Oklahoma Law Review

Volume 46 | Number 1

1-1-1993

Constitutional Law: *International Society for Krishna Consciousness, Inc. v. Lee*: Is the Public Forum a Closed Category?

Gary E. Newberry

Follow this and additional works at: https://digitalcommons.law.ou.edu/olr

 Part of the Constitutional Law Commons

Recommended Citation

Gary E. Newberry, *Constitutional Law: International Society for Krishna Consciousness, Inc. v. Lee: Is the Public Forum a Closed Category?*, 46 OKLA. L. REV. 155 (1993), https://digitalcommons.law.ou.edu/olr/vol46/iss1/12

This Note is brought to you for free and open access by University of Oklahoma College of Law Digital Commons. It has been accepted for inclusion in Oklahoma Law Review by an authorized editor of University of Oklahoma College of Law Digital Commons. For more information, please contact Law-LibraryDigitalCommons@ou.edu.

NOTES

Constitutional Law: *International Society for Krishna Consciousness, Inc. v. Lee*: Is the Public Forum a Closed Category?

I. Introduction

First Amendment public forum analysis is a judicial doctrine balancing the public's free speech interests against the government's proprietary interests over public property. The First Amendment to the United States Constitution guarantees the freedom of speech.[1] However, that right is not absolute.

The United States Supreme Court has upheld the government's power to regulate speech under certain conditions.[2] One such condition exists where the government is acting as a proprietor over public property and seeks to maintain the property's intended function. Public forum analysis is utilized by the courts to determine the permissible extent that government may regulate speech in the interest of maintaining the efficient use of public property and facilities.

The United States Supreme Court, in *International Society for Krishna Consciousness, Inc. v. Lee (ISKCON III)*,[3] upheld a government agency's regulations that prohibited solicitation at the three airports under the agency's control. *ISKCON III* held that the airports were nonpublic forums.[4] The government regulations at issue were held to be reasonable and to meet the applicable reasonable basis standard of review.[5]

First, this note summarizes the history of the First Amendment public forum doctrine. The rationale of the district court *(ISKCON I)*, court of appeals *(ISKCON II)*, and Supreme Court *(ISKCON III)* are examined. Next, this note analyzes the

1. The First Amendment provides in full: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. CONST. amend. I.

2. "[F]reedom of speech and of the press which is secured by the Constitution, does not confer an absolute right to speak or publish . . . ." Gitlow v. New York, 268 U.S. 652, 666 (1925); *see also* Cox v. Louisiana, 379 U.S. 536, 554 (1965) ("[T]he rights of free speech and assembly, while fundamental in our democratic society, still do not mean that everyone with opinions or beliefs to express may address a group at any public place and at any time.").

3. 112 S. Ct. 2701 (1992). For purposes of clarity, the opinion of the United States Court for the Southern District of New York is referred to as *ISKCON I*; the opinion of the United States Court of Appeals for the Second Circuit is referred to as *ISKCON II*; and the opinion of the United States Supreme Court is referred to as *ISKCON III*.

4. *Id.* at 2706. For discussion of the legal significance of the distinction between public and nonpublic forums, *see infra* text accompanying notes 6-43.

5. *ISKCON III*, 112 S. Ct. at 2708. For discussion of the reasonable basis standard of review, *see infra* note 26.

Published by University of Oklahoma College of Law Digital Commons, 1993

First Amendment speech values implicated by *ISKCON III*. Finally, this note concludes that *ISKCON III* has devitalized the public forum doctrine by foreclosing the future creation of new public forums.

II. The Public Forum Doctrine

The public forum doctrine is relatively new.[6] Public forum analysis addresses whether government regulation of speech in publicly owned areas and facilities is constitutional.[7] The public forum doctrine dates back to *Hauge v. Committee for Industrial Organization*,[8] decided in 1939.

6. Government regulation of speech in publicly owned areas was first addressed in the 1897 case Davis v. Massachusetts, 167 U.S. 43 (1897). However, the public forum doctrine has developed primarily since the 1970s. The first Supreme Court opinion using the phrase "public forum" was in 1961. *See* International Ass'n of Machinists v. Street, 367 U.S. 740 (1961). Since 1961 the phrase "public forum" has been widely used. *See, e.g.*, R.A.V. v. City of St. Paul, 112 S. Ct. 2538 (1992); Forsyth County v. Nationalist Movement, 112 S. Ct. 2395 (1992); Burson v. Freeman, 112 S. Ct. 1846 (1992); Simon & Schuster, Inc. v. New York State Crime Victims Bd., 112 S. Ct. 501 (1991); Barnes v. Glen Theatre, Inc., 111 S. Ct. 2456 (1991); Renne v. Geary, 111 S. Ct. 2331 (1991); Lehnert v. Ferris Faculty Ass'n, 111 S. Ct. 1950 (1991); County of Allegheny v. ACLU, 492 U.S. 573 (1989).

7. For a more detailed discussion and historical background of public forum analysis, see generally C. Thomas Dienes, *The Trashing of the Public Forum: Problems in First Amendment Analysis*, 55 GEO. WASH. L. REV. 109 (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 (1984); Harry Kalven, *The Concept of the Public Forum:* Cox v. Louisiana, 1965 SUP. CT. REV. 1; Robert C. Post, *Between Governance and Management: The History and Theory of the Public Forum*, 34 UCLA L. REV. 1713 (1987); Geoffrey R. Stone, *Fora Americana: Speech In Public Places*, 1974 SUP. CT. REV. 233; Werhan, *The Supreme Court's Public Forum Doctrine and the Return of Formalism*, 7 CARDOZO L. REV. 335 (1986).

8. 307 U.S. 496 (1939). In *Hauge*, members of the Committee for Industrial Organization challenged a municipal ordinance that forbade all meetings and pamphleteering in the streets and other public areas without a permit. *Id.* at 502. The Court held that the ordinance was void on its face. *Id.* at 516.

Hauge describes the origin and scope of the public forum doctrine. *Id.* at 515-16. Streets and parks were described as being held in trust for use by the public, and as historically being used for purposes of assembly and the discussion of public questions. *Id.* Further, the use of such public places has long been considered part of the liberties and rights of the citizenry. *Id.* However, these rights are not completely uncircumscribed.

The citizens' right to use public places for speech activities was characterized in *Hauge* as being relative to the government's interest in preserving order and peace. *Id.* at 515. The government may regulate speech in the interests of all. *Id.* However, the government can not, in the guise of regulation, abridge or deny citizens the right to use public property for expressive activity. *Id.*

Hauge took away the government's unfettered discretion to restrict speech activity on public property. *Hauge* was a departure from the rule set forth in Commonwealth v. Davis, 167 U.S. 43 (1897). In *Davis* the court upheld the conviction of a preacher who had addressed a crowd in the Boston Common in violation of a city ordinance. *Id.* at 44. The Court adopted dicta from then Massachusetts Supreme Judicial Court Judge Oliver Wendell Holmes' decision in the lower court. Judge Holmes stated that "[F]or the legislature absolutely or conditionally to forbid public speaking in a highway or public park is no more an infringement of the rights of a member of the public than for the owner of a private house to forbid it in his house." *Id.* at 47 (quoting Commonwealth v. Davis, 162 Mass. 510, 511 (1895), *aff'd*, 167 U.S. 43 (1897)). *Davis* concluded that the preacher had no right to use the common except as allowed by regulations passed by the legislature at its discretion. *Id.*

https://digitalcommons.law.ou.edu/olr/vol46/iss1/12

Hauge held that speech cannot be absolutely prohibited by legislation in the traditional public forum.[9] However, two years later, in *Cox v. New Hampshire*,[10] the Supreme Court held that legislation may impose restrictions regulating the time, place, or manner of expression.[11]

Thirty-one years after *Cox*, the Court extended the right of access for speech activities to public property which had not been traditionally used for expressive purposes. In *Grayned v. City of Rockford*,[12] Justice Marshall stated that the crucial issue in public forum analysis is whether the manner of expression is incompatible with the normal activity of a particular place at a particular time.[13]

In *Lehman v. City of Shaker Heights*,[14] decided two years after *Grayned*, the Supreme Court returned to the public forum/nonpublic forum distinction, rejecting *Grayned*'s speech compatibility test. In 1983, nine years after *Lehman*, the Court developed a tripartite framework for analyzing the relationship of First Amendment interests to government property in *Perry Education Ass'n v. Perry Local Educators*

Hauge recognized that the citizenry had a right to use publicly owned property for free expression. *Hauge*, 307 U.S. at 516. The Court held that the government's authority to regulate speech would be circumscribed in public areas traditionally dedicated to public use. *Id.* These areas are labeled as "classic" or "traditional" public forums.

9. *Hauge*, 307 U.S. at 515-16.

10. 312 U.S. 569 (1941).

11. *Id.* at 571. *Cox* upheld an ordinance which prohibited unlicensed parades upon the public streets. *Id.* at 576. The Court reasoned that civil liberties depend on an organized society capable of maintaining public order. *Id.* at 574. Therefore, municipal restrictions on the use of public property were not necessarily inconsistent with civil liberties. *Id.*

12. 408 U.S. 104 (1972). In *Grayned*, the Court upheld an anti-noise ordinance which prohibited any person from making noise or causing a diversion which would disturb the peace or order of the school session. *Id.* at 107-08.

13. *Id.* at 104. *Grayned* assessed a speech regulation's reasonableness by whether the regulation was narrowly drawn to further a legitimate state interest. *Id.* at 116-17. *Grayned* expanded the public forum inquiry to include not only the consideration of a forum's public or nonpublic nature, but whether a proposed use of a forum was functionally incompatible with the forum's normal activity. *See* Werhan, *supra* note 7, at 412 (stating that *Grayned* shifted the burden to the government to demonstrate the functional incompatibility of a manner of expression with the activity normally conducted at a forum).

Grayned did not focus upon whether the speech the government sought to regulate occurred in a public or nonpublic forum. The Court did not automatically presume that the government could exclude speech activity from nontraditional public property.

14. 418 U.S. 298 (1974). In *Lehman*, Harry J. Lehman, a candidate for the office in the Ohio State House of Representatives, submitted a political advertisement for display in the card space inside the city transit system buses. The city had a regulation forbidding political advertisements in the buses and rejected Lehman's proffered ad.

The Court classified commercial advertising space on a city's transit system buses as a nonpublic forum. *Id.* at 302. The Court returned to its pre-*Grayned* analysis by relying on the public forum/nonpublic forum distinction as the determinative factor in whether government restrictions on speech were proper.

Lehman analyzed the physical characteristics of the buses, the city's purpose for the advertising spaces, and the primary function of the forum. *Id.* at 303-04. *Lehman* determined that no public forum existed. *Id.* at 304. The Court deferred to the city council's judgment without requiring the council to demonstrate whether the proposed speech activity was incompatible with the normal use of its transit system buses. *Id.* at 302-04.

Published by University of Oklahoma College of Law Digital Commons, 1993

Ass'n.[15] *Perry* articulated three categories of public property,[16] providing tests with more particularity than the three-factor analysis used in *Lehman.*

According to *Perry*, the first category of public property is the "quintessential" or "traditional" public forum.[17] *Perry* defined the traditional public forum as places that have traditionally been dedicated to assembly and debate or have attained the status of traditional public forum by government fiat.[18] Examples of the traditional public forum are places which are held in trust for use by the public and have been traditionally used for purposes of public assembly, communication, and debate; namely, streets and parks.[19]

The second category of public property defined in *Perry* includes property that the state has opened to the public for expressive purposes.[20] Examples of this "limited public forum" category include state university meeting facilities,[21] municipal theatres,[22] and school board meetings.[23] *Perry* held that the government must show that its speech regulations serve a compelling state interest and are narrowly drawn.[24] This "strict scrutiny" standard of review applies to the first two categories of public property defined in *Perry.*

The nonpublic forum is the third category of public property in *Perry.* According to *Perry*, the nonpublic forum encompasses property that has not traditionally, or by designation, served as a forum for public communication.[25] Speech regulations in the nonpublic forum are reviewable under the reasonable basis standard.[26]

Perry's public forum categories were utilized in *United States v. Kokinda,*[27] a

15. 460 U.S. 37, 45 (1983). In *Perry*, the Court classified an interschool mail system and teacher mailboxes as a nonpublic forum and found no First Amendment violation when the teachers' elected union was granted access to the system but such access was denied to a rival union. *Id.* at 54-55.

16. *Id.* at 45.

17. *Id.*

18. *Id.*

19. *Id.*; *see also Hague*, 307 U.S. at 515.

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

21. *Id.* (citing Widmar v. Vincent, 454 U.S. 263 (1981)).

22. *Id.* (citing Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546 (1975)).

23. *Id.* (citing Madison Joint Sch. Dist. v. Wisconsin Employment Relations Comm'n, 429 U.S. 167 (1976)).

24. *Id.*

25. *Id.* at 46.

26. *Id.* Under the reasonable basis standard, speech regulations must be reasonable and "not an effort to suppress expression merely because public officials oppose the speaker's view." *Id.* Such regulations "can be based on subject matter and speaker identity so long as the distinctions drawn are reasonable in light of the purpose served by the forum and are viewpoint neutral." Cornelius v. NAACP Legal Defense & Educ. Fund, 473 U.S. 788, 806 (1985). The reasonable basis standard is a limited standard of review. *Id.* at 808. To pass the reasonable basis test a speech restriction need only be reasonable; it need not be the most reasonable or the only reasonable limitation. *Id.*

27. 497 U.S. 720 (1990). In *Kokinda*, a political advocacy group that had solicited contributions on the sidewalks outside a post office challenged a Postal Service regulation prohibiting the in-person solicitation of money on postal premises. *Id.* at 724. In a plurality opinion, four Justices held that the post office sidewalk was not a traditional public forum. *Id.* at 727. The Court applied a reasonableness test to the Postal Service regulations and found that the regulations were based on reasonable administrative concerns. *Id.* at 735.

https://digitalcommons.law.ou.edu/olr/vol46/iss1/12

1990 United States Supreme Court case. Writing for the plurality in *Kokinda*, Justice O'Connor held that a post office sidewalk was not a public forum.[28] Justice O'Connor rejected the argument that because the post office sidewalk was physically indistinguishable from a municipal sidewalk, it must be a traditional public forum and subject to strict scrutiny.[29] Justice O'Connor stated that the mere physical characteristics of public property do not determine the property's forum classification.[30] Further, because the public is granted free access to government property does not convert such property into a public forum.[31]

Kokinda also considered whether the post office sidewalk could be classified as a limited public forum. The Court held that the Postal Service had not explicitly dedicated its sidewalk to any expressive activity.[32] Moreover, the Postal Service's allowance of some speech activities on postal property did not equate to a government dedication of a forum for speech activities.[33]

Kokinda held that the post office sidewalk fit into the third category of public property described in *Perry*, the nonpublic forum.[34] Justice O'Connor emphasized the purpose and function of the post office sidewalk in classifying it as a nonpublic forum.[35] She distinguished the postal sidewalk at issue from a nearby municipal sidewalk that paralleled a roadway.[36] Justice O'Connor placed significance on the fact that the post office sidewalk led only from the post office parking area to the front door of the post office, whereas, the municipal sidewalk constituted a public thoroughfare.[37]

According to Justice O'Connor, the post office sidewalk lacked the characteristics of a public sidewalk traditionally open to expressive activity.[38] The post office sidewalk was constructed solely to serve postal patrons and was not designed as a

28. *Id.* at 727.

29. *Id.*

30. *Id.* (citing Greer v. Spock, 424 U.S. 828 (1976)). In *Greer*, a prohibition against demonstrations and the distribution or posting of any publication on a military base (Fort Dix) without prior approval of a specified military authority was upheld. *Greer*, 424 U.S. at 835-37. *Greer* held that military reservations have not traditionally served as a place for free public assembly and debate. *Id.* at 838. Under a reasonable basis standard of review, the speech regulations of the base passed constitutional muster. *Id.* at 863. The military interest was stated to be a unique need to insist upon a respect for duty and discipline from new recruits and the protection of troop morale and discipline from civilian interference. *Id.* at 848-49.

31. *Kokinda*, 497 U.S. at 727; *see also* Cornelius v. NAACP Legal Defense & Educ. Fund, 473 U.S. 788, 802 (1985) ("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."); Perry Educ. Ass'n v. Perry Local Educators Ass'n, 460 U.S. 37, 47 (1983) ("[S]elective access does not transform government property into a public forum.").

32. *Kokinda*, 497 U.S. at 730.

33. *Id.*

34. *Id.*

35. *Id.* at 744-45.

36. *Id.* at 745.

37. *Id.* at 742.

38. *Id.* at 727-28.

Published by University of Oklahoma College of Law Digital Commons, 1993

necessary conduit or to facilitate the daily affairs of the local citizenry.[39] *Kokinda* held that the purpose of the post office sidewalk was to help provide for the most efficient and effective postal delivery system.[40]

As evidenced in the *Kokinda* plurality opinion, greater emphasis was placed on the reasons for a forum's creation than had previously been accorded that factor.[41] The Second Circuit Court of Appeals, in *ISKCON II*,[42] interpreted *Kokinda* as altering the Court's public forum analysis.[43] This new emphasis on a forum's purpose set the background for *ISKCON III*.

III. International Society for Krishna Consciousness v. Lee

ISKCON III resulted from more than fifteen years of litigation between the Port Authority of New York (Port Authority) and the International Society for Krishna Consciousness (the Krishnas). The Port Authority owns and operates thirty-three facilities, including the John F. Kennedy International Airport, La Guardia Airport, and Newark International Airport.[44]

The Krishnas are a New York not-for-profit religious corporation which advocates the theological and missionary positions of the Krishna Consciousness. Krishna members are required to perform a ritual known as *sankirtan*, which involves disseminating religious literature and soliciting funds to support the religion.[45] *Sankirtan* is integral to the practice of Krishna Consciousness and the principal means of its support.[46]

In 1975, the Krishnas challenged Port Authority regulations which prohibited the continuous and repetitive distribution of literature and the solicitation of contributions from persons in the public areas of the Port Authority's airports.[47] The Krishnas initially sought access to airline-controlled property as well, but subsequently settled with the airlines in 1987.[48] The Krishnas contended that the

39. *Id.* at 727.

40. *Id.* at 732.

41. *Id.* at 744 (Brennan, J., dissenting).

42. 925 F.2d 576 (2d Cir.), *aff'd*, 112 S. Ct. 2709 (1991).

43. *Id.* at 580-81.

44. *See ISKCON II*, 925 F.2d at 578. The Port Authority was created in 1921 by a compact consented to by Congress between the States of New York and New Jersey. *See ISKCON I*, 721 F. Supp. 572 (S.D.N.Y. 1989). The three airports operated by the Port Authority are some of the busiest in the world. *See ISKCON II*, 925 F.2d at 577. In 1986 they served approximately 79,000,000 travelers, including more than half of the trans-Atlantic market. *Id.* Estimates project 110,000,000 travelers will use the Port Authority airports by the latter part of the 1990s. *Id.*

45. *ISKCON I*, 721 F. Supp. at 573.

46. *Id.*

47. *See id.*

48. The Krishnas settled with all the airlines prior to the district court decision. The district court did not disclose the details of the settlement. *See id.* at 573.

When the Krishnas commenced suit in 1975, the group was seeking access to airline-controlled property as well as Port Authority-controlled property. The district court held that the airlines were indispensable parties and denied the Krishnas' motion for preliminary injunctive relief from the challenged Port Authority regulations. International Soc'y for Krishna Consciousness v. New York Port

https://digitalcommons.law.ou.edu/olr/vol46/iss1/12

Port Authority regulations unconstitutionally prohibited protected First Amendment activity in a public forum.[49] Prior to resolution of the Krishnas' motion for summary judgment in 1987, the Port Authority adopted new regulations which would permit literature dissemination and solicitation activities outside the airports.[50]

A. ISKCON I: The District Court Decision

A magistrate, to whom the federal district court had referred all pretrial matters, found that airport terminals are public forums.[51] Consequently, the Port Authority's regulations were held to be an unconstitutional restriction of the Krishnas' First Amendment rights.[52] After the magistrate's decision, the district court in *ISKCON*

Auth., 425 F. Supp. 681, 686 (S.D.N.Y. 1977). The Krishnas subsequently amended their complaint to include as defendants several of the airlines who were leasing space from the Port Authority. *See ISKCON I*, 721 F. Supp. at 573.

In 1979, the airlines moved for dismissal, arguing that their prohibition of the Krishnas' activities was not state action. The district court denied the airline's motion but certified the state action question to the Second Circuit Court of Appeals. *Id.* The court of appeals accepted certification, and subsequently remanded the case for further discovery and development of the evidentiary record. *See* International Soc'y for Krishna Consciousness v. Air Canada, 727 F.2d 253, 255 (2d Cir. 1984). On remand in 1984, the district court referred the case to a federal magistrate for completion of all pretrial matters.

After discovery, the airlines again moved for dismissal. In 1987, the federal magistrate issued his findings and recommended that the airlines motion for dismissal be denied because the state action requirement had been met. *ISKCON I*, 721 F. Supp. at 573. The airlines and the Krishnas subsequently settled, which left the Port Authority as the only remaining defendant.

49. *ISKCON I*, 721 F. Supp. at 573.

50. *Id.* at 572-74 n.4. The new regulations provided in pertinent part:

> B. Non-commercial activity at Port Authority air terminals which are not occupied by a lessee, licensee or permittee is subject to the following conditions and restrictions: . . .
>
> 1. The following conduct is prohibited within the interior areas of buildings or structures at an air terminal if conducted by a person to or with passers-by in a continuous or repetitive manner:
>
> (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.
>
> 2. The following conduct is prohibited at an air terminal:
>
> . . . .
>
> (b) The performance of any ceremony, speech, song, carrying of any sign or placard, or other such activity which constitutes a danger to persons or property, or which interferes with the orderly formation and progression of waiting lines, or which interferes with any of the following: pedestrian and/or vehicular travel; the issuance of tickets or boarding passes or equivalent documents for air or ground transportation; luggage or cargo movement or handling; the entry to and exit from vehicles; security procedures; government inspection procedures; cleaning, maintenance, repair or construction operations.

Id.

51. *See ISKCON I*, 721 F. Supp. at 573.

52. *Id.* at 574.

Published by University of Oklahoma College of Law Digital Commons, 1993

I considered the effect of the Port Authority's new regulations on the scope of the contested forum. The Port Authority argued that the entire airport, including the exterior portions where *sankirtan* would be permitted, should be considered the relevant forum. The court in *ISKCON I* concurred with the magistrate's finding that the relevant forum is defined not by a proposed regulatory scheme but by the access sought by the speaker.[53] Therefore, the interior portion of the airport was the only relevant forum at issue since the Krishnas sought access to that area only.[54]

The district court in *ISKCON I* next considered whether the Port Authority regulations should be subjected to the public forum strict scrutiny standard or the nonpublic forum reasonable basis standard.[55] The United States Supreme Court had never decided whether airports constitute public forums.[56] However, every federal circuit court that has considered the issue has classified large municipal airports as public forums.[57]

The federal circuit courts uniformly held airports to be analogous to city streets because airports are continuously open to the public and are lined with restaurants, newsstands, shops, and other businesses for public use.[58] Airports have been held

53. *Id.* at 574-75.

54. *Id.* at 575.

55. *Id.*

56. In Board of Airport Comm'rs v. Jews for Jesus, 482 U.S. 569 (1987), the Court granted certiorari on the question but overturned the speech regulations at issue on overbreadth grounds. *Id.* at 576. The status of the airport as a public forum was left unaddressed.

57. *See, e.g.*, Jamison v. City of St. Louis, 828 F.2d 1280, 1282-84 (8th Cir. 1987), *cert. denied*, 485 U.S. 987 (1988) (Lambert-St. Louis International Airport); Jews for Jesus, Inc. v. Board of Airport Comm'rs, 785 F.2d 791, 793-95 (9th Cir. 1986) (Los Angeles International Airport), *aff'd on other grounds*, 482 U.S. 569 (1987); United States Southwest Africa/Namibia Trade & Cultural Council v. United States, 708 F.2d 760, 763-68 (D.C. Cir. 1983) (Washington's National and Dulles Airports); Fernandes v. Limmer, 663 F.2d 619, 626-27 (5th Cir. Unit A Dec. 1981) (Dallas/Fort Worth Regional Airport), *cert. dismissed*, 458 U.S. 1124 (1982); Chicago Area Military Project v. City of Chicago, 508 F.2d 921, 926 (7th Cir.) (Chicago's O'Hare Airport), *cert. denied*, 421 U.S. 992 (1975); Kuszynski v. City of Oakland, 479 F.2d 1130, 1131 (9th Cir. 1973) (Oakland Airport); *see also* Gannett Satellite Informational Network v. Berger, 716 F. Supp. 140, 149 (D.N.J. 1989) (Newark Airport), *aff'd in part and rev'd in part*, 894 F.2d 61 (3d Cir. 1990); International Soc'y for Krishna Consciousness v. Wolke, 453 F. Supp. 869, 872 (E.D. Wis. 1978) (General Mitchell Field in Milwaukee); International Soc'y for Krishna Consciousness v. Griffin, 437 F. Supp. 666, 672-73 (W.D. Pa. 1977) (Greater Pittsburgh International Airport); International Soc'y for Krishna Consciousness v. Rochford, 425 F. Supp. 734, 742 (N.D. Ill. 1977), *aff'd in part and rev'd in part*, 585 F.2d 263 (7th Cir. 1978) (Chicago's O'Hare Airport); International Soc'y for Krishna Consciousness v. Engelhardt, 425 F. Supp. 176, 180 (W.D. Mo. 1977) (Kansas City International Airport); *cf.* Wolin v. Port of New York Auth., 392 F.2d 83 (2d Cir.) (Port Authority bus terminal a public forum), *cert. denied*, 393 U.S. 940 (1968). *But see* International Caucus of Labor Comms. v. Metropolitan Dade County, 724 F. Supp. 917, 924 (S.D. Fla. 1989) (Miami International Airport terminal not a traditional public forum).

58. At the time the Krishnas submitted their motion for summary judgment to the district court, the lobby of the International Arrivals Building at Kennedy Airport 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. The east and west corridors of the same building had 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 candy shops, a cash and travelers check machine, an

https://digitalcommons.law.ou.edu/olr/vol46/iss1/12

to be enclosed public thoroughfares, indistinguishable from municipal streets except for their interior nature.[59] The court in *ISKCON I* found the precedents of the circuit courts and the analogy of airports to city streets to be persuasive.[60]

Nevertheless, the court contemplated the Port Authority's contentions that airports are distinguishable from city streets because of the presence of captive audiences, pedestrian congestion, unique security concerns, and the "singular purpose" of an airport.[61] The Port Authority raised the proposition from *Lehman* that the presence of a captive audience is a factor to consider in public forum analysis. *ISKCON I* found *Lehman* inapposite.[62] The court characterized the Port Authority's analogy between uses and conditions of an airport terminal and the interior of the city buses in *Lehman* as "farfetched."[63]

ISKCON I also rejected the Port Authority's argument that pedestrian traffic congestion and airport security concerns distinguish airports from city streets.[64] The court noted that traffic congestion and security problems are not unique to airport facilities.[65] For example, the streets of downtown Manhattan maintain their public forum character despite the risk of crime or traffic congestion problems.[66] *ISKCON I* held that concern over the efficient movement of traffic was not a sufficient justification for prohibiting expression.[67] Protection of captive audiences, traffic congestion problems, and security concerns can appropriately be addressed by time, place, and manner restrictions.[68]

The court summarily rejected the Port Authority's argument that because airports have a singular purpose of facilitating air travel, terminals are thus distinguishable from city streets.[69] The court agreed that the principal purpose of airports is to facilitate transportation, but noted that city streets had the same primary purpose.[70]

India store, and a boutique-sized Bloomingdale's. *See ISKCON II*, 925 F.2d at 578.

59. *ISKCON I*, 721 F. Supp. at 577 ("[W]e find it [im]plausible that the mere presence of a roof would preclude the terminals' designation as public fora when, in every other relevant respect, they are virtually identical to public streets and thoroughfares."); *see also Jamison*, 828 F.2d at 1283; *United States Southwest Africa/Namibia Trade & Cultural Council*, 708 F.2d at 764; *Chicago Area Military Project*, 508 F.2d at 925; *cf. Wolin*, 392 F.2d at 89 (Port Authority bus terminal physically resembles city street).

60. *ISKCON I*, 721 F. Supp. at 577.

61. *Id.* at 577-79.

62. *Id.*

63. *Id.* at 578 n.8; *see also United States Southwest Africa/Namibia Trade & Cultural Council*, 708 F.2d at 767 ("A person in the airports' concourse or walkways who considers advertisement . . . to be objectionable enjoys the freedom simply to walk away that a passenger on a bus does not.").

64. *ISKCON I*, 721 F. Supp. at 578.

65. *Id.*

66. *Id.*

67. *Id.*; *see also Fernandes*, 663 F.2d at 619 (traffic concerns do not "justify the total exclusion of those wishing to exercise free speech"); *Wolin*, 392 F.2d at 91-92 (absolute prohibition of pamphleteering cannot be defended on the grounds that it would obstruct traffic).

68. *ISKCON I*, 721 F. Supp. at 578.

69. *Id.* at 579.

70. *Id.* at 579; *see also Fernandes*, 465 F. Supp. at 501 n.4 (N.D. Tex. 1979), *aff'd*, 663 F.2d 619 (5th Cir. Unit A Dec. 1981), *cert. dismissed*, 458 U.S. 1124 (1982).

Published by University of Oklahoma College of Law Digital Commons, 1993

More important, the court held that courts must look beyond the principal purposes of a forum to determine its public or nonpublic nature.[71] The district court in *ISKCON I* concluded that no genuine issue of material fact existed and granted the Krishnas' motion for summary judgment.[72]

B. ISKCON II: The Court of Appeals Decision

In *ISKCON II* the Second Circuit Court of Appeals affirmed the district court's grant of summary judgment in *ISKCON I* concerning the Krishnas' distribution of literature.[73] However, the appeals court reversed that part of the decision which overturned the Port Authority ban on solicitation.[74] The court acknowledged that prior to the United States Supreme Court's decision in *Kokinda*, it was prepared to follow the decisions of the other circuit courts.[75] In light of *Kokinda*, however, the court declined to adopt the holdings of the other circuit courts and held that the Port Authority airports were nonpublic forums.[76]

The circuit court in *ISKCON II* interpreted *Kokinda* as fundamentally altering public forum analysis by requiring courts to analyze a forum's particular purpose in detail.[77] According to the court, *Kokinda* elevated a forum's function and purpose to crucial elements in determining a forum's classification.[78]

The court analyzed the Port Authority airports using its interpretation of a *Kokinda* "forum purpose test." *ISKCON II* analogized the airports to the sidewalk in *Kokinda*. Like the sidewalk in *Kokinda*, the airports were characterized as remote from pedestrian thoroughfares and intended solely to facilitate a single type of transaction. The airport's facilitation of air travel was deemed unrelated to protected speech activities.[79] The court in *ISKCON II* also placed significance on the fact that people using the terminal facilities were there solely for air travel-related purposes.[80]

The court then compared the purposes of the *Kokinda* antisolicitation regulations and the Port Authority's regulations and held that they served precisely the same purposes.[81] One purpose was the protection of facility users from the disruption of in-person solicitation.[82] Another purpose was to ease pedestrian congestion.[83]

Kokinda was interpreted by *ISKCON II* as distinguishing between the forum classification of dedicated-use facilities and general-use facilities such as streets and

71. *ISKCON I*, 721 F. Supp. at 579.
72. *Id.*
73. *ISKCON II*, 925 F.2d at 582.
74. *Id.* at 581-82.
75. *Id.* at 580. *Kokinda* was decided subsequent to *ISKCON I* and subsequent to the cases cited *supra* note 57.
76. *ISKCON II*, 925 F.2d at 580.
77. *Id.*
78. *Id.* at 580-81. For a discussion of *Kokinda*, *see supra* notes 27-43 and accompanying text.
79. *ISKCON II*, 925 F.2d at 581.
80. *Id.*
81. *Id.*
82. *Id.*
83. *Id.* at 582.

https://digitalcommons.law.ou.edu/olr/vol46/iss1/12

parks.[84] Dedicated-use facilities such as airports or postal facilities would be classified as nonpublic forums where the government may prohibit solicitation if a reasonable basis exists.[85] General-use facilities would be classified as public forums[86] where any government regulation of speech would be reviewed under strict scrutiny.

The court in *ISKCON II* affirmed the earlier *ISKCON I* rejection of the Port Authority ban on the distribution of literature.[87] The court noted that the four justices in *Kokinda* who held that the post office sidewalk was a nonpublic forum were influenced by the proposition that in-person solicitation is more "intrusive" than pamphleteering.[88] However, the court in *ISKCON II* primarily based its affirmance on a simple tally of how the justices voted in *Kokinda*.[89] The court determined that five of the justices would not prohibit distribution of literature on the postal sidewalk in *Kokinda*.[90] Because the court in *ISKCON II* considered *Kokinda* controlling, it held that literature distribution could not be completely banned at Port Authority airports either.[91]

The United States Supreme Court granted certiorari to consider: (1) whether solicitation of contributions for a religious cause can be prohibited on a public airport concourse; (2) whether a public corridor in a public airport is a public forum; and (3) whether the government can forbid the distribution of literature if the airport is held to be a nonpublic forum.[92]

C. ISKCON III: The Supreme Court Decision

The United States Supreme Court in *ISKCON III* affirmed the court of appeals decision in *ISKCON II*.[93] Writing for the majority, Chief Justice Rehnquist held that airports are nonpublic forums and solicitation activities can be prohibited if a reasonable basis exists.[94]

ISKCON III held that neither by tradition nor purpose could airports be classified as public forums.[95] Chief Justice Rehnquist stated that airports are commercial

84. *Id.*
85. *Id.*
86. *Id.* at 581-82.
87. *Id.* at 582.
88. *Id.* at 581.
89. *Id.* at 580-82.
90. *Id.* at 581-82.
91. *Id.* at 582.
92. *See* International Soc'y for Krishna Consciousness, Inc. v. Lee, 112 S. Ct. 2701 (1992) *(ISKCON III)*. A petition for rehearing en banc to the court of appeals was denied prior to the petition for certiorari. *See ISKCON II*, 925 F.2d at 587.
93. International Soc'y for Krishna Consciousness, Inc. v. Lee, 112 S. Ct. 2701 (1992) *(ISKCON III)*.
94. *Id.* at 2706, 2708. Chief Justice Rehnquist was joined by Justices White, O'Connor, Scalia, and Thomas. Justice O'Connor filed a concurring opinion. Justice Kennedy filed an opinion concurring in the judgment, of which Justices Blackmun, Stevens, and Souter joined as to part I. Justice Souter filed a dissenting opinion, joined by Justices Blackmun and Stevens.
95. *Id.* at 2706-07.

Published by University of Oklahoma College of Law Digital Commons, 1993

enterprises that do not have the principal purpose of promoting the free exchange of ideas.[96] The Court found it significant that the Port Authority considered its airport's purpose to be the facilitation of air travel, not the promotion of expression.[97] Further, *ISKCON III* noted the Port Authority had never dedicated the airport terminal for expressive activities.[98]

ISKCON III held that airports have not historically been made available for speech activity.[99] Because the modern air terminal has appeared relatively recently, the Court held airports could not be described as traditionally having been held in the public trust for purposes of expressive activity.[100]

The Court discounted arguments analogizing historical speech activity at transportation nodes such as rail stations, bus stations, wharves, and Ellis Island with speech activities at airports.[101] *ISKCON III* termed evidence of such historical speech as irrelevant to public forum analysis, because sites such as bus and rail terminals have traditionally been privately owned.[102] The practices of privately held transportation centers were held not to affect the determination of the government's regulatory authority over a public airport.[103] The Court limited its public forum analysis to the public airport, refusing to equate airports with transportation modes in general.[104]

ISKCON III held the Port Authority's ban on solicitation was reasonable.[105] The Court noted that solicitation activities may have a disruptive effect on airport operations by impeding the flow of travelers through the airport.[106] Travelers may be slowed while deciding whether to contribute or alter their path to avoid the solicitation.[107] *ISKCON III* also stated that face-to-face solicitation by skillful and unprincipled solicitors presents a risk of duress that is an appropriate target of regulation.[108]

The Court deferred to the Port Authority's judgment that solicitation could best be monitored by limiting the activity to the sidewalks outside the airports.[109] Though the inconvenience caused by the Krishnas' activities may be small, *ISKCON III* held that the Port Authority could reasonably worry that even such incremental effects could cause much disruption in light of pedestrian congestion problems.[110]

96. *Id.* at 2707.
97. *Id.*
98. *Id.*
99. *Id.* at 2706.
100. *Id.*
101. *Id.* at 2707.
102. *Id.* at 2706.
103. *Id.*
104. *Id.*
105. *Id.* at 2709.
106. *Id.* at 2708.
107. *Id.*
108. *Id.*
109. *Id.* at 2708-09.
110. *Id.* at 2709.

https://digitalcommons.law.ou.edu/olr/vol46/iss1/12

IV. ISKCON III and Public Forums

A. Free Speech Restrictions — First Amendment Implications

The *ISKCON III* decision, by implication, expands and liberalizes the government's power to restrict speech. *ISKCON III* may expand the scope of the government's power to restrict speech, not only in airports, but foreseeably to analogous facilities such as bus, subway, and train stations as well.

One First Amendment value directly implicated in *ISKCON III* is solicitation speech. Solicitation is a form of speech involving interests recognized and protected by the First Amendment.[111] A nexus exists between solicitation and the communication of information and the advocacy of causes. Solicitation is characterized by informative and persuasive speech.[112] A soliciting group will typically communicate information about the organization's goals and activities, disseminate views and ideas, and advocate the organization's cause, incidental to the group's quest for raising funds.[113] A donor's contribution acts as a general expression of support for the soliciting group and its views and represents an open exchange of ideas.[114]

A solicitation ban may quell the free interchange and advocacy of certain information, ideas, and causes. An organization's ability to convey its message to the public could be diminished as a result of being relegated into using a less effective forum. Prohibiting or reducing the efficacy of group solicitation efforts may have the ultimate effect of jeopardizing an organization's existence and continuing ability to communicate its ideas.[115]

A danger exists that the government will distort the "marketplace of ideas" by prohibiting certain types of speech. The government could deliberately or inadvertently change the nature of public discussion by restricting expression like solicitation and pamphleteering. The classification of airports and similar facilities as nonpublic forums increases the risk that government will abuse the judicial deference accorded it by the reasonable basis standard of review. The government could more easily concoct "reasonable" justifications to prohibit certain speech than would be the case under the nondeferential strict scrutiny standard of review.[116] In any given situation, the government could seek to suppress ideas and information it disfavors by finding distinct reasons why the message is inappropriate to that forum.

In an age of growing insularity in which the traditional gathering place — the "typical main street" — is being increasingly displaced by privately owned shopping malls, the danger is that many forms of speech will be de facto regulated out of the

111. *See* Riley v. National Fed'n of the Blind, 487 U.S. 781, 788-89 (1988); Schaumberg v. Citizens for a Better Env't, 444 U.S. 620, 629 (1980).

112. *Schaumburg*, 444 U.S. at 632.

113. *Id.*

114. *See* Buckley v. Valeo, 424 U.S. 1, 21 (1976).

115. *See* Cornelius v. NAACP Legal Defense & Educ. Fund, 473 U.S. 788, 798-99 (1985).

116. *See generally* Farber & Nowak, *supra* note 7.

Published by University of Oklahoma College of Law Digital Commons, 1993

"marketplace of ideas" for lack of an effective forum.[117] Modern socioeconomic changes, such as the societal loss of a sense of community and the advent of convenient, large shopping centers, have largely supplanted public streets and parks as areas where the public congregates.[118] Because the base of much community activity has shifted away from public streets and parks, owners of quasi-public facilities such as shopping malls have, to an extent, displaced the state from control of First Amendment forums.[119] The Supreme Court's refusal in *ISKCON III* to recognize new public forums that do not fit within the narrow tradition of streets and parks devitalizes the public forum doctrine in current times of fast-changing technology. Since most citizens now travel by automobile, and parks are more often locales for crime rather than discussion, the *ISKCON III* court's inflexible interpretation of the public forum doctrine could lead to a serious curtailment of public expression.[120] The increasing scarcity of effective public forums, where meaningful interaction between speakers and the public can take place, magnifies the importance of *ISKCON III* in First Amendment jurisprudence.

B. Analysis of the Port Authority Regulations Under the Strict Scrutiny Standard

The classification of airports as nonpublic forums in *ISKCON III* is significant because a forum's status determines the standard of review applied to speech regulations in the forum.[121] While the reasonable basis standard of review merely requires a government regulation to be reasonable and viewpoint-neutral, the strict scrutiny standard applied to public forums requires regulation of expressive activity to be narrowly drawn and promulgated in furtherance of a compelling state interest.[122] The Port Authority regulations would probably fail strict scrutiny review. The Port Authority regulations prohibit all solicitation activities.[123] The regulations constitute time, place, or manner restrictions only in the sense that they permit no manner of solicitation at any time or at any place in the airports. The

117. Individual states may protect the First Amendment right of access for speech activities on privately owned property. In Pruneyard Shopping Ctr. v. Robins, 447 U.S. 74 (1980), the United States Supreme Court held that free speech and the right to petition were fundamental rights which justified the California Constitution's imposition of reasonable restrictions on private property rights. *Id.* at 88. The Court thus upheld California's protection of a right of access for speech activities in the common areas of privately owned shopping malls. *Id.*

The right to First Amendment access to privately owned property was limited in *Pruneyard*. *Pruneyard* left the protection of First Amendment access to privately owned property to the legislative prerogative of the individual states. Furthermore, there is no federal or Constitutional protection for First Amendment speech access to privately owned property. In Hudgens v. NLRB, 424 U.S. 507 (1976), the Court held that speech restrictions by private shopping malls is not government action and thus cannot be Constitutionally prohibited. *Id.* at 519-21.

118. *See* WARREN FREEDMAN, FREEDOM OF SPEECH ON PRIVATE PROPERTY 37 (1988).

119. *See Hudgens*, 424 U.S. at 539 (Marshall, J., dissenting); *How Shopping Malls Are Changing Life in U.S.*, U.S. NEWS & WORLD REP., June 18, 1973, at 43 (referring to shopping malls as a "New Kind of Civic Center").

120. *See ISKCON III*, 112 S. Ct. at 2717 (Kennedy, J., concurring).

121. *See* Perry Educ. Ass'n v. Perry Local Educators Ass'n, 460 U.S. 37, 45-46 (1983).

122. *Id.*

123. The text of the regulation is set forth at *supra* note 50.

https://digitalcommons.law.ou.edu/olr/vol46/iss1/12

government has a heavy burden of justification when it seeks to prohibit an entire category of speech.[124] Under the strict scrutiny standard, the Port Authority would have to show why nothing short of the total ban they imposed would be sufficient to further their interests. The Port Authority would also have to demonstrate that its regulations do not burden substantially more speech than is necessary to protect its legitimate interests.[125]

One of the primary interests the Port Authority seeks to further by prohibiting the Krishnas' solicitation activities is the expeditious movement of air travelers by reducing congestion in the terminal passageways.[126] While the Port Authority has a substantial interest in controlling the flow of traffic in its airports, that interest is no greater than the identical governmental interest in controlling the movement of traffic in public streets.[127] There would seem to be no more substantial distinction between the incompatibility of the government interest and free speech interest on a public street than in a major airport terminal. In light of the fact that the Port Authority permits the inefficiencies of movement caused by travelers' stopping to patronize the numerous shops along the terminal passageways, the Port Authority would have difficulty justifying why at least some administrative inconvenience could not be tolerated from the Krishnas' solicitation activities.[128]

The Port Authority could accommodate the Krishnas' First Amendment rights as well as promote the expeditious movement of air travel by promulgating reasonable time, place, and manner restrictions on solicitation short of a total ban. The Port Authority could restrict solicitation activities during peak traffic hours and limit the locations within the terminal buildings where solicitation is permitted. The Port Authority could also restrict the numbers of solicitors allowed or require them to obtain a permit.[129] Because a reasonable, narrowly drawn regulation on the Krishnas' solicitation activities could accomplish the Port Authority's objective of

124. *See* Schad v. Mount Ephraim, 452 U.S. 61, 67, 72-74 (1981) (holding that the categorical prohibition of a class of protected expression demands heightened scrutiny and evidence that the complete exclusion is needed).

125. *See* Ward v. Rock Against Racism, 491 U.S. 781, 799 (1989).

126. *ISKCON III*, 112 S. Ct. at 2708.

127. *Id.* at 2704.

128. *See ISKCON II*, 925 F.2d at 586 (Oakes, C.J., dissenting); *see also* Boos v. Barry, 485 U.S. 312, 335 (1988) (Brennan, J., concurring in part and concurring in judgment) ("government [must] regulate based on actual congestion . . . rather than based on predictions that speech with a certain content will induce [certain] effects"); NAACP v. Button, 371 U.S. 415, 438 (1963) ("[b]road prophylactic rules in the area of free expression are suspect . . . Precision of regulation must be the touchstone").

129. *ISKCON II*, 925 F.2d at 586 (Oakes, C.J., dissenting); *see also* Heffron v. International Soc'y for Krishna Consciousness, 452 U.S. 640, 654 (1981) (upholding restriction of the Krishnas' solicitation activities at state fair to stationary booths); International Soc'y for Krishna Consciousness v. Rockford, 585 F.2d 263, 268-69 (7th Cir. 1978) (upholding location restrictions on speech activities in airport); Wolin v. Port of New York Auth., 392 F.2d 83, 93-94 (2d Cir.) (holding that Port Authority may set reasonable limitations on the number of people who engage in First Amendment activities as well as the duration and places within their facilities where expression may be exercised), *cert. denied*, 393 U.S. 940 (1968).

Published by University of Oklahoma College of Law Digital Commons, 1993

reducing airport congestion, the Port Authority's regulation would probably be overturned under strict scrutiny review as an unconstitutional restriction of speech.

ISKCON III states that the Port Authority has an interest in protecting airport patrons from the "disruption" of in-person solicitation.[130] However, speech may not be banned merely because it may disturb or coerce its listener into action.[131] Airport patrons are free to avoid the Krishnas' message by simply walking away.[132] The First Amendment is often inconvenient. However, inconvenience does not relieve the government of its obligation to tolerate speech.[133] The Port Authority's paternalistic intent in protecting its patrons from bothersome or disruptive speech would not rise to the level of a significant governmental interest and would thus fail strict scrutiny review.

ISKCON III denied strict scrutiny protection to expressive activity in public airports by classifying airports as nonpublic forums. Consequently, the Port Authority regulations need only satisfy a deferential standard of reasonableness to survive judicial review. Furthermore, even though the Port Authority could have promulgated regulations more accommodating to expressive activities, the reasonable basis standard only requires a regulation to be reasonable; it does not need to be the most reasonable limitation.[134]

C. Application of Kokinda to ISKCON III

The majority of the judges in *ISKCON II* based their decision on the premise that *Kokinda* had altered the Supreme Court's public forum analysis.[135] Here, the majority of judges interpreted *Kokinda* as focusing on the distinction between public dedicated-use facilities, and public general-use facilities.[136] The former would be classified as nonpublic forums, and the latter would be classified as public forums. The purpose and everyday functioning of a facility would be the sole determinant of a forum's status.[137]

ISKCON III did not explicitly address whether *Kokinda* established a public forum purpose test. The Court, however, examined the purpose of the modern airport as well as its historical use as the primary factors in determining forum status.[138] *ISKCON III*, like *Kokinda*, engaged in a fact-specific inquiry regarding a forum's purpose. Cases forming the foundation of the public forum doctrine analyzed whether expressive activity was compatible with the normal functioning

130. *ISKCON III*, 112 S. Ct. at 2708.

131. *See* NAACP v. Claiborne Hardware Co., 458 U.S. 886, 910 (1982).

132. *See* Cohen v. California, 403 U.S. 15, 21 (1971) (stating that those offended or annoyed by speech can "avoid further bombardment of their sensibilities . . . by averting their eyes").

133. *ISKCON III*, 112 S. Ct. at 2719 (Kennedy, J., concurring).

134. *Id.* at 2708 (citing United States v. Kokinda, 497 U.S. 720, 735-36 (1990)).

135. *See ISKCON II*, 925 F.2d at 580.

136. *Id.* at 581-82.

137. *See id.* at 584 (Oakes, C.J., dissenting).

138. *See ISKCON III*, 112 S. Ct. at 2707-08.

https://digitalcommons.law.ou.edu/olr/vol46/iss1/12

of the forum.[139] *ISKCON III* and *Kokinda* go further, applying principles of analysis developed in cases addressing novel and specialized contexts.[140] The Court had never previously applied a reasonableness test to the context of government property open to the public.[141]

In *Kokinda*, only four justices agreed that the post office sidewalk at issue was a public forum. Justice Kennedy never reached the issue of whether the sidewalk was a public forum. Justice Kennedy stated that a strong argument existed that because of the wide range of activity that the government permitted on the sidewalk, it was more than a nonpublic forum.[142]

The circuit court in *ISKCON II* elevated one of the important factors used in *Kokinda*'s analysis to the status of the sole determining factor. In *Kokinda*, Justice O'Connor assessed several factors besides the sidewalk's purpose, in determining that the post office sidewalk was not a public forum. Justice O'Connor considered the sidewalk's location, degree of public access, and whether post office sidewalks had historically been used for public communication and free assembly.[143] In contrast to the circuit court's narrow interpretation of *Kokinda*, Justice O'Connor asserted that whether a forum had traditionally served the role of a public forum illuminated the Court's analysis and was the critical inquiry in *Kokinda*.[144] The Supreme Court's analysis in *ISKCON III* was broader than the circuit court and did not focus on any single factor as being dispositive of a forum's status. Like *Kokinda*, *ISKCON III* evaluated the traditional use of the relevant forum, as well as the forum's purpose.[145]

Kokinda held that the post office sidewalk at issue lacked the characteristics of the traditional public sidewalk which would be open to expressive activity.[146] This is the major factual distinction between *Kokinda* and *ISKCON III*. Unlike the

139. *See Kokinda*, 497 U.S. at 743-46; *Grayned*, 408 U.S. at 116 ("The crucial question is whether the manner of expression is basically incompatible with the normal activity of a particular place at a particular time.").

140. *See Kokinda*, 497 U.S. at 746-48. *ISKCON III* cited Cornelius v. NAACP Legal Defense & Educ. Fund, 473 U.S. 788, 788 (1985), as authority that a forum's purpose is a relevant factor in public forum analysis. *Cornelius* considered whether advocacy groups could be excluded from participation in the Combined Federal Campaign, a fund-raising drive held exclusively in the federal workplace. The Court held the Combined Federal Campaign was a nonpublic forum. *Id.* at 806. The *Perry* decision, cited extensively in both *ISKCON III* and *Kokinda*, held the internal mail system of a public school was not a public forum. Perry Educ. Ass'n v. Perry Local Educators Ass'n, 460 U.S. 37, 46 (1983).

Both *Cornelius* and *Perry* took place in distinctive contexts where the government created a nontraditional forum to accommodate speech for a special purpose. In contract, *ISKCON III* and *Kokinda* involved places freely open to the public. Justice Kennedy noted that the need for heightened First Amendment protection has more force in the context of government property open to the public than in situations where the government has created a special purpose nontraditional forum as in *Cornelius* and *Perry*. *See Kokinda*, 497 U.S. at 738 (Kennedy, J., concurring).

141. *See Kokinda*, 497 U.S. at 748.

142. *See id.* at 737 (Kennedy, J., concurring).

143. *Id.* at 727-29.

144. *Id.* at 729; *see also ISKCON II*, 925 F.2d at 584 (Oakes, C.J., dissenting).

145. *See ISKCON III*, 112 S. Ct. at 2706-08.

146. *Kokinda*, 497 U.S. at 727.

Published by University of Oklahoma College of Law Digital Commons, 1993

relatively isolated post office sidewalk in *Kokinda*, the Port Authority airports are conceptually and physically comparable to traditional public forum streets.[147] The airports are bustling with social and commercial activity, teeming with shops, restaurants, and a multitude of other businesses catering to the public. It is doubtful whether the *ISKCON III* plurality would have voted that the sidewalk in *Kokinda* was a nonpublic forum if it had similarly been lined with such a vast array of activity. *ISKCON III* did not focus on the conceptual and physical characteristics of airports in relation to traditional public forums.

D. Forum Purpose Analysis in ISKCON III

ISKCON III and the circuit court regarded the government's purpose for a forum to be one of the primary factors in determining a forum's status. The analysis in *ISKCON III*, in effect, grants the government sole power to classify a forum. *ISKCON III* held that public forum status depends in part on the government's defined purpose for property or a decision by the government to dedicate the property to expressive activity.[148] The Court's treatment of forum purpose is logically dubious and fails to objectify the public forum inquiry.

Most government property has a purpose other than the accommodation of First Amendment expressive activities. Streets are built for the purpose of facilitating transportation, sidewalks are built for pedestrians, and parks are usually opened to provide recreation and beauty to a city. The primary purpose of an airport is to facilitate air travel; the primary purpose of streets is to accommodate automobile travel.

It is difficult to conceive how constitutional significance can be attached to the fact that airports involve travel by airplane, and that streets involve travel by automobile.[149] Merely examining a forum's purpose does little to illuminate the compatibility of expressive activity to the forum. Few public forums would remain for the exercise of First Amendment expression if a forum's purpose determined its status. Because streets and parks are not constructed with the primary purpose of facilitating speech, under the *ISKCON III* analysis even the quintessential public forums would seem to lack the requirements necessary to constitute a public forum.

E. Public Forums and the ISKCON III Historic Tradition Test

The public forum doctrine originated with Justice Roberts' dictum in *Hauge v. Committee for Industrial Organization*.[150] Justice Roberts noted that streets and parks had "immemorially been held in trust for the use of the public . . . for purposes of assembly, communicating thoughts between citizens, and discussing public questions."[151]

147. *See ISKCON I*, 721 F. Supp. at 576.
148. *ISKCON III*, 112 S. Ct. at 2706-07.
149. *See ISKCON II*, 925 F.2d at 585 (Oakes, C.J., dissenting).
150. The *Hauge* decision is discussed *supra* note 8.
151. *Hauge*, 307 U.S. at 515-16.

https://digitalcommons.law.ou.edu/olr/vol46/iss1/12

ISKCON III decreed that because airports are a relatively new form of property, they could not be described as having been held immemorially in the public trust for purposes of expressive activity.[152] Thus, airports were held to fail the tradition requirement for identification as a public forum.[153] *ISKCON III* disregarded the purpose of the public forum doctrine and converted Justice Roberts' observations into a narrow test, effectively foreclosing the recognition of new forums.

The public forum doctrine is tied to the First Amendment liberties it was created to protect.[154] Although the public forum doctrine has its origins in Supreme Court dictum, the right of speech protected by the doctrine stems from the Constitution's recognition that government may not control the speech of a free people.[155]

Reliance on history as an organizing rule leads to arbitrary line drawing.[156] By focusing on a forum's historical pedigree, attention is diverted from the First Amendment values at stake in a given case. In *ISKCON III* consideration of First Amendment values was subordinate to the Court's narrow focus on historic tradition. The Court has closed the public forum category by its very definition of such forums as "traditional."[157] The public forum doctrine retains no future relevance without judicial recognition that open, public spaces which are suitable for expression may be public forums despite lacking a historical lineage.[158]

Conclusion

Before *ISKCON III*, First Amendment public forum analysis involved a complex balancing of several distinct factors and interests. Besides analyzing the purpose and tradition of a forum, courts considered the character of the forum's surrounding, the pattern of activity associated with the forum, and whether expressive activity was compatible with the forum's use. The governmental purposes for a forum were balanced against the tradition of public access and the interests of those wishing to utilize the forum for expressive activities.

Important interests are at stake on both sides of the First Amendment public forum issue. Both the government and the public have an interest in maintaining the efficient use of publicly owned facilities. Individuals and organizations have an interest in communicating their ideas to the public. The First Amendment also recognizes that the public has an interest in freely receiving ideas and information. The public forum analysis equation recognized both first Amendment concerns and governmental proprietary interests by giving both interests appropriate weight. *ISKCON III* alters that equation by making a forum's status depend on the government's defined purpose for the property, effectively granting the government plenary authority to restrict speech by fiat.

152. *See ISKCON III*, 112 S. Ct. at 2706.
153. *Id.* at 2708.
154. *See* Kalven, *supra* note 7, at 14, 19.
155. *See ISKCON III*, 112 S. Ct. at 2716-17 (Kennedy, J., concurring).
156. *See* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 544 (1985).
157. *See ISKCON III*, 112 S. Ct. at 2724 (Souter, J., dissenting).
158. *See id.* at 2717 (Kennedy, J., concurring).

Published by University of Oklahoma College of Law Digital Commons, 1993

ISKCON III froze the public forum doctrine into a narrow framework of static categories, prohibiting the creation of new public forums which do not fit into the tradition of streets, sidewalks, and parks. *ISKCON III* has closed public forums as a class by defining such forums as traditional. The Court negated the future relevance of the public forum doctrine by foreclosing the recognition of new public forums as society changes and new technologies emerge. *ISKCON III* devitalized the public forum doctrine by eliminating its flexibility.

ISKCON III has potentially far-reaching ramifications. The government's power to restrict speech in public areas has been significantly expanded. Emanating from *ISKCON III*, government authority to restrict speech could logically extend beyond airports to encompass analogous public facilities such as bus, subway, and train stations. Marginal voices may be more easily excluded, altering the dialogue heard by the public. Indirectly, *ISKCON III* could affect the survival of many nonprofit organizations by eliminating or severely reducing their ability to raise support funding. The free interchange of information and ideas between these groups and the public could similarly be extinguished.

The public forum doctrine was established to protect the First Amendment guarantee of free speech from government interference. In *ISKCON III*, the Court ignored the doctrines' underlying purpose; restricting public forums to those which could be described as "traditional," and granting the government the power to classify a forum by defining its purpose. The Court's analysis makes it clear that few, if any, types of property will be granted public forum status in the future.

Gary E. Newberry

https://digitalcommons.law.ou.edu/olr/vol46/iss1/12