmun, J., dissenting).

[66] *See id.* at 3119-20. *See also* Cornelius v. NAACP Legal Defense and Educ. Fund, Inc., 473 U.S. 788, 800 (1985) (extent to which government can control access depends upon nature of relevant forum).

[67] *See Kokinda*, 110 S. Ct. at 3122. (Brennan, J., Marshall, J., Stevens, J., & Blackmun, J., dissenting).

[68] *See id.* at 3123. (Brennan, J., Marshall, J., Stevens, J., & Blackmun, J., dissenting).

[69] *See, e.g.*, Jews for Jesus, Inc. v. Board of Airport Comm'rs, 785 F.2d 791, 793-95 (9th Cir. 1986) (airports are public forums), *aff'd*, 492 U.S. 569 (1987); Fernandes v. Limmer, 663 F.2d 619, 626 (5th Cir. 1981) (same). *See also supra* note 10 (list of circuits holding airports are public forums).

Supreme Court decision in *United States v. Kokinda*,[70] compelled its holding that airport terminals are nonpublic forums.[71] It is submitted that the majority in *ISKCON v. Lee* arrived at this conclusion based on faulty analysis. Although the court acknowledged that the physical characteristics of the airports resemble those of a public forum,[72] it asserted that an analysis of the airport's *purpose* compelled a different result.[73]

A. Misapplication of Physical Characteristic Analysis

As previously noted, the physical characteristics of property are a factor to be considered when determining forum status.[74] To that end, the degree to which a location resembles a street is a frequently examined factor.[75] For instance, in *Kokinda*, the entire postal complex consisted of a free standing building, two sidewalks, a driveway and a parking lot.[76] It did not lease any space to stores or restaurants, nor were the building and sidewalk immediately adjacent to other commercial establishments.[77] The postal complex did not resemble the common examples of traditional public forums:[78] main streets and public parks.

In contrast, the airport terminals house a variety of stores and

[70] 110 S. Ct. 3115 (1990).

[71] *See ISKCON v. Lee*, 925 F.2d at 580 (prior to *Kokinda*, this panel was prepared to follow authority established in other circuits).

[72] *See id.* at 581. "[R]eliance on the visual and other similarities between the terminals' passageways and a 'bustling metropolitan boulevard' was understandable." *Id.*

[73] *See id.* at 580-81 (emphasis added).

[74] *See* Wolin v. Port of New York Auth., 392 F.2d 83, 89 (2d Cir.), *cert. denied*, 393 U.S. 940 (1968).

[75] *See* Comment, *supra* note 10, at 1081. *See also* Fernandes v. Limmer, 663 F.2d 619, 627 (5th Cir. 1981); Chicago Area Military Project v. City of Chicago, 508 F.2d 921, 925 (7th Cir.), *cert. denied*, 421 U.S. 992 (1975).

[76] *See* United States v. Kokinda, 110 S. Ct. 3115, 3118 (1990).

[77] *See id.* at 3120. "[T]he postal sidewalk was constructed solely to provide for the passage of individuals engaged in postal business." *Id.* The Court distinguished the sidewalk from a public street which is "open . . . [as] a necessary conduit in the daily affairs of . . . citizens, . . . [and as] a place where people . . .[can] enjoy the open air . . . in a relaxed environment." *Id.* (quoting Heffron v. International Soc'y for Krishna Consciousness, Inc., 452 U.S. 640, 651 (1981)). *But see Fernandes*, 663 F.2d at 627 ("existence of a leasehold by a private party on public property does not remove from the realm of state action restrictions on the exercise of civil rights at the site").

[78] *See* Cornelius v. NAACP Legal Defense and Educ. Fund, Inc., 473 U.S. 788, 802 (1985) (streets and parks immemorially held for use of public); Hague v. Committee for Indus. Org., 307 U.S. 496, 515-16 (1939) (same). *See also Public Forum Analysis After Perry*, *supra* note 8, at 547 (examples of street and park protection).

restaurants, as well as an art exhibition area, bank and dental office.[79] The many commercial establishments, open passageways and hoards of people present in the terminals mirror the scene of a crowded downtown street;[80] air terminals are "streets of modernity."[81] Such an analysis reveals that the physical characteristics of the post office and sidewalk, in *Kokinda*, are substantially different from the physical characteristics of the airport terminals at issue in *ISKCON v. Lee*.[82] The additional commercial establishments, which the post office does not harbor, render the airports more analogous to a city street, long regarded to be a public forum,[83] than to a postal facility.[84]

Geographic location of an area is another physical factor relevant to public forum analysis.[85] For example, the *Kokinda* plurality, in holding that the post office was a nonpublic forum, pointed to the physical location of the walkway as separating the parking lot from the post office.[86] The physical-geographic separation of airports from residential and downtown areas, however, is due to the noise emitted by airplanes.[87] The physical isolation of airports is not for the purpose of regulating public access[88] and, therefore, does not jeopardize its status as a public forum.[89]

[79] *See infra* note 101 (list of facilities and stores available in airports).

[80] *See Public Forum Analysis After Perry, supra* note 8, at 557. *See, e.g.*, Jamison v. City of St. Louis, 828 F.2d 1280, 1283 (8th Cir. 1987) (airport terminal is like busy city street), *cert. denied*, 485 U.S. 987 (1988); U.S. S.W. Africa/Namibia Trade and Cultural Council v. United States, 708 F.2d 760, 764 (D.C. Cir. 1983) (airports similar to streets).

[81] *Public Forum Analysis After Perry, supra* note 8, at 557.

[82] *See infra* notes 83-84 and accompanying text (discussing public areas).

[83] *See, e.g.*, Fernandes v. Limmer, 663 F.2d 619, 627 (5th Cir. 1981) (areas where people dine, shop, sightsee are public forums), *cert. dismissed*, 485 U.S. 1124 (1982).

[84] *See ISKCON v. Lee*, 925 F.2d at 585 (discussion of similarities between airports and streets); *Jamison*, 828 F.2d at 1283 (airport terminal like busy street with shops, restaurants, newsstands). *See also* Wolin v. Port of New York Auth., 392 F.2d 83, 89 (2d Cir.) (interior of bus terminal containing stores and concessions resembling small city was public forum), *cert. denied*, 393 U.S. 940 (1968); *supra* note 80 and accompanying text (airport terminal visually resembles street).

[85] *See supra* notes 52-55 and accompanying text (discussing physical analysis to determine forum status).

[86] *See Kokinda*, 110 S. Ct. at 3120.

[87] *See ISKCON v. Lee*, 925 F.2d at 586 (Oakes, C.J., dissenting). *See generally* C. RHYNE, AIRPORTS AND THE LAW, 48-54 (1979) (zoning restrictions on airports).

[88] *See ISKCON v. Lee*, 925 F.2d at 586. "The isolation . . . is in deference to the physics and audiophonics of aviation and not to . . . [restrict] movement of people and ideas." *Id.*

[89] *See id.* (location becomes less important when it is for functional purposes and not to regulate public access). The district court, in *ISKCON v. Lee*, noted that:

The "openness" of an area, both in terms of accessibility and spaciousness, is a further area to be addressed in public forum analysis.[90] Notably, public ownership, albeit a significant factor in forum analysis, does not automatically "open" that property to the public.[91] However, in *ISKCON v. Lee*, the Port Authority opened the airports to the public by a lack of restriction on entry.[92] Being open and accessible to the public at all times as a place for the expression of public issues,[93] airports are similar to parks and streets whose "open access [to] all members of the public is integral to their function as central gathering places."[94]

Consideration of openness leads to the issue of congestion in airports.[95] Congestion in the terminals, resulting from their openness and accessibility, although a growing problem, "cannot support the sweeping prohibition of free speech implicit in finding that the airport is not a public forum."[96] Rather, it is submitted

> [I]f . . . defendant means that geographical proximity to the surrounding community is an essential component of public forum status, he is quite mistaken, for remote, residential streets, removed from a city's nerve center, are no less deserving of such status than Times Square itself. If on the other hand, defendant means that surrounding community members must pass through the situs on a daily basis, he fails to cite any authority for so sweeping a proposition.

ISKCON v. Lee, 721 F. Supp. at 572, 579 (S.D.N.Y. 1989), *aff'd in part, rev'd in part*, 925 F.2d 576 (2d Cir. 1991).

[90] *See Public Forum Analysis After Perry, supra* note 8, at 555 ("a public forum should be relatively spacious to ensure both the physical and psychological comfort and convenience of all users of the property").

[91] *See* United States Postal Serv. v. Council of Greenburgh Civic Ass'ns, 453 U.S. 114, 129, *cert. denied*, 453 U.S. 917 (1981). *See also* Grayned v. City of Rockford, 408 U.S. 104, 116-17 (1972) (public school not available for unlimited expressive activity); Chicago Area Military Project v. City of Chicago, 508 F.2d 921, 925 (7th Cir.) ("not all publically owned facilities are available for every expression of free speech"), *cert. denied*, 421 U.S. 992 (1975); International Soc'y for Krishna Consciousness, Inc. v. Wolke, 453 F. Supp. 869, 873 (E.D. Wis. 1978) ("mere fact of public ownership does not by itself require that a building be available as a public forum").

[92] *Cf.* Fernandes v. Limmer, 663 F.2d 619, 627 (5th Cir. 1981) ("lack of restrictions on public access to the commercial establishments located along . . . passageways").

[93] *See ISKCON v. Lee*, 925 F.2d at 585 (Oakes, C.J., dissenting) (airports have "invited and welcomed extensive expressive activity within [their] . . . terminals").

[94] United States v. Kokinda, 110 S. Ct. 3115, 3128 (1990).

[95] *See ISKCON v. Lee*, 925 F.2d at 586 (Oakes, C.J., dissenting) (congestion problems, which Port Authority asserts removed airport terminals from traditional forum status, are no different from traffic on public streets).

[96] *Fernandes*, 663 F.2d at 626. The crowded passageways do not make the airport a non-public forum. *Id.* "Rather, such . . . go[es] to the reasonableness of the time, place, and manner restrictions imposed on persons exercising First Amendment rights in the forum." *Id. See also* Wolin v. Port of New York Auth., 392 F.2d 83, 90 (2d Cir.), *cert. denied*, 393

that the congestion problem in airports is consistent with a finding that the airport is a traditional public forum since the crowds and unrest provide an atmosphere for free expression.[97] Additionally, the open areas in airport terminals are sufficiently spacious to allow the public to avoid any undesired intrusion.[98]

B. Misapplication of United States v. Kokinda's *Purpose Analysis*

The majority stated that airports exist for the single purpose of facilitating air travel,[99] and thus, like the post office sidewalk, which existed solely to facilitate the postal business, was unrelated to protected expression.[100] It is submitted that such a determination overlooks the multitude of purposes served by the airports. Although the primary activity of such a facility is air travel, it is by no means the exclusive purpose.[101] For example, the lobby of the International Arrivals Building at Kennedy Airport includes an area for the display of art exhibits, which any interested member

U.S. 940 (1968).

[97] *See ISKCON v. Lee*, 925 F.2d at 586 (Oakes, C.J., dissenting). "The airport terminals are 'an appropriate place for expressing one's view precisely because the primary activity for which [they are] designed is attended with noisy crowds . . . some unrest and less than perfect order.'" *Id.* (quoting *Wolin*, 392 F.2d at 90). The three airports together form one of the busiest airport complexes in the world, having served almost 79 million travelers in 1986. *See id.* at 578.

[98] *Compare* Lehman v. City of Shaker Heights, 418 U.S. 298, 307 (1973) (Douglas, J., concurring) (crowded confines of bus inappropriate for political ads forced on captive audience) *with* U.S. S.W. Africa/Namibia Trade and Cultural Council v. United States, 708 F.2d 760, 767 (D.C. Cir. 1983) ("The captive audience concerns of the Lehman Court . . . are obviously lessened in the open parts of airport terminals . . ."). *See also* Consolidated Edison v. Public Serv. Comm'n, 447 U.S. 530, 542 (1980) (customer may escape objectionable bill insert by disposing of it); Erznozik v. City of Jacksonville, 422 U.S. 205, 209-10 n.5 (1975) (intrusion on privacy greater in bus than on street); Kovacs v. Cooper, 336 U.S. 77, 87-88 (1949) (persons unable to escape interference with privacy by loud broadcast message).

[99] *See ISKCON v. Lee*, 925 F.2d at 581. Air terminals "are intended solely to facilitate a particular type of transaction—air travel." *Id.*

[100] *See id.* at 581. "Persons using the passageways in terminals are not there primarily to meet a friend for lunch, window shop . . . or engage in any . . . other . . . purposes for which typical downtown streets are used." *Id.*

[101] *See id.* at 578. The airports house numerous shops and facilities in addition to facilitating air travel. At Kennedy's terminal building one can find numerous restaurants, bars, and snack stands, a postal substation and postal facility, banks, telegraph offices, duty free boutiques, a drug store, a nursery, barber shop, currency exchange facilities, a dental office, an area for the display of art exhibits, travel insurance facilities, cookie and candy shops, a travellers check machine, an India store and a Bloomingdales boutique. *Id.*

of the general public could view.[102] The terminals also contain several currency exchanges,[103] as well as, in the Kennedy Airport Lobby, a dental office.[104] Local residents wishing to be treated by the dentist practicing at the airport would be required to visit the airport for their dental needs. Any person requiring these services may utilize the facilities regardless of whether that person is utilizing air travel facilities.[105]

In addition, it is suggested that the airport complexes employ hundreds of workers who may spend time casually strolling through the terminal, browsing in shops, dining or viewing the current art exhibit; these workers use the terminals as they would a "main street" and not for an air-travel related purpose. Because of the wide variety of services offered in the airports, it is submitted that the airport terminals should not have been subjected to the "sole purpose analysis" applied by the *ISKCON* court.

IV. Application of Forum Analysis

In determining that an airport is a nonpublic forum, *ISKCON v. Lee* relied on the Supreme Court's decision in *United States v. Kokinda*.[106] In *Kokinda*, however, no clear majority agreed on the public forum question.[107] Therefore, it is submitted, the court in *ISKCON v. Lee* was not compelled to deem the airport a nonpublic forum. Rather, it is suggested that the court ought to have desig-

[102] *See id.* at 578.

[103] *See id.* at 578.

[104] *See ISKCON v. Lee*, 925 F.2d at 578.

[105] *See* Chicago Area Military Project v. City of Chicago, 508 F.2d 921, 925 (7th Cir.) (many people enter airport terminals for reasons unconnected to travel), *cert. denied*, 421 U.S. 992 (1975); Comment, *supra* note 10, at 1081-82 ("Any member of the public may enter an airport terminal whether he or she plans to board an airplane or not.").

[106] *See ISKCON v. Lee*, 925 F.2d at 580. "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 [holding an airport to be a public forum]." *Id.*

[107] *See* United States v. Kokinda, 110 S. Ct. 3115 (1990). The plurality opinion by Justice O'Connor, joined by Chief Justice Rehnquist, Justice White and Justice Scalia, maintained that the postal sidewalks were nonpublic forums. *See id.* at 3119-20. Justice Kennedy, although concurring in the judgment, determined that "[i]t is not necessary, however, to make a precise determination whether this sidewalk and others like it are public or nonpublic forums." *Id.* at 3125 (Kennedy, J., concurring). Justice Brennan, dissenting along with Justice Marshall, Justice Stevens and Justice Blackmun, asserted that "the postal sidewalk is a public forum, either of the 'traditional' or 'limited-purpose' variety." *Id.* at 3133 (Brennan, J., dissenting).

nated the airport a public forum and scrutinized the regulation under the more stringent standard of review applicable to restrictions on speech in public forums — narrowly tailored to serve a significant governmental interest, leaving open alternative channels of communication. It is further suggested that the portion of the airport regulation at issue in *ISKCON v. Lee*, which prohibited the solicitation of funds in the airport, withstands constitutional scrutiny under this more stringent standard of review, and, therefore, it was unnecessary for the court to conduct a forum analysis.

The airport regulation merely prohibits the solicitation of funds in a "continuous or repetitive manner."[108] The requirement that a time, place and manner restriction on speech in a public forum be narrowly tailored, does not oblige the state to use the least restrictive means to realize its objective.[109] Rather, the state must not implement a restriction which is substantially broader than necessary to effectuate its purpose.[110] The airport regulation complies with this mandate since it prohibits only that conduct which interferes with the airport's effective operation — the continuous or repetitive solicitation of funds.[111]

Moreover, the airport regulation serves the significant governmental interest of facilitating air travel and protecting airport patrons from the agitation and disturbance caused by in-person so-

[108] *See ISKCON v. Lee*, 925 F.2d at 578-79. "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: . . . (c) The solicitation and receipt of funds." *Id.*

[109] *See* Ward v. Rock Against Racism, 491 U.S. 781, 782 (1989) ("less-restrictive-alternative" analysis is rejected as part of constitutionality of time, place and manner restriction). *See also* United States v. Albertini, 472 U.S. 675, 689 (1985) (bar letter regulation not "invalid simply because there is some imaginable alternative that might be less burdensome on speech"); Regan v. Time, Inc., 468 U.S. 641, 657 (1984) ("less-restrictive alternative analysis . . . has never been a part of the inquiry into the validity of a time, place,' and manner regulation"); Clark v. Community for Creative Non-Violence, 468 U.S. 288, 297 (1984) ("if the parks would be more exposed to harm without the sleeping prohibition than with it, the ban is safe from invalidation under the First Amendment"). *But see* Boos v. Barry, 485 U.S. 312, 329 (1988) (content-based restriction is not narrowly tailored if less restrictive alternative is readily available); Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 280 n.6 (1986) (under strict scrutiny court may consider "whether lawful alternative and less restrictive means could have been used").

[110] *See Rock Against Racism*, 491 U.S. at 799; *see also* Frisby v. Schultz, 487 U.S. 474, 485 (1988) ("a complete ban can be narrowly tailored but only if each activity within the proscription's scope is an appropriately targeted evil").

[111] *See supra* note 108.

licitation of money.[112] Additionally, since only "continuous or repetitive" solicitation of money is forbidden, alternative channels of communication, such as the distribution of literature, are still available to the public.[113]

The *ISKCON* court was not explicit as to which standard of review it was applying. Although it characterized the airport terminals as nonpublic forums, its analysis included an examination of the second prong of traditional public forum analysis: significant governmental interests served by the regulation.[114] It is submitted that the court's examination of "significant governmental interests" was inconsistent with its designation of the airport as a nonpublic forum. Instead, the time, place and manner regulation at issue in the case should have been reviewed solely to determine whether the restriction was reasonable and whether it substantially interfered with communication.[115] Finally, a better alternative was to classify the airports as public forums and uphold the regulation under the stricter standard of review.

Conclusion

Forum status can be determined only after careful examination

[112] *See ISKCON v. Lee*, 925 F.2d at 581. "Just as the Postal Authority in *Kokinda* had a significant interest in protecting users of the branch office from the in-person solicitation of funds, the Port Authority has an interest in protecting its airport patrons from the identical disruption of in-person solicitation." *Id. Cf. Kokinda*, 110 S. Ct. at 3126 (Kennedy, J., concurring) ("the Government here has a significant interest in protecting the integrity of the purposes to which it has dedicated the property, that is, facilitating its customers' postal transactions").

[113] *Cf. Kokinda*, 110 S. Ct. at 3126. Justice Kennedy, in his concurring opinion, noted that the postal regulation provided for alternative channels of communication because it only banned in-person solicitations. *Id.*

> The regulation, in its only part challenged here, goes no further than to prohibit personal solicitations on postal property for the immediate payment of money. The regulation, as the United States concedes, expressly permits the respondents and all others to engage in political speech on topics of their choice and to distribute literature soliciting support . . . .

Id. See also United States v. Grace, 461 U.S. 171, 180-81 (1983) (invalidating ban on picketing only on sidewalks surrounding court building); Linmark Assocs. Inc. v. Willingboro, 431 U.S. 85, 93 (1977) (ban on 'For Sale' signs does not leave sellers with realistic alternative channels of communication); Grayned v. City of Rockford, 408 U.S. 104, 120 (1972) (antinoise ordinance leaves open alternative channels of communication).

[114] *See ISKCON v. Lee*, 925 F.2d at 581.

[115] *See supra* notes 47-49 and accompanying text (different standards of review for different types of forums).

of a forum's physical characteristics *and* purpose. The majority in *ISKCON v. Lee* failed to engage in this two-part forum analysis, relying, instead, solely upon the Supreme Court's decision in *Kokinda* to determine that airports are nonpublic forums. It is suggested that a detailed scrutiny of the physical characteristics and purposes of the airports would have lead to the conclusion that airports are public forums. Accordingly, a more demanding standard of review would be applied to time, place and manner restrictions on speech in those areas. The regulation at issue in *ISKCON v. Lee* could have withstood such scrutiny, and, therefore, it was wholly unnecessary to make a precedent-setting determination as to the forum status of public airports.

The designation of a particular forum should not be ascertained hastily. In order to safeguard the fundamental right of access to public places for the exercise of first amendment privileges, courts should carefully examine the site of a speech-inhibiting regulation before labeling it a nonpublic forum. Such a determination not only increases the government's ability to restrain free speech in the area, but it will have a significant impact on the public's right to express themselves in that place in the future.

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