FORMALISM IN THE FORUM?
UNITED STATES V. KOKINDA AND THE EXTENSION OF THE PUBLIC FORUM DOCTRINE

Ignoring cries of formalism, Justice O'Connor led the plurality in *United States v. Kokinda* [1] in further refining the public forum doctrine.[2] The plurality held that government property's location and purpose, rather than its mere physical characteristics, dictate whether such property constitutes a traditional public forum.[3] The Court thus determined that a sidewalk[4] leading to a post office was not a traditional public forum and therefore not available for public discourse.[5]

The first amendment's[6] protection of freedom of speech is not absolute.[7] Courts do not hesitate to uphold a multitude of restrictions on

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1. 110 S. Ct. 3115 (1990).

2. The phrase "public forum" is generally attributed to Professor Harry Kalven's 1965 article, *The Concept of the Public Forum: Cox v. Louisiana* 1965 SUP. CT. REV. 1 [hereinafter Kalven]. *See also* Post, *Between Government and Management: The History and Theory of the Public Forum*, 34 U.C.L.A. L. REV. 1713, 1718 (1987) (citing Kalven); M. NIMMER, NIMMER ON FREEDOM OF SPEECH: A TREATISE ON THE THEORY OF THE FIRST AMENDMENT § 4.09[D], at 4-69 n.163 (2d ed. 1984); and Karst, *Equality as a Central Principle in the First Amendment*, 43 U. CHI. L. REV. 20, 35 (1975)). For Kalven, the public forum doctrine was not a means of categorizing government property. "[H]is central concern was rather with the protection of 'uninhibited, robust and wide-open' speech 'on public issues' . . ." Post, *supra*, at 1718-19 (citing Kalven, *supra*, at 3). Kalven believed:

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

Kalven, *supra*, at 11-12.

The Supreme Court adopted the phrase "public forum" in Police Department v. Mosley, 408 U.S. 92 (1972), explicitly acknowledging its debt to Kalven. 408 U.S. at 95 n.3, 99 n.6.

3. 110 S. Ct. at 3120-21.

4. For a discussion of the particular characteristics of the sidewalk at issue, see *infra* note 44.

5. A "traditional public forum" is one of three classifications into which all government property must fall. In addition to traditional public forums, publicly owned property may also be a "designated public forum" or a "nonpublic forum." See *infra* notes 23-27 and accompanying text for the distinguishing features of each category.

6. "Congress shall make no law . . . abridging the freedom of speech, or of the press, or the right of the people to peaceably assemble, and to petition to Government for a redress of grievances." U.S. CONST. amend. I.

7. "No one, with the possible exception of Justice Douglas in his last years, believed that all speech was absolutely protected." Farber & Nowak, *The Misleading Nature of Public Forum Analysis: Content and Context in First Amendment Adjudication*, 70 VA. L. REV. 1219, 1227 (1984) (citing Gertz v. Robert Welch, Inc., 418 U.S. 323, 356 (1974) (Douglas, J., dissenting); Paris Adult

content,[8] as well as the time, place, and manner of speech.[9] Furthermore, for nearly a century, the Supreme Court has struggled to determine the extent to which government may restrict the freedom of speech on government-owned property.[10]

The Court first addressed the question of a citizen's right to use government property for expressive activities in the 1897 case *Davis v. Massachusetts*.[11] The Court held that the government, like the private citizen,[12] was not obliged to make available its property for open discussion.[13] Forty-two years later, in *Hague v. Committee for Industrial Or-*

Theatre I v. Slaton, 413 U.S. 49, 70-73 (1973) (Douglas, J., dissenting); New York Times Co. v. United States, 403 U.S. 713, 720 (1971) (Douglas, J., concurring)).

8. For example "unprotected speech" may be regulated based on its content. *See generally* Chaplinsky v. New Hampshire, 315 U.S. 568 (1942). "Unprotected speech" falls into recognized categories of harmful speech to which the Court awards little or no first amendment protection. G. STONE, L. SEIDMAN, C. SUNSTEIN, & M. TUSHNET, CONSTITUTIONAL LAW 1058 (1986) [hereinafter G. STONE]. Unprotected speech includes obscenity, fraudulent misrepresentation, defamation, fighting words, etc. *Id.* at 1114-15, 1104-05, 1059-80 and 1009-17.

In addition, Cornelius v. NAACP Legal Defense and Education Fund, 473 U.S. 788, 806-07 (1985) held that the government may restrict speech in nonpublic and limited designated forums based on the *content* of the speech but not on the viewpoint of the speaker. *Cornelius* allows the government to prohibit topics not encompassed within the designated forum. However, if the topic is appropriate the government may prohibit discussion based solely on the speaker's opinion on that topic. *Id. See infra* notes 37-42 and accompanying text.

9. For example, a city ordinance may properly require a permit to hold a parade on a city street. *See, e.g.*, Cox v. New Hampshire, 312 U.S. 569 (1941), discussed *infra* at note 15.

10. The exercise of first amendment rights on private property is beyond the scope of this Note. For a discussion of this subject *see* G. STONE, *supra* note 8, at 1198-1201. *See also* L. TRIBE, AMERICAN CONSTITUTIONAL LAW 998-1009 (1988).

11. 167 U.S. 43 (1897). The Court upheld a preacher's conviction for addressing a crowd in the Boston Common without a permit. *Id.* at 46-47.

12. The Court reasoned that the government's right to regulate expression on public land was co-extensive with the right of a private landowner. *Id.* at 47.

13. 167 U.S. at 47-48. The Court concluded that the defendant had no first amendment right to use the Boston Common without consent. *Id.*

Commentators generally have been critical of *Davis*. Post attacks the reasoning in Davis as resting on a "syllogism." Post, *supra* note 2, at 1722.

> The major premise of the argument is that when the government acts in a proprietary capacity, like "the owner of a private house," it can abridge or prohibit speech. The minor premise of the argument is that the government in fact acted in a proprietary capacity with respect to the Boston Common. . . .
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> The Court in *Davis* defended the minor premise of this syllogism on the basis of state property law. It defended the major premise on the basis of what today would be called the "rights-privilege" distinction. The Court reasoned that, because Boston "owned" the Common and could therefore "absolutely exclude all right to use," it necessarily also retained the power "to determine under what circumstances such use may be availed," including circumstances abridging speech, since the "greater power contains the lesser."

Post, *supra* note 2, at 1722-23 (footnotes omitted).

ganization,[14] the Court retreated from *Davis*'s broad holding. Justice Roberts asserted that streets and parks immemorially have been held in trust for public use and for "time out of mind" have been utilized for assembly and speech.[15] Occasionally in the 1960s and 1970s, the Court departed completely from a forum analysis in favor of a single test that focused on the compatibility of the expressive activity with the normal activity of the relevant place.[16] Later cases, however, reaffirmed that not

14. 307 U.S. 496 (1939). In *Hague*, the Court examined a municipal ordinance prohibiting meetings in the street and other public places without a permit. *Id.* at 501-03.

15. *Id.* at 515-16. Writing for the plurality, Justice Roberts regarded the use of such places as a right of citizenship that, although not absolute, could not be abridged or denied totally. *Id.* This statement became the cornerstone of the "public forum doctrine." *See, e.g.*, Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983). *See also supra* note 2 for a discussion of the term "public forum."

In Schneider v. State, 308 U.S. 147 (1939), decided shortly after *Hague*, the Court struck down three municipal ordinances that established an absolute ban on the distribution of leaflets. *Id.* at 162-65. Although the government contended that the ban was necessary to prevent littering, the Court held such inconveniences insufficient to justify a flat denial of a fundamental right. *Id.* at 162. The Court further noted that the State's objective could be met by means less burdensome on the freedom of expression. *Id.*

While *Schneider* prohibited absolute denials of speech in traditional public forums, the Court has upheld less restrictive regulations. In Cox v. New Hampshire, 312 U.S. 569 (1941), the Court permitted an ordinance requiring a permit for parades and processions on a public street. *Id.* at 570-71. The Court held the ordinance permissible but limited the time, place, and manner of speech. *Id.* at 576. The Court noted that the maintenance of public order and efficient use of the street was an essential prerequisite to the enjoyment of constitutionally guaranteed civil liberties. *Id.* at 574.

16. *See* Grayned v. Rockford, 408 U.S. 104 (1972). In *Grayned*, the Court upheld an ordinance prohibiting a person from willfully making noise on grounds adjacent to a school if the noise disturbed the school's peace or good order. *Id.* at 107-08. The Court recognized that exposure of the students to the "robust exchange of ideas" was an important function of the school, but noted that expressive activity permissibly could be restricted to forbid material disruption of the educational process. *Id.* at 117-18 (quoting Tinker v. Des Moines School Dist., 393 U.S. 503, 512-13 (1969)). In *Tinker* the Court held that the school district could not punish students for wearing black arm bands in protest of the Vietnam War. 393 U.S. at 512-14. The Grayned Court stated that the determinative inquiry was whether the manner of expression was "basically incompatible" with the normal activity of a particular place and time. 408 U.S. at 116. This basic incompatibility test offered an alternative to the public forum analysis, subjecting all government property to a single test.

See also Post, *supra* note 2, at 1730. Post suggests that *Grayned*'s test "set forth a regime of constitutional regulation explicitly designed to serve the first amendment value of maximizing social communication." *Id.* at 1731. In this light, *Grayned* "exemplified the spirit of Kalven's 1965 article, which it duly acknowledged. For this reason, *Grayned* has remained a touchstone case for many commentators." *Id.* Thus, in rejecting the categorization of public property, *Grayned* served the underlying first amendment values.

Post asserts that the impact of *Grayned* was undercut by Police Dep't v. Mosley, 408 U.S. 92 (1972). *Mosley*, decided the same day as *Grayned* and similarly authored by Justice Marshall, expressly adopted Kalven's public forum concept. Post, *supra* note 2, at 1731-33. Therefore, *Grayned* and *Mosley*, taken together, created confusion as to whether government property should be catego-

all government property is an appropriate forum for speech.[17]

In 1983, *Perry Education Association v. Perry Local Educators' Association* [18] created a new era of public forum analysis. In *Perry*, a teachers' union[19] sought access to the teachers' intraschool mailboxes.[20] The Court stated that the right of access to public property depends upon that property's character.[21] The property's character will determine the proper standard to test the validity of the limitation on speech.[22]

Perry categorized all government owned property into three groups.[23] First, the Court labeled places that are traditionally devoted to assembly and debate, such as streets and parks, as "quintessential" or traditional public forums.[24] Second, property that the government specifically opens for public use as places for expressive activity the Court categorized as "designated public forums."[25] The scope of a designated public forum,

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rized for first amendment analysis. *Id.* Post claims, "Modern public forum doctrine developed from *Mosley*, not *Grayned*." *Id.* at 1733.

17. *See, e.g.*, Adderley v. Florida, 385 U.S. 39 (1966) (upholding the conviction of 32 students arrested for trespassing during a demonstration on jailhouse grounds). Some commentators point to *Adderley* as the key case "resurrecting" the logic of *Davis*. *See, e.g.*, Post, *supra* note 2, at 1725-29; Dienes, *The Trashing of the Public Forum: Problems in First Amendment Analysis*, 55 GEO. WASH. L. REV. 109, 115-17 (1986).

See also Greer v. Spock, 424 U.S. 828 (1976) (upholding a regulation prohibiting political speeches and leafletting on the federal military reservation Fort Dix); United Postal Serv. v. Council of Greenburgh Civic Assocs., 453 U.S. 114 (1981) (holding residential mailboxes were not public forums and as such could not be used to distribute leaflets without the proper postage). These cases held that public ownership or control of property did not guarantee access for first amendment activities, thus enabling the government to preserve its property for its lawfully dedication purpose. *See, e.g., Council of Greenburgh Civic Assocs.*, 453 U.S. at 129-30 (citing Greer v. Spock, 424 U.S. 828 (1976) and Adderley v. Florida, 385 U.S. 39 (1966)).

18. 460 U.S. 37 (1983).

19. Prior to the election that selected Perry Education Association as the exclusive union, both competing unions had access to the intraschool mail system and the teachers' in school mailboxes. After the election, Perry Education Association became the only union allowed access to the mail system or mailboxes. *Id.* at 38-41.

20. *Id.* at 41. *See supra* note 19.

21. *Id.* at 44.

22. *Id.* at 44.

23. 460 U.S. at 45-46.

24. *Id.* at 45 (citing Hague v. Committee for Indus. Orgs., 307 U.S. 496, 515 (1939)). *See supra* notes 14-15 and accompanying text for a further discussion of *Hague*. In *Perry*, the parties conceded that the school mail system and mailboxes were not traditional public forums. *Id.* at 46-47. The court approved language of the court of appeals holding the forums at issue not traditionally public. "We do not hold that a school's internal mail system is a public forum in the sense that a school board may not close it to all but official business if it chooses." *Id.* at 46 (quoting Perry Local Educators' Ass'n v. Hohlt, 652 F.2d 1286, 1301 (7th Cir. 1981), *rev'd sub nom* Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 36 (1983)).

25. 460 U.S. at 45-46.

however, may be limited.[26] Finally, public property closed to public communication were nonpublic forums.[27]

Perry's categorization of forums is significant because it determines the Court's standard of review for restrictions. The government must show a compelling interest to enforce "content-based" regulations for traditional and designated public forums.[28] Furthermore, it must show that its regulations are narrowly tailored to achieve that interest.[29] As long as the restrictions leave open channels of communication, the government may impose "content-neutral" time, place, and manner restrictions narrowly tailored to serve a significant government interest.[30]

A different standard governs nonpublic forums. The government may restrict expression if the regulation is *reasonable*[31] and not an effort to suppress an opposed view.[32]

In defining the parameters of a designated public forum,[33] *Perry* noted that the government's opening of its property for unrestricted use by the

26. 460 U.S. at 46 n.7. The Court recognized that a forum may be created to serve particular groups such as in Widmar v. Vincent, 454 U.S. 263 (1981) (student groups allowed to use otherwise unoccupied meeting facilities), or for the discussion of particular subjects. City of Madison Joint School District v. Wisconsin Pub. Employment Relations Comm'n, 429 U.S. 167 (1976) (scope of discussion at a school board meeting). *Id.* The Court implicitly indicated that the forum could be limited in the manner of expression allowed by citing to Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546 (1975) (a municipal theater could be opened for theatrical presentations). *Id.* at 45-46.

The Constitution forbids exclusion from a forum generally open to the public, even if the government was not required to create the forum in the first place. *Id.* at 45. "Although a state is not required to indefinitely retain the open character of the facility, as long as it does so it is bound by the same standards as apply in a traditional public forum." *Id.* at 46.

The designated public forum category apparently encompassed what had been referred to as "limited public forums" in earlier cases. *See, e.g.*, Hefferon v. International Soc'y for Krishna Consciousness, Inc., 452 U.S. 640 (1981).

27. *Perry*, 460 U.S. at 46. Notable examples of public property regarded as nonpublic forums include those addressed in *Adderley* (a county jailhouse), Greer v. Spock, 424 U.S. 828 (1976) and United Postal Service v. Council of Greenburgh Civic Ass'ns, 453 U.S. 114 (1981). *See supra* note 17 and accompanying text.

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

29. *Id.* (citing Carey v. Brown, 447 U.S. 455, 461 (1980)).

30. *Id.* (citing *Council of Greenburgh*, 453 U.S. at 132; Consolidated Edison Co. v. Public Serv. Comm'n, 447 U.S. 530, 535-36 (1980); Grayned v. Rockford, 408 U.S. 104, 115 (1972); Cantwell v. Connecticut, 310 U.S. 296 (1940); Schneider v. State, 308 U.S. 147 (1939)).

31. *See infra* notes 41-42 and accompanying text.

32. *Perry*, 460 U.S. at 46 (citing *Council of Greenburgh Civic Associations*, 453 U.S. at 131 n.7). *Perry* later asserts that "when government property is not dedicated to open communication the government may—without further justification—restrict use to those who participate in the forum's official business." *Id.* at 53 (footnote omitted).

33. *See supra* note 26 and accompanying text.

general public arguably creates a public forum.[34] However, the Court held mere selective access insufficient to create such a forum[35] Moreover, the constitutional right of access to a public forum designated for particular groups' limited purposes only extends to other entities of similar character.[36]

In *Cornelius v. NAACP Legal Defense and Educational Fund, Inc.*,[37] the Court further refined the public forum doctrine in three significant respects. First, the Court adopted a forum analysis as a means of determining when the government's interest in limiting the use of public property outweighs the interest of those wishing to use the property for expressive activities.[38]

Second, *Cornelius* held that the government creates a designated public forum only by *intentionally* opening a non-traditional public forum for expressive activities.[39] The government's policy and practice regarding the forum, the property's nature, and its compatibility with expressive activities are determinative of the government's intent.[40]

Finally, the Court clarified the "reasonableness test" applicable to nonpublic forums. The Court held that the reasonableness of a restriction on speech must be assessed in light of the forum's purpose and all surrounding circumstances.[41] The regulation need not be the most reasonable or the only reasonable limitation, but merely reasonable.[42]

In *United States v. Kokinda*,[43] the Court determined that a sidewalk

34. *Id.* at 47.

35. *Id.*

36. *Id.* at 48. The court stated that even if the school district created a "limited" public forum by granting access to the Cub Scouts, YMCAs, and parochial schools, the forum would be open only "for use by the Girl Scouts, the local boys' club, and other organizations that engage in activities of interest and educational relevance to students. They would not as a consequence be open to an organization such as the PLEA, which is concerned with the terms and conditions of teacher employment." *Id.*

37. 473 U.S. 788 (1985).

38. *Id.* at 800.

39. *Id.* at 802. "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." *Id.* (citing Perry Educ. Ass'n v. Perry Local Educators Ass'n, 460 U.S. at 46).

40. *Id.* The Court further stated that it "will not find that a public forum has been created in the face of clear evidence of a contrary intent, nor will we infer that the government intended to create a public forum when the nature of the property is inconsistent with expressive activity." *Id.* at 804 (citing Jones v. North Carolina Prisoners' Labor Union, 433 U.S. 119 (1977)).

41. *Id.* at 809.

42. *Id.* at 808.

43. 110 S. Ct. 3115 (1990).

leading to the entrance of a post office was neither a traditional public forum nor expressly designated for the type of speech in question.[44] Therefore, the sidewalk constituted a nonpublic forum,[45] thus implicating the "reasonableness test." The Court found that the postal regulation at issue prohibiting solicitation on post office grounds was reasonable[46] and thus constitutional.[47]

Kokinda further developed the public forum doctrine by addressing

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44. *Id.* at 3121. In *Kokinda*, postal inspectors arrested Marsha Kokinda and Kevin Pearl for soliciting contributions for the National Democratic Policy Committee on a sidewalk leading to the entrance of a post office. *Id.* at 3117-18. The sidewalk ran adjacent to the post office building, was completely on post office property, and was distinct from the public sidewalk, which ran parallel to the highway on which the post office was located. *Id.* at 3118.

A United States Magistrate in the District of Maryland tried and convicted Kokinda and Pearl. The court fined Kokinda $50 and sentenced her to ten days in imprisonment and fined Pearl $100 and ordered a thirty day suspended sentence. *Id.* at 3118. The district court affirmed the convictions, holding the sidewalk in question did not constitute a public forum. *Id.* A divided panel of the United States Court of Appeals for the Fourth Circuit reversed, holding the sidewalk was a traditional public forum and that the restriction failed to pass strict scrutiny. 866 F.2d 699 (4th Cir. 1989), *rev'd*, 110 S. Ct. 3115 (1990). See *supra* notes 6, 39-41 and accompanying text for a discussion of traditional public forums and the level of scrutiny applied.

45. 110 S. Ct. at 3121.

46. *Id.* at 3122-25. The plurality rested its decision on the post office's prior experience with solicitation that proved the endeavor to be "unadministratable." *Id.* at 3122. It also held that solicitation is "inherently disruptive" of the postal service's business of "efficient and effective delivery of the mail." *Id.* at 3123.

47. For a nonpublic forum, any reasonable regulation will pass constitutional muster. *Id.* at 3121-22. The Court cited *Cornelius* with approval: "The Government's decision to restrict access to a nonpublic forum need only be *reasonable*; it need not be the most reasonable or the only reasonable limitation." *Id.* (citing *Cornelius*, 473 U.S. at 808) (emphasis in the original). *See supra* notes 41-42 and accompanying text.

Justice O'Connor wrote the plurality decision joined by Justice Kennedy. Justice Kennedy believed the regulation at issue met "the traditional standards applied to time, place, and manner restrictions of protected expression." *Id.* (citing Clark v. Community for Creative Non-Violence, 468 U.S. 288, 293 (1984)).

Although Justice Kennedy found it unnecessary to reach a conclusion on the public forum question, he subtlety criticized the plurality's forum analysis, asserting that a "powerful argument" remains that the postal sidewalk was more than a nonpublic forum. *Id.* at 3125. Kennedy stated: "If our public forum jurisprudence is to retain vitality, we must recognize that certain objective characteristics of Government property and its customary use by the public may control the case." *Id.* (citing *Cornelius*, 473 U.S. at 819-20 (Blackmun, J., dissenting)).

The Second Circuit in International Soc'y for Krishna Consciousness, Inc. v. Lee, 925 F.2d 576 (2d Cir. 1991) placed great weight on Justice Kennedy's opinion. In resolving the question of whether the unleased portion of an airport terminal constituted a traditional public forum, the court noted that other circuits regarded airports as traditional public forums or "public forums" generally. 925 F.2d at 580 (citing Jamison v. City of St. Louis, 828 F.2d 1280 (8th Cir. 1987), *cert. denied*, 485 U.S. 987 (1988); Jews for Jesus, Inc. v. Board of Airport Comm'rs, 785 F.2d 791, 793-95 (9th Cir. 1986), *aff'd on other grounds*, 482 U.S. 569 (1987); Fernandes v. Limmer, 663 F.2d 619, 626 (5th

how to determine whether a given government-owned property constitutes a traditional public forum.[48] The Court held that "mere *physical* characteristics" are not determinative.[49] The plurality reasoned that the postal sidewalk did not have the "characteristics of public sidewalks traditionally open to expressive activity."[50]

The Court distinguished the postal sidewalk from a nearby municipal sidewalk that ran parallel with the road.[51] The postal sidewalk led only from the parking areas to the front door of the post office and was not a public thoroughfare.[52] The plurality emphasized that the city constructed the postal sidewalk solely to assist patrons in negotiating the area between the parking lot and the post office's front door and not to facilitate "the daily commerce and life of the neighborhood or city."[53] Thus, *Kokinda* establishes that the determination of a forum's nature turns upon its "*location and purpose*," rather than its physical

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Cir. 1981)). However, *Lee* maintained that the *Kokinda* decision required the court to re-examine the issue in a new light. 925 F.2d at 580.

Lee regarded Justice Kennedy's opinion as determinative on the practices engaged in by the plaintiff—in-person solicitation and the distribution of literature. The *Lee* court applied the *Kokinda* plurality's analysis and held that airports were not traditional public forums and upheld the ban on solicitation, as did Justice Kennedy in *Kokinda*. *Id.* at 581. However, the court noted that Kennedy's concurrence offered limited support to the plurality's opinion and indicated his willingness to strike a ban on the distribution of literature. *Id.* at 582. Noting that the four dissenters in *Kokinda* also would have struck a ban on the distribution of literature, *Lee* observed that "at least a majority, perhaps more," of the justices would render such a prohibition unconstitutional. *Id.* Therefore, *Lee* struck the airport's prohibition on the distribution of literature but upheld its ban on in-person solicitation. *Id.* at 577.

48. Neither *Perry* nor *Cornelius* contend the relevant forums were traditionally public. *See supra* notes 24, 37-42 and accompanying text. Therefore, O'Connor looked to the rationals of *Grace*, *Greer*, and *Council of Greenburgh* as supplemented by the holdings of *Perry* and *Cornelius*. *See generally* 110 S. Ct. at 3119-22. *See also supra* notes 17, 27 and accompanying text.

49. 110 S. Ct. at 3120 (emphasis added). The plurality reasoned that if the mere physical characteristics of the property controlled, then Greer v. Spock, 424 U.S. 828 (1976) would have been decided differently. *Id.* "In that case, we held that even though a military base permitted free civilian access to certain unrestricted areas, the base was a nonpublic forum. The presence of sidewalks and streets within the base did not require a finding that it was a public forum." *Id.* (citing *Greer*, 424 U.S. at 835-37).

50. *Id.* at 3120.

51. *Id.* For more on the particular sidewalk in question see *supra* note 44.

52. *Id.*

53. *Id.* O'Connor sought to distinguish the postal sidewalk from the public street described in *Heffron*, which was "continually open, often uncontested, and constitute[d] not only a necessary conduit in the daily affairs of a locality's citizens, but also a place where people [could] enjoy the open air or the company of friends and neighbors in a relaxed environment." *Id.* (quoting *Heffron*, 452 U.S. at 651).

characteristics.[54]

Justice Brennan, in his final dissent before leaving the Court,[55] attacked the public forum doctrine developed in *Perry* and *Cornelius*[56] and criticized the plurality's extension of that doctrine.[57] Noting the widespread criticism of the contemporary use of the public forum doctrine,[58] Brennan stated that the plurality's present use of the doctrine confirmed his doubts.[59] He maintained that all government-owned sidewalks left open to the public are public forums per se.[60] Departing from the public forum doctrine,[61] Justice Brennan concluded that expressive activity was compatible with the normal use of even a single-purpose sidewalk.[62] Moreover, under prior public forum analysis, sidewalks have been considered traditional public forums that do not lose their historically recognized character simply because they abut government property.[63]

Justice Brennan concluded that communication on a postal sidewalk is permissible under the principle that a person rightfully on a street left open to the public carries the constitutional right to express her views in an orderly fashion.[64] He asserted that this obvious conclusion could not

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54. *Id.*

55. *See* James, *Free-Speech Cases Reveal Momentum of Restraint*, NAT'L L.J., Aug. 13, 1990, at S11, col. 1.

56. *Kokinda*, 110 S. Ct. at 3126-28. For a discussion of *Perry* and *Cornelius*, see *supra* notes 18-42 and accompanying text.

57. *Id.* at 3128-39.

58. *Id.* at 3126 n.1 (citing L. TRIBE, *supra* note 10, at 993; Dienes, *supra* note 26, at 110; Farber & Nowak, *supra* note 7, at 1234; Post, *supra* note 2, at 1715-16; and Stone, *Content-neutral Restrictions*, 54 U. CHI. L. REV. 46, 93 (1987)).

See also Werhan, *The Supreme Court's Public Forum Doctrine and the Return of Formalism*, 7 CARDOZO L. REV. 335, 341 (1986); Note, *A Unitary Approach to Claims of First Amendment Access to Publicly Owned Property*, 35 STAN. L. REV. 121, 121-22 (1982) *noted in* Post, *supra* note 2, at 1715-16 n.7.

59. 110 S. Ct. at 3128.

60. *Id.* (quoting United States v. Grace, 461 U.S. 171, 177 (1983)).

61. Brennan relied on the compatibility standard set out in *Grayned*. *See supra* note 16 and accompanying text.

62. 110 S. Ct. at 3128.

63. *Id.* (citing *Grace*, 461 U.S. at 177, 180).

64. *Id.* (quoting Jamison v. Texas, 318 U.S. 413, 416 (1943)). Brennan distinguished the case in which the citizen does not have the legal right to be present from those in which the citizen "claim[s] a right to enter government property for the particular purpose of speaking." *Id.* at 3128-3129 n.2 (quoting Laycock, *Equal Access and Moments of Silence: The Equal Status of Religious Speech by Private Speakers*, 81 NW. U.L. REV. 1, 48 (1986)). Justice O'Connor raised the issue of whether such a distinction was viable in her unanimous opinion in Airport Commr's v. Jews for Jesus, Inc., 482 U.S. 569, 573 (1987). However, as the regulation in question there was struck down as overbroad, the Court did not resolve the issue of one's right to be on government property. 482

be obscured by any "doctrinal pigeonholing, complex formula, or multipart test."[65]

CONCLUSION

Kokinda clarifies the traditional public forum concept by looking beyond the physical characteristics to the property's location and purpose.[66] The decision recognizes the government's right to utilize public property without encroaching upon those places that have "immemorially been held in trust" for speech and debate.[67] Undoubtedly, prior lower court cases that resolved the forum issue by looking only to the physical characteristic of the property will require re-evaluation.[68]

Although the modern public forum doctrine ultimately may rest on a formalistic principle,[69] *Kokinda's* "logic and purpose" standard rejects a

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U.S. at 573. Apparently, Justice O'Connor does not believe such a distinction is significant under the public forum analysis. *See supra* notes 43-55 and accompanying text.

65. 110 S. Ct. at 3128. In sum, Justice Brennan regards the Court's opinion in *Kokinda* as "a farce of the public forum doctrine." *Id.* at 3139.

However, the plurality's opinion in *Kokinda* is consistent with the Court's recent public forum doctrine cases. The plurality's distinction between the sidewalks in *Grace* and *Kokinda* turns on the difference in location and purpose. A decision to the contrary turns the rights of citizens to use government property on such "architectural idiosyncrasies" as whether the property provides an entrance preceded by a sidewalk, a staircase, an enclosed walkway, or nothing at all. Holding that a postal walkway is a traditional public forum because it physically resembles a municipal sidewalk well enough to be labeled a "sidewalk" is a formalism of its own.

Justice Brennan sought to avoid having architectural idiosyncrasies and labeling dominate the public forum analysis; but read literally, that is exactly what his argument, in part, achieves. *See supra* notes 56-66 and accompanying text.

66. *See supra* notes 52-55 and accompanying text.

67. *See supra* notes 14-15, 24-25, 49-55 and accompanying text.

68. *See, e.g.*, International Soc'y for Krishna Consciousness, Inc. v. Lee, 925 F.2d 576 (2d Cir. 1991). In resolving the question of whether the unleased portion of an airport terminal constituted a traditional public forum, the Second Circuit noted that other circuits addressing the issue regarded airports as traditional public forums or "public forums" generally. 925 F.2d at 580 (citing Jamison v. City of St. Louis, 828 F.2d 1280 (8th Cir. 1987), *cert. denied*, 485 U.S. 987 (1988); Jews for Jesus, Inc. v. Board of Airport Comm'rs, 785 F.2d 791, 793-95 (9th Cir. 1986), *aff'd on other grounds*, 482 U.S. 569 (1987); Fernandes v. Limmer, 663 F.2d 619, 626 (5th Cir. 1981)). These decisions often stressed the fact that the physical characteristics of a modern airport terminal usually resemble a miniature city or busy city street. However, *Lee* maintained that *Kokinda* required the court to re-examine the airport forum issue in light of that decision. 925 F.2d at 580.

Applying the *Kokinda* plurality's analysis, *Lee* held that airports were not traditional public forums. The court relied on Justice Kennedy's opinion and struck down the airport's prohibition on the distribution of literature but upheld the ban on in-person solicitation. 925 F.2d at 577. *See supra* note 48.

69. The "correctness" of the modern public forum doctrine appears to turn on the appropriateness of the Court's application of common law property notions in the determination of the first

similarly formalistic alternative that would classify any property which could be labeled a "sidewalk" as a traditional public forum.[70] Instead, the Court prescribes a test that requires an analysis of whether the property may be properly regarded as a place immemorially held in trust for speech and debate.[71] In this respect, *Kokinda* takes a decisive step away from formalistic answers to difficult questions and embraces a constitutional analysis befitting the high principles of free speech.

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amendment's scope. If these notions of ownership and the power to exclude rest with the government, even in the context of the first amendment, then *Kokinda* and the precedent on which it rests are correct. If not, and the public forum analysis is merely a substitute for balancing the government's interest against the interests of individual citizens, then the cries of formalism are well-founded, and the public forum analysis is no more than a complex doctrinal pigeonholing standing in the place of constitutional analysis. *See generally* Post, *supra* note 2, at 1715-64 and Dienes, *supra* note 26, at 119-20. *See also supra* notes 38, 49-66 and accompanying text.

Although critics of the Court's public forum analysis regard the application of common law property notions as inappropriate, such notions lie at the heart of *Davis, Adderley, Perry, Cornelius, Kokinda,* and their progeny. *See generally* Post, *supra* note 2, at 1715-64 and Dienes, *supra* note 26, at 119-20. The contention that the Court ignores the balancing of interests in favor of a formalistic methodology to answer difficult questions of first amendment rights lies at the core of Justice Brennan's dissents in *Kokinda* and *Perry* and Justice Blackmun's dissent in *Cornelius*, with which Justice Kennedy apparently agrees to some extent. Absent a superseding reason, such as the property/rights reasoning, the use of the public forum doctrine to circumvent a consideration of the impact of the Court's decision rests ultimately on a convenience justification—which by any standard is wholly unacceptable.

70. *See supra* notes 44-66 and accompanying text.

71. *See supra* notes 49-55 and accompanying text.