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## Constitutional Law - A Forum by Any Other Name ... Would Be Just as Confusing: The Tenth Circuit Dismisses Intent from the Public Forum

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**CONSTITUTIONAL LAW – A Forum by Any Other Name . . . Would Be Just as Confusing: The Tenth Circuit Dismisses Intent from the Public Forum. *First Unitarian Church v. Salt Lake City Corp.*, 308 F.3d 1114 (10th Cir. 2002).**

INTRODUCTION

On December 1, 1998, representatives of the Salt Lake City Corporation (hereinafter the “City”) and the Church of Jesus Christ of Latter-Day Saints (hereinafter “LDS Church”) held a joint news conference announcing the proposed development of an “open-space pedestrian plaza” in downtown Salt Lake City.<sup>1</sup> The new plaza would be built upon a section of Main Street between North and South Temple.<sup>2</sup> It was announced that the plaza would form an attractive pedestrian thoroughfare enhancing the beauty of downtown Salt Lake City.<sup>3</sup>

Following the announcement, the LDS Church filed a petition with the City for street closure and submitted plans for a pedestrian easement to the City Planning Commission.<sup>4</sup> The Planning Commission recommended that the City Council approve the sale of the property on the condition that the City retain a perpetual pedestrian easement “so as to maintain, encourage, and invite public use” and “that there be no restrictions on the use of this space that are more restrictive than is currently permitted at a public park.”<sup>5</sup> The City Council only adopted some of the Planning Commission’s suggested conditions on April 13, 1999.<sup>6</sup> The City Council retained the Planning Commission’s recommendation that the City retain a public use easement as a condition of the sale.<sup>7</sup> However, the Council omitted the suggested condition requiring that the plaza be regulated no more strictly than a public park.<sup>8</sup>

The sale was enacted through the recording of a Special Warranty Deed and Reservation of Easement conveying the Main Street surface property to the LDS Church.<sup>9</sup> The reservation of easement provided for “pedestrian access and passage only” and stipulated that the church would not erect any perimeter fences or gates adjacent to city rights of way.<sup>10</sup> The reserva-

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1. *First Unitarian Church v. Salt Lake City Corp.*, 308 F.3d 1114, 1118 (10th Cir. 2002).
  2. *Id.* at 1118.
  3. Rebecca Walsh, *New Plaza Proposed On Main; Downtown street would be sold to LDS Church, closed; Plaza Proposed on Street In Downtown S.L.*, S.L. TRIB., Dec. 2, 1998, at A1.
  4. *First Unitarian*, 308 F.3d at 1118.
  5. *Id.*
  6. *Id.*
  7. *Id.*
  8. *Id.*
  9. *Id.*
  10. *Id.* The full text of the reservation of easement read:

tion was followed by express language stating the parties' intent that the easement would not create a public forum of any sort.<sup>11</sup> This language was accompanied by an extensive list of activities the LDS Church would be allowed to restrict on the property.<sup>12</sup> Among the activities subject to restriction were assembling, demonstrating, picketing, use of loudspeakers or signs, distribution of literature, and otherwise disturbing the peace.<sup>13</sup>

Following the sale, at its own expense, the LDS Church reconstructed the former street into a pedestrian plaza, forming an attractive extension of the Church's downtown campus.<sup>14</sup> Several parties, constituting the plaintiffs in this case, soon challenged the restrictions contained in the easement.<sup>15</sup> Challenge was filed with the United States District Court for the District of Utah.<sup>16</sup> The plaintiffs were the First Unitarian Church of Salt

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Grantor reserves an easement over and across the surface of the Property for pedestrian access and passage only . . . Grantee shall not erect any perimeter fences or gates on the property along the North Temple or South Temple rights of way . . . . Grantor may allow the general public to use this easement for pedestrian access and passage only, but all use of this easement shall be subject to the conditions, limitations and restrictions described herein below:

*Id.*

11. *Id.*

12. *Id.* at 1118-19.

13. *Id.* The full text of the restrictions read as follows:

Nothing in the reservation or use of this easement shall be deemed to create or constitute a public forum, limited or otherwise, on the Property. Nothing in this easement is intended to permit any of the following enumerated or similar activities on the Property: loitering, assembling, partying, demonstrating, picketing, distributing literature, soliciting, begging, littering, consuming alcoholic beverages or using tobacco products, sunbathing, carrying firearms (except for police personnel), erecting signs or displays, using loudspeakers or other devices to project music, sound or spoken messages, engaging in any illegal, offensive, indecent, obscene, vulgar, lewd or disorderly speech, dress or conduct, or otherwise disturbing the peace. Grantee shall have the right to deny access to the Property to persons who are disorderly or intoxicated or engaging in any of the activities identified above. The provisions of this section are intended to apply only to Grantor and other users of the easement and are not intended to limit or restrict Grantee's use of the Property as owner thereof, including, without limitation, the distribution of literature, the erection of signs and displays by Grantee, and the projection of music and spoken messages by Grantee.

*Id.*

14. *Id.* at 1119.

15. *First Unitarian Church v. Salt Lake City Corp.*, 146 F. Supp. 2d 1155, 1159 (D. Utah 2001).

16. *Id.* at 1155.

Lake City, Utahns for Fairness, the Utah National Organization for Women, and one individual, Craig Axford.<sup>17</sup>

The plaintiffs named the Salt Lake City Corporation as the defendant.<sup>18</sup> The Corporation of the Presiding Bishopric of the Church of Jesus Christ of Latter Day Saints was permitted to intervene as defendant.<sup>19</sup> All parties promptly filed for summary judgment on all claims.<sup>20</sup> The United States District Court for the District of Utah, Judge Ted Stewart presiding, granted summary judgment against the plaintiffs, in favor of the City and the LDS Church.<sup>21</sup>

Judge Stewart noted that the facts showed that the plaza property had been so altered that any traditional public forum that had existed prior to the property's sale had terminated with the sale.<sup>22</sup> He then ruled that the property constituted a "nonpublic forum."<sup>23</sup> Applying the less stringent constitutional restrictions that apply to property not protected under the First Amendment, he easily concluded that the City's restrictions of the easement were permissible.<sup>24</sup> After quickly dismissing the plaintiffs' other claims, Judge Stewart granted summary judgment for the defendants.<sup>25</sup>

Following the District Court ruling, the plaintiffs appealed to the United States Court of Appeals for the Tenth Circuit.<sup>26</sup> The Court of Appeals first noted that the District Court had erred by analyzing the surrounding property instead of the easement itself, and then held that the easement was still a traditional public forum.<sup>27</sup> Ultimately, the Tenth Circuit Court reversed the District Court decision.<sup>28</sup>

Ever since the Supreme Court's 1983 landmark decision in *Perry Education Association v. Perry Local Educators' Association*, the First

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17. *Id.* at 1159. Craig Axford is a resident of Salt Lake City and a member of the Unitarian Church. ACLU Utah, *First Unitarian v. Salt Lake City Corporation*, available at <http://www.acluutah.org/mscomplaint.htm> (last visited Oct. 6, 2003). He testified in opposition to the sale at public hearings and claims that although he would have visited and used the plaza, he will now take pains to avoid using the easement to avoid being confronted with governmentally-endorsed religious messages. *Id.*

18. *First Unitarian*, 146 F. Supp. 2d at 1159.

19. *Id.* The Corporation of the Presiding Bishop is the arm of the Church of Jesus Christ of Latter-Day Saints that oversees all Church finances and expenditures. Peggy Fletcher Stack, *S.L. Man Is LDS Presiding Bishop*, S.L. TRIB., Dec. 28, 1995, at D1.

20. *First Unitarian*, 146 F. Supp. 2d at 1158-59, 1161.

21. *First Unitarian Church v. Salt Lake City Corp.*, 308 F.3d 1114, 1133 (10th Cir. 2002).

22. *First Unitarian*, 146 F. Supp. 2d at 1158-59, 1171.

23. *Id.* at 1172.

24. *Id.*

25. *Id.* at 1180.

26. *First Unitarian*, 308 F.3d at 1117.

27. *Id.* at 1128.

28. *Id.* at 1133-34.

Amendment “forum analysis” used in *First Unitarian* has become the judicial tool of choice in analyzing public speech rights on government-owned property.<sup>29</sup> However, forum analysis has been widely criticized in both judicial and academic circles, not only for its hopelessly confusing attendant case law, but for its failure to adequately address the First Amendment issues inherent in government property.<sup>30</sup> This case note will first explore the convoluted history of “forum analysis” in Supreme Court case law. Next, it will detail the ruling of the Tenth Circuit Court of Appeals in *First Unitarian*. Finally, this note will provide an analysis of the court’s application of the public forum framework in *First Unitarian*. The analysis will also show that the Tenth Circuit opinion applies the public forum framework in a way that is both more consistent with the history of public forum jurisprudence, and more responsive to the First Amendment issues inherent in government property than recent Supreme Court rulings.

#### BACKGROUND

##### *Government as a Private Property Owner*

The First Amendment of the United States Constitution declares that “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.”<sup>31</sup>

While freedom of speech in the United States is as old as the Bill of Rights, freedom to conduct that speech on government property is actually a relatively recent development. For much of American history, United States Supreme Court opinion refused to recognize any public speech rights on

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29. Perry Educ. Ass’n v. Perry Local Educators’ Ass’n, 460 U.S. 37, 44-47 (1983). See also Stephen K. Schutte, *International Society for Krishna Consciousness, Inc. v. Lee: The Public Forum Doctrine Falls to Government Intent Standard*, 23 GOLDEN GATE U. L. REV. 563 (1993).

30. For examples of judicial criticism of the public forum doctrine, see *Denver Area Educ. Telecomm. Consortium v. FCC*, 518 U.S. 727, 749 (Breyer, J., concurring); *Int’l Soc’y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 627, 694 (1992) (Kennedy, J., concurring); *United States v. Kokinda*, 497 U.S. 720, 741 (1990) (Brennan, J., dissenting). For examples of scholarly criticism, see LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 987 (2d ed. 1988); Schutte, *supra* note 29, at 568; David S. Day, *The End of the Public Forum Doctrine*, 78 IOWA L. REV. 143, 145, 202 (1992); G. Sidney Buchanan, *The Case of the Vanishing Public Forum*, 1991 U. ILL. L. REV. 949, 980 (1991); Robert C. Post, *Between Governance and Management: The History and Theory of the Public Forum*, 34 UCLA L. REV. 1713, 1715 (1987); Thomas Dienes, *The Trashing of the Public Forum: Problems in First Amendment Analysis*, 55 GEO. WASH. L. REV. 109, 110, 120 (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, 1223-24 (1984).

31. U.S. CONST. amend. I.

government property.<sup>32</sup> This is typified in the case of *Davis v. Commonwealth of Massachusetts*.<sup>33</sup> In *Davis*, the Court upheld a Boston ordinance prohibiting "any public address" on publicly owned property without a permit from the mayor.<sup>34</sup> The Court based its decision on the premise that the government had a right to control the use of its own property.<sup>35</sup>

This view of speech activity on government property saw its first reversals in 1939. In *Hague v. CIO*, the Court struck down a city ordinance quite similar to the ordinance in *Davis*.<sup>36</sup> The ordinance prohibited all public meetings in the streets and other public places without a permit from the city.<sup>37</sup> In dicta that would be used in countless later cases, Justice Roberts stated,

Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thought between citizens, and discussing public questions. Such use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens.<sup>38</sup>

In *Schneider v. State of New Jersey*, the Court struck down a city ordinance prohibiting the distribution of leaflets on public property in spite of the city's arguments that the ordinance was necessary to prevent litter and maintain the appearance of its streets.<sup>39</sup> The Court wrote, "We are of opinion that the purpose to keep the streets clean and of good appearance is insufficient to justify an ordinance which prohibits a person rightfully on a public street from handing literature to one willing to receive it."<sup>40</sup> In its ruling in *Schneider*, not only had the Court struck down a government attempt to regulate its own property, but the Court had done so despite gov-

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32. ERWIN CHEMERINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* 1083 (2d ed. 2002).

33. *Davis v. Commonwealth of Massachusetts*, 167 U.S. 43 (1897).

34. *Id.* at 43.

35. *Id.* at 47. Justice White summed up the Court's view of the plaintiff's Fourteenth Amendment challenge to the Boston City ordinance writing, "For 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.*

36. *Hague v. CIO*, 307 U.S. 496, 501 (1939). In *Hague*, the ordinance had been implemented to deny a permit to assemble to a labor organization on the grounds that it was a Communist group. *Id.* Members found distributing literature in the streets were forcibly compelled to desist by the police and many members of the organization has been arrested and deported from the city. *Id.* at 504.

37. *Id.* at 501.

38. *Id.* at 515.

39. *Schneider v. State of New Jersey*, 308 U.S. 147, 156 (1939).

40. *Id.* at 162.

ernment assertions that such a requirement would interfere with legitimate state interests.<sup>41</sup> Furthermore, the Court even rejected the argument that such speech activities could be conducted elsewhere.<sup>42</sup>

In spite of such advances in public speech, the assumption of the United States government as a private property holder still clung to the Court in later cases. In *Adderley v. Florida* for example, the Court upheld the convictions of several students who were arrested for demonstrating against racial segregation while on jailhouse grounds.<sup>43</sup> The Court explained that “[t]he State, no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated.”<sup>44</sup> The Court then declared that as long as the government did not discriminate on the basis of the content of the students’ speech, its restrictions would be found permissible.<sup>45</sup> After *Adderley*, the United States government was still a private property holder. However, as subsequent Supreme Court case law demonstrates, fully articulating the relationship between the First Amendment and public property would prove a difficult task.

### *Making Government Property Fit the First Amendment*

Justice Robert’s famous “time out of mind” statement in *Hague* established a presumptive right to use sidewalks for speech activities.<sup>46</sup> Yet, by painting free speech rights on public property as a sort of public speech easement, *Hague* preserved the idea that the United States government has the same basic right to exclude people and views that a private property owner does.<sup>47</sup> This idea of private property ownership complicated the application of First Amendment principles to government property in later cases, and eventually resulted in the categorical approach adopted in *Perry Education Association v. Perry Local Educators’ Association*, which remains in force today.<sup>48</sup> However, *Perry* was preceded by a period of Court experimentation during the civil rights movement of the 1960s, where it was not entirely certain that *Hague*’s idea of the public forum would survive at all.<sup>49</sup> Two cases are representative of the attempt to incorporate the ideals of the civil rights movement into the Court’s analysis of free speech on public

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41. *Id.* In rejecting the city’s argument, the Court noted that there were other ways for the city to prevent littering without running afoul of the Constitution. *Id.*

42. *Id.* at 163. The Court stated, “[T]he streets are natural and proper places for the dissemination of information and opinion; and one is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place.” *Id.*

43. *Adderley v. Florida*, 385 U.S. 39, 40 (1966).

44. *Id.* at 47.

45. *Id.* at 48.

46. *Hague v. CIO*, 307 U.S. 496, 515 (1939); CHEMERINSKY, *supra* note 32, at 1085.

47. Dienes, *supra* note 30, at 112.

48. *Id.*

49. *Id.* at 112-14. *See also*, Post, *supra* note 30, at 1729-30.

property. These cases are *Police Dept. v. Mosley* and *Grayned v. City of Rockford*.<sup>50</sup>

*Mosley* dealt with the constitutionality of a Chicago ordinance prohibiting picketing or demonstrating on a public way, near a school building, while school was in session.<sup>51</sup> However, the ordinance exempted "peaceful picketing of any school involved in a labor dispute."<sup>52</sup>

The Court chose to frame the issues in light of the Equal Protection Clause of the Fourteenth Amendment stating, "There is an 'equality of status in the field of ideas,' and government must afford all points of view an equal opportunity to be heard."<sup>53</sup> The Court also made direct reference to the idea of the public forum noting that "[s]elective exclusions from a public forum may not be based on content alone, and may not be justified by reference to content alone."<sup>54</sup> Even while introducing Equal Protection analysis however, the Court was unable to escape from the private ownership framework of the public forum established in *Hague* and *Adderley*.<sup>55</sup>

What emerges from *Mosley*, is a two-track analysis of speech rights on public property.<sup>56</sup> The crucial distinction is whether or not the government regulation is directed at the content of the speech. If the government legislates on the basis of the content of the speech, it must either show that the speech belongs to an unprotected category such as obscenity, or it must show that the law is necessary for a compelling government interest.<sup>57</sup> However, if the regulation is content-neutral, it will be subject to a lesser burden of showing that the law is narrowly tailored to achieve a significant or substantial government interest and that alternative means of communication are available.<sup>58</sup>

In *Grayned*, the Supreme Court appeared ready to entirely reject the *Davis* idea of government as a private property holder.<sup>59</sup> Here, the Court upheld a municipal ordinance that prohibited disturbing school classes, by noise or diversion, while on public or private grounds adjacent to any school building.<sup>60</sup> While upholding the ordinance, the Court took the opportunity to

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50. *Police Dept. of Chicago v. Mosley*, 408 U.S. 92 (1972); *Grayned v. City of Rockford*, 408 U.S. 104, 115 (1972).

51. *Mosley*, 408 U.S. at 92-93.

52. *Id.*

53. *Id.* at 96 (quoting A. MEIKLEJOHN, *POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE* 27 (1948)).

54. *Mosley*, 408 U.S. at 96.

55. See *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 49 n.9 (1983).

56. *Schutte*, *supra* note 29, at 113-14.

57. *Id.* at 114.

58. *Id.*

59. *Grayned v. City of Rockford*, 408 U.S. 104, 115 (1972).

60. *Id.* at 107-08.



discuss speech rights on public property. The Court began with what seemed like a clear refutation of the *Davis* assumption: "The right to use a public place for expressive activity may be restricted only for weighty reasons."<sup>61</sup> Whereas *Davis* created a presumption of government license to regulate its own property however it wished, *Grayned* now seemed to shift the burden of justifying the regulation onto the government.<sup>62</sup>

The Court continued by noting that while the government cannot make content-based restrictions, it may make reasonable "time, place and manner" regulations that are necessary to further a significant government interest.<sup>63</sup> However, the Court then declared that in determining the reasonableness of such regulations "[t]he crucial question is whether the manner of expression is basically incompatible with the normal activity of a particular place at a particular time."<sup>64</sup> In *Davis*, the Court had classified public property without any real reference to the First Amendment.<sup>65</sup> However, in *Grayned*, the Court now proposed a new, unified First Amendment test that would be applied to all public property.<sup>66</sup>

What is significant about both *Mosley* and *Grayned* is that characterization of the property in question as a public forum is not crucial to the outcome, and there is at least some discussion of the First Amendment issues at stake.<sup>67</sup> However, this approach was abandoned by the Court a few years later in *Greer v. Spock*, which reinstated classification of government property as the determinative factor.<sup>68</sup> In *Greer*, the Court upheld a regulation prohibiting "demonstrations, picketing, sit-ins, protest marches, [and] political speeches" on a military base even though the regulation also included some parts of the base to which civilians were allowed free access.<sup>69</sup>

In upholding the regulation, the Court not only invoked public forum classification as a threshold issue, it also included a new focus on whether the property in question had a tradition of being open to the public for First Amendment activities.<sup>70</sup> The result of *Greer* was to shift Court at-

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61. *Id.* at 115.

62. Post, *supra* note 30, at 1729-30.

63. *Grayned*, 408 U.S. at 115-16.

64. *Id.* at 116.

65. Post, *supra* note 30, at 1731.

66. *Id.* See also, *Grayned*, 408 U.S. at 116-17.

67. *Grayned*, 408 U.S. at 115.

68. Post, *supra* note 30, at 1739.

69. *Greer v. Spock*, 424 U.S. 828, 831 (1976). The Court found that the regulation had been applied in an acceptably neutral fashion and was not unreasonable given the military's historical mandate to provide for the national defense. *Id.* at 838-39. While admitting that the regulation might possibly be applied irrationally or arbitrarily, the Court noted that the plaintiffs had failed to submit any material proving such a claim. *Id.* at 840.

70. Citing Justice Roberts' famous *Hague* dicta, the Court defined a public forum as a place that has traditionally served as a place for free public assembly and communication of thoughts by private citizens. *Id.* at 835-36. The Court also rejected the *Mosley* assertion that

tention away from whether the speech was basically incompatible with the primary purpose of the property, and to focus instead on the classification of the government property.<sup>71</sup> Yet, even though the Court had shifted its analysis to the government property instead of the speech, the Court failed to discuss the specific attributes of the military base at issue, preferring instead to focus on "military installations" as a category.<sup>72</sup>

The majority opinion in *Greer* drew a sharp dissent from Justice Brennan who seemed to realize that the categorical approach adopted by the Court would likely lead to tradition becoming the determinative issue in any case dealing with speech on public property.<sup>73</sup> However, *Greer* had set the stage for the institution of forum analysis as the exclusive vehicle for applying the First Amendment to government property.<sup>74</sup>

#### *Forum Analysis: The Categorical Approach*

Forum analysis became firmly institutionalized in *Perry Education Association v. Perry Local Educators' Association*.<sup>75</sup> In *Perry*, the Court gave perhaps its most comprehensive articulation of what guidelines were to be applied when faced with questions of First Amendment status of government property.<sup>76</sup> The issue in *Perry* centered on whether a teacher's union should be allowed to use an interschool mailing system that had already been made available to a rival union.<sup>77</sup> Under a collective bargaining agreement with the school district, the Perry Education Association would have access to the mailing system, but no other union would be allowed access.<sup>78</sup> The

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public property may become a public forum if it is opened up to speech activity, stating that "[t]he fact that other civilian speakers and entertainers had sometimes been invited to appear at Fort Dix did not of itself serve to convert Fort Dix into a public forum." *Id.* at 838.

71. *Post, supra* note 30, at 1741.

72. *Greer*, 424 U.S. at 838. The Court noted that the commanding officer of a military base has historically always enjoyed the right to exclude civilians, concluding that "[t]he notion that federal military reservations, like municipal streets and parks, have traditionally served as a place for free public assembly and communication of thoughts by private citizens is thus historically and constitutionally false." *Id.*

73. *Id.* at 858-59 (Brennan, J., dissenting). Justice Brennan noted, "It bears special note that the notion of 'public forum' has never been the touchstone of public expression, for a contrary approach blinds the Court to any possible accommodation of First Amendment values in this case." *Id.* at 859 (Brennan, J., dissenting). *See also Post, supra* note 30, at 1744-45 (describing Brennan's attempt to rehabilitate *Grayned* to counteract the establishment of the public forum).

74. *Post, supra* note 30, at 1743, 1745.

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

76. *Id.* at 45-46.

77. *Id.* at 38.

78. *Id.* The relevant government entities had designated the Perry Education Association as the exclusive representative of the teachers of Perry Township in an election in 1977. *Id.* at 40. The Perry Education Association negotiated the contract at issue soon after the election.

Court ruled that the school had no obligation to allow the union access to the mailing system.<sup>79</sup>

In giving its rationale for the ruling, the Court designated three types of government property: public forums, nonpublic forums, and limited public forums.<sup>80</sup> Whether a government regulation will be held constitutional will depend on the nature of the property and the government restriction.<sup>81</sup>

### 1. Public Forums

Public forums are those government-owned properties that the government is constitutionally obligated to make available for speech activities.<sup>82</sup> Sidewalks and public parks provide the most recognizable examples of public forums.<sup>83</sup> The government is allowed to regulate speech within the forum, but only if the regulation meets certain requirements.<sup>84</sup> First, the regulation must be either content-neutral, or it must be justifiable under strict scrutiny as illustrated in *Carey v. Brown*.<sup>85</sup> In *Carey*, the Supreme Court struck down an Illinois statute that prohibited picketing in residential areas, but allowed it if the dwelling was being used as a place of business or was a place of employment involved in a labor dispute.<sup>86</sup> The Court found that the statute gave preferential treatment to certain kinds of speech, such as speech related to labor disputes.<sup>87</sup> Therefore, it violated the requirement of content neutrality.<sup>88</sup> Regarding the content-neutrality requirement, Justice Brennan wrote,

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*Id.* The contract only excluded the Perry Local Educators' Association from use of the teachers' mailboxes and the school mailing system. *Id.* at 41.

79. *Id.* at 55.

80. *Id.* at 45-46.

81. *Id.* at 45.

82. *Id.* (citing *Ark. Educ. Television Comm'n v. Forbes*, 523 U.S. 666, 677 (1998)).

83. *Id.* (quoting *Hague v. CIO*, 307 U.S. 496, 515 (1939)). In 1965, Professor Harry Kalven expanded upon the "time out of mind" statement from *Hague*:

[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.

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

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

85. *Carey v. Brown*, 447 U.S. 455, 463 (1980).

86. *Id.* at 457.

87. *Id.* at 462, 471.

88. *Id.* at 463. By contrast, in *Frisby v. Schultz*, the Court upheld an anti-residential picketing statute despite the fact that the statute was enacted in response to targeted picketing by abortion protestors of an abortion doctor's home. *Frisby v. Schultz*, 487 U.S. 474, 476, 477

[The] government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views. And it may not select which issues are worth discussing or debating in public facilities. There is an 'equality of status in the field of ideas,' and government must afford all points of view an equal opportunity to be heard.<sup>89</sup>

The second requirement is that the regulation must be a reasonable time, place, and manner restriction that serves an important government interest and provides adequate alternative places for speech.<sup>90</sup> For example, in *Clark v. Community for Creative Non-Violence*, the Court upheld a Park Service regulation that prevented protest groups from actually sleeping in symbolic tent cities erected in Lafayette Park and the Mall in Washington, D.C.<sup>91</sup> Although the protestors were allowed to erect the tent cities, in protest of the plight of the homeless, they were not allowed to sleep in the tents because of a regulation prohibiting camping in the parks.<sup>92</sup> While the Court accepted that sleeping in the tents was a part of the desired expressive conduct, it held that the regulation was a reasonable time, place, and manner restriction.<sup>93</sup> The Court also noted the content-neutrality of the regulation, the important governmental purpose of preserving the attractiveness of the parks, and the availability of adequate alternative methods of expressing the desired message.<sup>94</sup>

Finally, the Court has noted that government regulation of speech in public forums need not use the least restrictive alternative available.<sup>95</sup> However, the regulation must still be narrowly tailored to achieve the government's purpose.<sup>96</sup> For example, a New York City regulation requiring that any concert using the Bandshell in Central Park use sound engineers and city sound equipment passed constitutional muster in *Ward v. Rock Against Racism*.<sup>97</sup> The United States Court of Appeals for the Second Circuit had reasoned that since less restrictive means of meeting city objectives of noise reduction were available, the city had failed to use "the least intrusive means" of achieving its desired result.<sup>98</sup> The United States Supreme Court responded that while the regulation had to be narrowly tailored to serve the

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(1988). Since the statute simply prohibited targeted picketing of residences regardless of content, it survived the content-neutrality test. *Id.* at 488.

89. *Carey*, 447 U.S. at 463.

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

91. *Clark v. Cmty for Creative Non-Violence*, 468 U.S. 288, 299 (1984).

92. *Id.* at 292.

93. *Id.* at 294.

94. *Id.* at 295.

95. *Ward v. Rock Against Racism*, 491 U.S. 781, 798 (1989).

96. *Id.* at 798.

97. *Id.* at 786-88.

98. *Id.* at 797.

legitimate government objective, "it need not be the least restrictive or least intrusive means of doing so."<sup>99</sup>

## 2. Nonpublic Forums

A nonpublic forum is a place that the government can close to all speech activity, subject to the requirement that the regulation be "reasonable" and "viewpoint neutral."<sup>100</sup> This category re-invokes the *Greer* decision allowing the government to limit public access to its property based on content.<sup>101</sup> However, the *Perry* Court sought to distinguish itself from *Greer* by prohibiting "viewpoint discrimination," although the Court never clearly articulated what made "viewpoint discrimination" different from "content discrimination" (which it allowed).<sup>102</sup>

The *Perry* Court also drew upon the *Adderley* decision.<sup>103</sup> In *Adderley*, the Court set out the basic criteria for review of any regulation of a nonpublic forum:

It is, of course, undisputed that appropriate, limited discretion, under properly drawn statutes or ordinances, concerning the time, place, duration, or manner of use of the streets for public assemblies may be vested in administrative officials, provided that such limited discretion is exercised with uniformity of method of treatment upon the facts of each application, free from improper or inappropriate considerations and from unfair discrimination . . . [and with] a systematic, consistent and just order of treatment, with reference to the convenience of public use of the highways . . . .<sup>104</sup>

The Court also upheld a government prohibition on posting signs on publicly owned utility poles in *Members of the City Council of the City of Los Angeles v. Taxpayers for Vincent*.<sup>105</sup> The Court first noted that the state had a legitimate interest in preserving the aesthetic appearance of public

99. *Id.* at 798.

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

101. *Greer v. Spock*, 424 U.S. 828, 830-31 (1976). The Court found that the regulation had been applied in an acceptably neutral fashion and was not unreasonable given the military's historical mandate to provide for the national defense. *Id.* at 838-39. While admitting that the regulation might possibly be applied irrationally or arbitrarily, the Court noted that the plaintiffs had failed to submit any material proving such a claim. *Id.* at 840.

102. *Perry*, 460 U.S. at 49-50.

103. *Id.* at 46. "[As we have] stated on several occasions, '[the] State, no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated.'" *Id.* (quoting *Adderley v. Florida*, 385 U.S. 39, 47 (1966)).

104. *Adderley*, 385 U.S. at 48 (internal quotations and citations omitted).

105. *Members of the City Council of the City of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 792, 817 (1984).

places and could make reasonable regulations to that end.<sup>106</sup> The Court then refused to designate public utility poles as a public forum noting the lack of any history supporting the existence of a traditional right of access comparable to public streets and parks.<sup>107</sup> The Court concluded that “[p]ublic property which is not by tradition or designation a forum for public communication may be reserved by the State for its intended purposes . . . as long as the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker’s view.”<sup>108</sup>

In brief, a nonpublic forum, as currently construed by the Court, is subject to rational basis review. Consequently, the government restriction on the property must merely be rationally related to a legitimate government purpose, and cannot discriminate on the basis of content.<sup>109</sup>

### 3. Designated (or Limited) Public Forums

The designated public forum is an attempt to determine what happens when the government allows some groups or individuals freedom of expression on its property, but selectively denies access to other groups or individuals. Probably the most influential case dealing with this question is *Police Department v. Mosley*.<sup>110</sup> *Mosley* dealt with a Chicago ordinance prohibiting picketing or demonstrating on a public way within 150 feet of any school building while school was in session, with an exception for peaceful picketing of a school involved in a labor dispute.<sup>111</sup> The Supreme Court stated that once the government opens a forum to some groups, it cannot then exclude others on the mere basis of what they intend to say.<sup>112</sup> The Court then struck the ordinance down as a content-based exclusion, which “is never permitted.”<sup>113</sup>

In *Mosley*, the Court set forth the basic concept behind what is now termed the “designated” or “limited” public forum. As long as the government allows speech on its property, it cannot then pick and choose between different speech activities on the basis of content.<sup>114</sup> In effect, a limited or designated public forum had been created. Such a forum is a place that the

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106. *Id.* at 805.

107. *Id.* at 814.

108. *Id.* at 814-15 (quoting *Perry*, 460 U.S. at 46).

109. CHEMERINSKY, *supra* note 32, at 1097.

110. *Police Dep’t of Chicago v. Mosley*, 408 U.S. 92 (1972). See also Ronnie J. Fischer, “What’s In a Name?”: An Attempt to Resolve the “Analytic Ambiguity” of the Designated and Limited Public Fora, 107 DICK. L. REV. 639 (2003).

111. *Mosley*, 408 U.S. at 94.

112. *Id.* at 96.

113. *Id.* at 100.

114. *Id.* at 46.

government could close to speech, but that the government has voluntarily and affirmatively left open to speech activity.<sup>115</sup>

While *Mosley* set forth the idea behind the designated public forum, *Widmar v. Vincent* was the first case to recognize the possibility of its existence independent from other public forums.<sup>116</sup> In *Widmar*, the Court ruled that a university that allowed student groups to use school buildings could not then exclude religious student groups.<sup>117</sup> The Court recognized that the property in question was very different from a traditional public forum, but then applied forum analysis determining the exclusion was a content-based restriction, and therefore subject to the strict scrutiny test (under which, the exclusion was struck down).<sup>118</sup>

It was not until the *Perry* decision that the designated public forum was officially recognized by the Supreme Court, although it was neither named, nor described in much detail.<sup>119</sup> The Court mentioned a type of forum that neither qualified as a "traditional public forum" or the Court's newly created "nonpublic forum."<sup>120</sup> Although the Court did not name this new category of government property, its description of the "nonpublic forum" as "public property that is not by tradition or designation a forum for public communication," led to the label of "designated public forum" by negative implication.<sup>121</sup>

In *Cornelius v. NAACP Legal Defense & Educational Fund, Inc.*, the Court affirmed *Perry*'s categorical approach, but deviated significantly from prior interpretations of the nonpublic and designated public forum.<sup>122</sup> In *Cornelius*, certain advocacy organizations were excluded from participation in a federally created and managed charity drive entitled "The Combined Federal Campaign."<sup>123</sup> The United States Supreme Court upheld the regulation, holding that the Combined Federal Campaign was a nonpublic forum, and the government's restrictions were reasonable.<sup>124</sup> The Court, citing *Perry*, found that the Combined Federal Campaign qualified as a fo-

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

116. *Widmar v. Vincent*, 454 U.S. 263, 270 (1981).

117. *Id.* at 276. The *Widmar* Court stated, "Through its policy of accommodating their meetings, the University has created a forum generally open for use by student groups. Having done so, the University has assumed an obligation to justify its discriminations and exclusions under applicable constitutional norms." *Id.* at 267.

118. *Id.* at 270.

119. *Perry*, 460 U.S. at 45-46, 48 (1983).

120. *Id.* at 45.

121. *Id.* See also *Ark. Educ. Television Comm'n v. Forbes*, 523 U.S. 666, 679 (1998).

122. *Cornelius v. NAACP Legal Def. and Educ. Fund*, 473 U.S. 788, 790, 802 (1985).

123. *Id.* at 790.

124. *Id.* at 806, 812, 813.

rum even though it did not really exist in any tangible location.<sup>125</sup> The Court then designated the campaign as a nonpublic forum.<sup>126</sup>

The Court in *Cornelius* agreed with *Perry* that a designated public forum can be created when the government opens a place or channel of communication for general public use.<sup>127</sup> However, the Court then specified that a designated public forum is created only when the government intended that the forum be opened for public discourse.<sup>128</sup> This focus on government intent, displayed in *Cornelius*, would emerge again in *United States v. Kokinda* and *International Society for Krishna Consciousness, Inc. v. Lee*, revealing an increasingly speech restrictive trend on the Supreme Court.<sup>129</sup>

Later cases have done little to clarify designated public forum doctrine further than *Cornelius*. In *Lamb's Chapel v. Center Moriches Union Free School Dist.*, the Court held that by allowing community groups to use its facilities on weekends, a school district could not then exclude religious groups.<sup>130</sup> Although the Court struck the restriction down as content-based, and therefore presumptively impermissible, it avoided analyzing the limited public forum concept in any depth.<sup>131</sup> More recently, in *Good News Club v. Milford Central School*, the Supreme Court similarly managed to avoid explaining the rules governing intermediate categories of public fora.<sup>132</sup> However, the Court did explain that speech restrictions on limited public fora do not receive strict scrutiny, as do traditional public fora.<sup>133</sup>

At present, there is a great deal of confusion over the exact nature of the designated public forum and what level of judicial review ought to be

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125. *Id.* at 801 (citing *Perry*, 460 U.S. at 45).

126. *Cornelius*, 473 U.S. at 806. In giving its rationale, the Court stated, "We 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 803.

127. *Id.*

128. *Id.* The Court stated that mere government inaction or permitting of a "limited discourse" is not sufficient for creating a public forum. *Id.*

129. *See United States v. Kokinda*, 497 U.S. 720, 730 (1990) (O'Connor, J., plurality) (stating that government creates a public forum only by intentionally opening a nontraditional forum for public discourse); *Int'l Soc'y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 679 (1992) (stating that a traditional public forum is property that has the free exchange of ideas as a "principle purpose").

130. *Lamb's Chapel v. Center Moriches Union Free School Dist.*, 508 U.S. 384, 391 (1993).

131. *Id.* at 387. *See also Fischer*, *supra* note 110, at 639.

132. *Good News Club v. Milford Central School*, 533 U.S. 98, 106 (2001). In *Good News*, a Christian youth organization was denied permission to use the school's cafeteria for after-school meetings. *Id.* at 103. The Court's avoidance of discussion was facilitated by both parties' agreement that the school district had created a limited public forum. *Id.* at 106.

133. *Id.*



applied.<sup>134</sup> However, *Cornelius* and *Good News* yield at least two general guidelines. In *Cornelius*, government intent became the determining factor in analyzing the designated public forum, replacing more objective criteria.<sup>135</sup> In *Good News*, rational basis became the appropriate standard of review for the designated public forum rather than the strict scrutiny applied in *Mosley* and *Widmar*.<sup>136</sup> As in public and nonpublic forum jurisprudence, the recent trend of Supreme Court opinion articulated in *Cornelius* and *Good News* clearly indicates an attitude that is both more restrictive of free speech, and more permissive of government restrictions.

### *Government Intent Determines the Public Forum*

The forum analysis jurisprudence following *Perry* had effectively removed the *Grayned* approach that had focused on whether the speech conduct was compatible with the primary purpose of the property.<sup>137</sup> Instead, the Court now focused on the objective character and history of the government property. The Court then used these characteristics to classify the property accordingly and typically, the classification would be determinative for any First Amendment issues at stake.<sup>138</sup> However, two cases in the early 1990s would challenge this new standard as well, shifting the Court's focus away from both the nature of the speech and the nature of the property: *United States v. Kokinda*, and *International Society for Krishna Consciousness v. Lee*.<sup>139</sup>

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134. For examples of the confusion prevailing among the Federal Courts of Appeals, see generally *Heartbeat of Ottawa County v. City of Port Clinton*, 207 F. Supp. 2d 699, 702 n.2 (N.D. Ohio 2002) (noting that limited public forum and designated public forum are interchangeable terms and both are subject to strict scrutiny); *Van Bergen v. Minnesota*, 59 F.3d 1541, 1553 n.10 (8th Cir. 1995) (stating that a limited public forum is a type of designated public forum and both receive strict scrutiny); *DiLoreto v. Downey Unified Sch. Dist. Bd. Educ.*, 196 F.3d 958 (9th Cir. 1999) (stating that a limited public forum is a type of nonpublic forum that receives rational basis review); *Summum v. Callaghan*, 130 F.3d 906 (10th Cir. 1997) (stating a limited public forum can be either a type of designated public forum, or a type of nonpublic forum receiving either strict scrutiny review or rational basis review respectively); *Hopper v. City of Pasco*, 241 F.3d 1067, 1074-75 (9th Cir. 2001) (stating that a limited public forum is a type of designated public forum, but only receives rational basis review); *Hotel Employees & Rest. Employees Union, Local 100 v. City of New York Dep't of Parks & Recreation*, 311 F.3d 534 (2d Cir. 2002) (stating that a limited public forum is a type of designated public forum, but the standard of review depends on whether the speaker falls within the limiting class set by the government).

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

136. *Good News*, 533 U.S. at 106; *Police Dept. of Chicago v. Mosley*, 408 U.S. 92, 101 (1972); *Widmar v. Vincent*, 454 U.S. 263, 270 (1981).

137. Post, *supra* note 30, at 1749-50.

138. *Id.* at 1714-16.

139. *United States v. Kokinda*, 497 U.S. 720 (1990) (O'Connor, J., plurality); *Int'l Soc'y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672 (1992) (Rehnquist, C.J., plurality).

The *Kokinda* ruling has particular importance for the recent *First Unitarian* ruling.<sup>140</sup> In *Kokinda*, the Court upheld restrictions on solicitations on a portion of sidewalk on United States Postal Service property.<sup>141</sup> A plurality Court opinion held that the sidewalk in question did not “have the characteristics of public sidewalks traditionally open to expressive activity.”<sup>142</sup> As Justice O’Connor wrote, “[T]he postal sidewalk was constructed solely to provide for the passage of individuals engaged in postal business.”<sup>143</sup> The Court then ruled the sidewalk a nonpublic forum and upheld the government restriction under rational basis review.<sup>144</sup>

*Kokinda* is unusual for two reasons. First, the Court was taking what had typically been considered the “archetype” of a traditional public forum (a public sidewalk) and designating it as a nonpublic forum.<sup>145</sup> But secondly, and more importantly, the Court had clearly invoked government intent as the standard for classifying the property as a nonpublic forum.<sup>146</sup> Furthermore, in doing so, the Court also marginalized the importance of the actual objective characteristics of the property in question stating: “The mere physical characteristics of the property cannot dictate forum analysis. If they did, then *Greer v. Spock* would have been decided differently.”<sup>147</sup> The message was clear – government intent to create a public forum was now more important than either the nature of the speech or the objective characteristics of the property.<sup>148</sup> In this sense, *Kokinda* marks an important shift in Su-

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140. *Kokinda*, 497 U.S. at 720 (1990) (O’Connor, J., plurality).

141. *Id.*

142. *Id.* at 727. In rejecting the traditional public forum designation, Justice O’Connor stated that the sidewalk was not meant “to facilitate the daily commerce and life of the neighborhood or city.” *Id.* The sidewalk was solely meant to assist patrons in accessing the post office. *Id.* at 728.

143. *Id.* at 727.

144. *Id.* at 730.

145. See *Frisby v. Schultz*, 487 U.S. 474, 481 (1988) (stating that once an archetype of a public forum has been identified it is not appropriate to examine whether special circumstances would support downgrading the property to a less protected forum).

146. *Kokinda*, 497 U.S. at 730 (O’Connor, J., plurality). Justice O’Connor stated, “[T]he government does not create a public forum by . . . permitting limited discourse, but only by intentionally opening a nontraditional forum for public discourse.” *Id.* (quoting *Cornelius v. NAACP Legal Def. and Educ. Fund*, 473 U.S. 788, 802 (1985)). O’Connor also noted that “[t]he Postal Service has not expressly dedicated its sidewalks to any expressive activity.” *Kokinda*, 497 U.S. at 730.

147. *Id.* at 727 (holding that portions of a military base normally open to the public do not constitute a public forum).

148. Justice Kennedy criticized the Court’s new focus on intent in his concurrence in *Kokinda*. He advocated retaining the focus on the nature of the property arguing, “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.* at 737-38 (Kennedy, J., concurring).

preme Court forum analysis doctrine to a much more speech restrictive stance.<sup>149</sup>

The unusual focus of *Kokinda* was reaffirmed by Chief Justice Rehnquist, writing for a plurality, in *International Society for Krishna Consciousness, Inc. v. Lee* (“*ISKCON*”).<sup>150</sup> In *ISKCON*, the Court ruled that airport terminals constitute a nonpublic forum.<sup>151</sup> Noting that large airports are a relatively recent development, Rehnquist stated that an airport “hardly qualifies for the description of having ‘immemorially . . . time out of mind’ been held for the public trust and used for purposes of expressive activity.”<sup>152</sup> The Court also observed that the airport terminals were not designated public forums since the responsible government entity had not intentionally opened them for speech activity.<sup>153</sup> Having designated airports as a nonpublic forum, the Court turned its consideration to whether the restriction satisfied the reasonableness standard, and easily concluded that it did.<sup>154</sup>

Although the plurality opinion in *ISKCON* was a natural outgrowth of *Kokinda*, it resulted in a badly fractured Court and has been sharply criticized in scholarly circles.<sup>155</sup> Justice Kennedy’s concurrence is perhaps representative of some of the criticisms leveled at the new government-intent-based approach adopted in *Kokinda* and *ISKCON*. Justice Kennedy attacked both the categorical approach of the Court’s forum analysis and its emphasis on intent, stating: “Our public forum doctrine ought not be a jurisprudence of categories rather than ideas or convert what was once an analysis protective of expression into one which grants the government authority to restrict speech by fiat.”<sup>156</sup> While attacking the Court’s analysis, Kennedy repeated

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149. David S. Day, *The Public Forum Doctrine’s “Government Intent Standard”: What Happened to Justice Kennedy?*, L. REV. MICH. ST. U. DET. C. L., Spring 2000, at 178.

150. *Int’l Soc’y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 680 (1992) (Rehnquist, C.J., plurality). This case came before the Court as two separate petitions for certiorari and was decided as two companion cases. This note is primarily concerned with the opinion authored by Chief Justice Rehnquist upholding the ban on solicitation, as well as the concurrences and dissents to that opinion.

151. *Id.* at 683. The International Society for Krishna Consciousness challenged a regulation that limited the distribution of literature and solicitations at an airport to areas outside the terminals. *Id.*

152. *Id.* at 680 (quoting *Hague v. CIO*, 307 U.S. 496, 515 (1939)).

153. *Id.* at 680. The plaintiffs sought to establish a tradition of speech in airports by showing that speech had historically been a part of activity at various “transportation nodes” such as railway stations, bus stations, and wharves. *Id.* at 681. Justice Rehnquist dismissed such arguments noting that first of all, such “transportation nodes” were traditionally of private ownership, and second, the case was about airports, not “transportation nodes” generally. *Id.*

154. *Id.* at 683.

155. Day, *supra* note 30, at 192. For scholarly criticism of *ISKCON*, see generally Schutte, *supra* note 29; Day, *supra* note 149, at 176, 184-85; R. Alexander Acosta, *Revealing the Inadequacy of the Public Forum Doctrine: International Society for Krishna Consciousness, Inc. v. Lee*, 112 S. Ct. 2701 (1992), 16 HARV. J.L. & PUB. POL’Y 269 (1993).

156. *ISKCON*, 505 U.S. at 693-94 (Kennedy, J., concurring)

the call he had made in *Kokinda*, advocating a return to an analysis that focuses on the characteristics of the government property:

This analysis is flawed at its very beginning. It leaves the government with almost unlimited authority to restrict speech on its property by doing nothing more than articulating a non-speech related purpose for the area, and it leaves almost no scope for the development of new public forums absent the rare approval of the government. The Court's error lies in its conclusion that the public forum status of public property depends on the government's defined purpose for the property, or on an explicit decision by the government to dedicate the property to expressive activity. In my view, the inquiry must be an objective one, based on the actual, physical characteristics and uses of the property.<sup>157</sup>

The emergence of the government intent standard also indicates that public forum status is unlikely to be granted to any government property outside of the traditional categories of streets and parks.<sup>158</sup> Significantly, any new and emerging forms of government property will be, by definition, excluded from public forum classification.<sup>159</sup> On the other hand, the Court has shown few qualms in finding nonpublic forums in a variety of contexts. In *United States Postal Service v. Council of Greenburgh Civic Associations*, the Court upheld a Postal Service regulation prohibiting the deposit of unstamped "mailable matter" in Postal Service approved mailboxes.<sup>160</sup> The Court reasoned that there was no reason to treat letterboxes any differently than it had treated military bases in *Greer* or jails in *Adderley* and upheld the regulation and labeled the mailboxes as a nonpublic forum.<sup>161</sup>

*Greenburgh* illustrates the emergence of the problem of applying forum analysis to new and unconventional forms of government property. It is in *Cornelius v. NAACP*, however, that the Supreme Court indicates the kind

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157. *Id.* at 694 (Kennedy, J., concurring).

158. *Id.* at 680 (stating that the relatively recent emergence of modern airport terminals in U.S. history disqualifies them from being considered "made available" for public speech (quoting *Hague*, 307 U.S. at 515)).

159. Schutte, *supra* note 29, at 580. See also *ISKCON*, 505 U.S. at 680 (quoting *Hague*, 307 U.S. at 515).

160. *United States Postal Service v. Council of Greenburgh Civic Ass'ns.*, 453 U.S. 114, 115 (1981).

161. *Id.* at 129. After noting the lack of any historical support for mailboxes as public forums, the Court then founded a large part of its rationale on the fact that private parties often place locks on mailboxes (which has the same effect on the plaintiffs as the government regulation) and a designation of mailboxes as public forums might require such locks to be removed. *Id.* at 128-29. The Court also noted that the restriction on the plaintiffs' speech was merely inconvenient since alternative methods of communication were available. *Id.* at 129.

of application of forum analysis such property might receive.<sup>162</sup> In language that would be echoed later in the *Kokinda* and *ISKCON* decisions, the *Cornelius* Court reasoned that 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.”<sup>163</sup> It is hard to imagine a form of government property other than streets or parks that could meet such requirements.<sup>164</sup>

This was the state of public forum analysis at the time *First Unitarian* was decided. Forum status would be determinative of the permissibility of the government regulation, and that status, in turn, would be determined not by considering the nature of the speech activity or the objective characteristics of the government property, but by whether the government intended to create a public forum or not.

### *Lower Court Approaches*

Besides the extensive Supreme Court case law on public forum analysis, two circuit court decisions figured prominently in the Tenth Circuit ruling in *First Unitarian*. The first case, *Hawkins v. City and County of Denver*, arose from action by the City and County of Denver removing protesters from the “Galleria” of the Denver Performing Arts Complex.<sup>165</sup> In analyzing the nature of the property, the Tenth Circuit Court concluded that the Galleria did not constitute a public forum.<sup>166</sup> The court distinguished the Galleria from such traditional public forums as public streets and sidewalks, noting that the Galleria did not “form part of Denver’s automotive, bicycle or pedestrian transportation grid” and that its purpose was merely “to permit ingress to and egress from” the Denver Performing Arts Complex facilities.”<sup>167</sup>

The *Hawkins* court also noted that while the property of the Galleria used to be a public street, that fact did not make the Galleria a public forum.<sup>168</sup> The court explained, “In some sense the government always retains authority to close a public forum, by selling the property, changing its physical character, or changing its principle use.”<sup>169</sup> However, the court noted that “the government must alter the objective physical character or uses of

162. *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 802 (1985).

163. *Id.* at 802. See also *ISKCON*, 505 U.S. at 680 (Rehnquist, C.J., plurality); *United States v. Kokinda*, 497 U.S. 720, 730 (1990) (O’Connor, J., plurality).

164. See *Cornelius*, 473 U.S. at 825 (Blackmun, J., dissenting) (arguing that government can show requisite intent merely by denying access to the speaker).

165. *Hawkins v. City and County of Denver*, 170 F.3d 1281, 1283 (10th Cir.1999).

166. *Id.* at 1287. The court stated that the mere fact that the public was allowed to come and go at will did not render the Galleria a public forum. *Id.*

167. *Id.*

168. *Id.*

169. *Id.*

the property, and bear the attendant costs, to change the property's forum status."<sup>170</sup>

The second important case is *Venetian Casino Resort, L.L.C. v. Local Joint Executive Board of Las Vegas*.<sup>171</sup> In *Venetian Casino*, the United States Court of Appeals for the Ninth Circuit refused to issue an injunction upon Clark County officials requiring them to recognize and enforce Venetian's right to exclude labor union demonstrators from a sidewalk fronting the casino on Las Vegas Boulevard.<sup>172</sup> Due to a street widening project, the old sidewalk along the street was destroyed and, by agreement with the Venetian Casino, the county was permitted to build a new sidewalk on Venetian's property.<sup>173</sup>

The Venetian contended that the old public forum was destroyed and the new sidewalk was not intended to be dedicated as a public forum.<sup>174</sup> The court acknowledged that the pre-existing public forum could have been destroyed if the relocation to Venetian's property had fundamentally changed the sidewalk's character or use.<sup>175</sup> However, the court quickly noted that no such transformation had taken place with the new sidewalk fronting the Venetian Casino.<sup>176</sup> The court explained that the new sidewalk still performed the same role and that there was "little to distinguish the replacement sidewalk in front of the Venetian from the connecting public sidewalks to its north and south."<sup>177</sup>

#### PRINCIPAL CASE

The sale of the plaza property and terms of the easement were first challenged in the United States District Court for the District of Utah.<sup>178</sup> The plaintiffs brought summary judgment claims under the First Amendment, the Establishment Clause, and the Equal Protection Clause of the Fifth and Fourteenth Amendments.<sup>179</sup> Regarding the First Amendment claim, the plaintiffs argued that the property remained a public forum where their rights of expression could not be restricted and that the provisions of the easement were facially invalid restrictions of their freedom of expression on the prop-

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170. *Id.* at 1288.

171. *See generally* *Venetian Casino Resort, L.L.C. v. Local Joint Executive Board of Las Vegas*, 257 F.3d 937 (9th 2001).

172. *Id.* at 941.

173. *Id.* at 943.

174. *Id.*

175. *Id.* at 944.

176. *Id.*

177. *Id.* at 945.

178. *First Unitarian Church v. Salt Lake City Corp.*, 146 F. Supp. 2d 1155, 1158 (D. Utah 2001).

179. *Id.* at 1161-62.

erty.<sup>180</sup> The second claim alleged that the City had violated the Establishment Clause by impermissibly delegating full discretion to the LDS Church over which members of the public would be allowed to use the easement.<sup>181</sup> Finally, the plaintiffs claimed that the City's imposition of vague, arbitrary, and discriminatory restrictions on public use of the property while allowing the Church unrestricted access, constituted a violation of the Equal Protection Clause.<sup>182</sup> In addressing the plaintiffs' First Amendment claims, the district court ruled that the plaza constituted a nonpublic forum and applied rational basis review finding the government restrictions on the easement permissible.<sup>183</sup> The plaintiffs then appealed the case to the United States Court of Appeals for the Tenth Circuit.<sup>184</sup> The Tenth Circuit panel overruled the lower court, finding that the easement actually constituted a traditional public forum and found the restrictions impermissible under strict scrutiny review.<sup>185</sup>

#### *The Decision of the United States Court of Appeals for the Tenth Circuit*

The Tenth Circuit panel opinion, authored by Judge Seymour, first examined the plaintiffs' free speech claim.<sup>186</sup> The court wrote that the issue before it was "whether the City has the authority to prohibit all expressive activities on a public easement it reserved across otherwise private property except for the speech permitted by the private owner of the underlying estate."<sup>187</sup>

The court was dismissive of arguments by the City and LDS Church that the terms of the easement designated it only for pedestrian passage and expressly excluded speech activities.<sup>188</sup> The court wrote, "[A] deed does not insulate government action from constitutional review . . . . If government actions taken with respect to the easement violate the Constitution, this simply means the easement terms themselves are unconstitutional . . . ."<sup>189</sup>

The opinion quickly moved to the defendants' central contention that an easement is not a government property interest at all and therefore, First Amendment principles should not apply.<sup>190</sup> Drawing on rulings from the United States Supreme Court and the United States Circuit Court of Appeals for the Ninth Circuit, the court declared that forum analysis does not

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180. *Id.* at 1161.

181. *Id.* at 1162.

182. *Id.*

183. *Id.* at 1172-73.

184. *First Unitarian Church v. Salt Lake City Corp.*, 308 F.3d 1114, 1117 (10th 2002).

185. *Id.* at 1128, 1132.

186. *Id.* at 1121.

187. *Id.*

188. *Id.*

189. *Id.* at 1122.

190. *Id.*

require that the government hold a possessory interest in the underlying land and that either government regulation or ownership is sufficient for some sort of First Amendment forum to exist.<sup>191</sup> The court further held that according to *Cornelius v. NAACP Legal Defense & Education Fund, Incorporated*, forum analysis does not even require that the government property have an identifiable location.<sup>192</sup> Therefore, whether the property interest was characterized as a government property interest, or a private property interest burdened by the government, First Amendment principles would still apply.<sup>193</sup>

The court also disagreed with the defendants' contention that easements do not constitute significant enough property interests to warrant forum analysis.<sup>194</sup> The court reasoned that if the condemnation of an easement is enough to constitute a taking under the Fifth Amendment of the United States Constitution, easements must be constitutionally cognizable in other areas of the Constitution as well.<sup>195</sup> The court was unsympathetic to LDS Church arguments that permitting speech on the easement would constitute a taking of its property by simply remarking that any potential constitutional conflicts arising in the future were not before the court and need not be considered.<sup>196</sup>

The court ended by noting that the public fora status of many existing public streets and sidewalks would be jeopardized by holding that easements cannot be First Amendment fora, since many streets and sidewalks are mere public easements.<sup>197</sup> The court also noted that its decision should not be interpreted as a holding that the First Amendment applies to all easements, but that whether an easement constitutes a public forum will depend

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191. *Id.* (citing *United States Postal Service v. Council of Greenburgh Civic Ass'ns*, 453 U.S. 114, 129 (1981) (applying forum principles to privately owned mailboxes "controlled by the government"); *Marsh v. Alabama*, 326 U.S. 501, 505 (1946) (holding that title to the property is not necessarily determinative of public speech rights); *Venetian Casino v. Local Joint Executive Board*, 257 F.3d 937, 945-46 (9th Cir. 2001) (holding that a sidewalk need not be government owned to constitute a public forum)).

192. *Id.* In *Cornelius*, the Court was willing to classify a federal charity drive as a forum despite the fact that it is difficult to identify the physical location or "situs" of a charity drive. *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 801 (1985) (citing *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983)).

193. *First Unitarian*, 308 F.3d at 1121.

194. *Id.* at 1122.

195. *Id.* at 1122-23.

196. *Id.* at 1123.

197. *Id.* The court noted that highways and streets "are public property only in the sense that they are subject to public use . . . As a rule, and whether a highway is established by dedication or prescription, or by the direct action of the public authorities, the public acquires merely an easement of passage, the fee title remaining in the landowner." *Id.* (citing 39 AM. JUR. 2D *Highways, Streets, and Bridges* § 182-83 (1999)).



upon the characteristics and context of the easement, as well as other practical considerations.<sup>198</sup>

Having concluded the forum analysis was appropriate, the court opinion proceeded to designate the easement as a traditional public forum.<sup>199</sup> The court began by rejecting the defendants' argument that the express language in the reservation of easement prevents the easement from being considered a public forum.<sup>200</sup> The court noted, "The government cannot simply declare the First Amendment status of property regardless of its nature and public use."<sup>201</sup> The opinion specified that it is only in respect to designated public fora that Supreme Court analysis has focused on government intent to create a public forum.<sup>202</sup> In analysis of traditional public fora, by contrast, the objective characteristics of the property are centrally important.<sup>203</sup>

The court determined that the actual purpose of the easement in question, as stated in the City Ordinance authorizing closure of the street, was to serve as a pedestrian thoroughway, "planned and improved so as to maintain, encourage, and invite public use."<sup>204</sup> Arguments from the defendants claiming that the purpose of the easement was merely ingress and egress from Church buildings and facilities were dismissed as being at odds with the publicly and legislatively stated purposes of the plaza.<sup>205</sup>

The defendants further argued that the easement in question was similar to the walkways at issue in the *Hawkins* decision and therefore, not a traditional public forum.<sup>206</sup> However, the court distinguished the *Hawkins* case from *First Unitarian*, noting that in *Hawkins* the walkway at issue was not a part of the city's transportation grid and was not generally used for any purpose other than access to and from the Galleria.<sup>207</sup> On the contrary, the court felt the easement at issue was better compared to the easement that was ruled a public sidewalk in *Venetian Casino*.<sup>208</sup>

The court then considered whether speech activities were incompatible with the purpose of the easement.<sup>209</sup> The court noted that the district court had erred in its analysis of incompatibility by declaring speech activi-

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198. *First Unitarian*, 308 F.3d at 1124.

199. *Id.* at 1128.

200. *Id.* at 1124.

201. *Id.*

202. *Id.*

203. *Id.* at 1125 (citing *Int'l Soc'y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 698, 699 (1992)).

204. *Id.* at 1126.

205. *Id.* at 1126-27.

206. *Id.* at 1127.

207. *Id.*

208. *Id.* at 1128.

209. *Id.*

ties incompatible with an “ecclesiastical park” instead of the actual easement itself.<sup>210</sup> Providing an “ecclesiastical park” had been the purpose of the surrounding property, not the purpose of the easement.<sup>211</sup> Furthermore, the court noted that speech activity is historically compatible with spaces dedicated to pedestrian passage.<sup>212</sup> Arguments from the defendants claiming that expressive conduct would interfere with the LDS Church’s use of the surrounding property were dismissed as presenting separate issues not before the court in this case.<sup>213</sup> The court concluded by ruling that the fact that the pedestrian passageway in question traverses private property does not defeat its status as a public forum.<sup>214</sup>

Having determined that the nature of the easement is not incompatible with speech activities, the court proceeded to determine whether the property had traditionally been open to expressive public activity.<sup>215</sup> While acknowledging that the government always retains authority to close a public forum either by selling it or by altering it sufficiently, the court did not believe that the principle use of the easement in question had changed sufficiently to close its status as a traditional public forum.<sup>216</sup> In fact, the purpose of providing a pedestrian thoroughway was identical to the purpose served by the sidewalks that formerly occupied the property and the City had deliberately retained the most important functions of the property.<sup>217</sup> Therefore, it had also retained the functions associated with speech activities.<sup>218</sup> In effect, the City was attempting to change the forum’s status without bearing the attendant costs associated with such change.<sup>219</sup>

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210. *Id.*

211. *Id.*

212. *Id.*

213. *Id.* at 1129.

214. *Id.*

215. *Id.*

216. *Id.* at 1130. The question of whether the City and the LDS Church had altered the property sufficiently to change its forum status was a crucial component of the Utah District Court decision. *First Unitarian Church v. Salt Lake City Corp.*, 146 F. Supp. 2d 1155, 1168-71 (D. Utah 2001). Regarding the changed nature and use of the plaza, the District Court stated, “[B]y purchasing the Property and creating thereon a religiously oriented pedestrian plaza connecting two privately owned blocks of property, the CBP sufficiently changed the physical character and principal use or function of the Property so as to terminate its status as a public forum.” *Id.* at 1171. Having determined that the City’s retained easement did not constitute a “public forum,” the District Court held that the easement constituted a “nonpublic forum” and was therefore subject to rational basis review. *Id.* at 1172. Reasoning that the prohibited speech activities were incompatible with the property right held by the city (namely, that of a mere pedestrian easement), the restrictions on the property were indeed rationally related to a legitimate government interest. *Id.*

217. *First Unitarian Church v. Salt Lake City Corp.*, 308 F.3d 1114, 1130-31 (10th Cir. 2002).

218. *Id.* at 1131.

219. *Id.* at 1131. Justice Seymour wrote,

Having ruled that the easement constituted a traditional public forum, the court had little difficulty in finding that the restrictions that had been placed on the easement were invalid.<sup>220</sup> Citing to *Perry*, the court stated that the government may not prohibit all communicative activity within a public forum.<sup>221</sup> The court observed that the essential contention of the defendants was that the public has no speech rights at all, except as the LDS Church permitted. The court then noted that the United States Supreme Court had held such broad bans unconstitutional even in nonpublic forum analysis.<sup>222</sup> The court concluded by noting that although the plaintiffs had moved for partial summary judgment only on their First Amendment claim, the Tenth Circuit ruling would dispose of the plaintiffs' remaining claims because all of the claims rested on the easement restrictions that the Court now held invalid.<sup>223</sup>

#### ANALYSIS

The Tenth Circuit ruling in *First Unitarian* represents both a break with the trend of recent United States Supreme Court forum analysis, and a return to the more speech protective stance of older Supreme Court case law. In *First Unitarian*, the Tenth Circuit deemphasizes the government intent standard articulated in *ISKCON*, in favor of the standard set forth in Justice Kennedy's concurrence in *ISKCON*. Although the idea of holding a mere concurrence as binding Supreme Court precedent is questionable, and even more questionable considering that Kennedy's concurrence disagreed with Chief Justice Rehnquist's plurality opinion on several points, the Kennedy test does seem preferable to Rehnquist's overly deferential government intent approach. Thus, while the Tenth Circuit opinion is questionable as an interpretation of current binding Supreme Court jurisprudence, it also arrives at a result that is both more sensible to the relevant facts of the case and in greater harmony with the true essence of the First Amendment.

#### *Rejecting the Intent Standard*

In *First Unitarian*, the Tenth Circuit was faced with the charge of determining whether or not a publicly owned pedestrian easement over pri-

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We are convinced the City has attempted to change the forum's status without bearing the attendant costs, by retaining the pedestrian easement but eliminating the speech previously permitted on the same property. In effect, the City wants to have its cake and eat it too, but it cannot do so under the First Amendment.

*Id.*

220. *Id.* at 1132.

221. *Id.* (citing, *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983)).

222. *First Unitarian*, 308 F.3d at 1132.

223. *Id.* at 1120, 1133.

vate property should be ruled a public forum.<sup>224</sup> While the Tenth Circuit's decision to apply forum analysis to an easement does not seem unusual in light of recent Supreme Court case law, the court's designation of the easement as a traditional public forum is probably less in keeping with the current trend of Supreme Court opinion.<sup>225</sup> In arriving at the classification of the easement as a public forum the Tenth Circuit invoked *ISKCON* and *Kokinda* in a manner that is initially somewhat confusing.

The Tenth Circuit's decision to apply forum analysis to the easement is largely unproblematic. While the Supreme Court has not yet had the opportunity to rule on whether a government easement can constitute a traditional public forum, it would not be a large step for the Court to do so. As the Tenth Circuit opinion noted, *United States v. Council of Greenburgh Civic Associations* shows that government possessory interest in or title to the underlying land is not a prerequisite for forum analysis.<sup>226</sup> While the Court upheld the restrictions, the ruling seemed to clearly indicate mere government ownership or regulation can subject a piece of property to First Amendment forum analysis.<sup>227</sup>

Furthermore, as the *First Unitarian* court noted, it may not even be necessary for the government to have any property interest at all.<sup>228</sup> In *Cornelius v. NAACP Legal Defense & Education Fund, Inc.*, the Supreme Court applied forum analysis to the "Combined Federal Campaign," a federally run charity drive.<sup>229</sup> Despite the fact that a charity drive did not constitute a

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224. *Id.* at 1124.

225. *See, e.g.,* *Members of the City Council of the City of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 814 (1984) (refusing to designate public utility poles as public forums on the grounds that they lacked a traditional right of public access); *Cornelius v. NAACP Legal Def. and Educ. Fund*, 473 U.S. 788, 803 (1985) (a designated public forum is only created when the government intends that the forum be opened for public use); *United States v. Kokinda*, 497 U.S. 720, 727 (1990) (O'Connor, J., plurality) (noting that the post office sidewalk was distinguishable from traditional sidewalks because its primary purpose was to facilitate pedestrian passage and stating that the sidewalk was not a public forum because the Postal Service had not "expressly dedicated" it to expressive activity); *Int'l Soc'y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 679-81 (1992) (Rehnquist, C.J., plurality) (refusing to consider tradition of speech within "transportation nodes," instead narrowing the focus to "airport terminals" and reaffirming that a traditional public forum must have free exchange of ideas as its "primary purpose").

226. *First Unitarian*, 308 F.3d at 1122 (citing *United States Postal Serv. v. Council of Greenburgh Civic Ass'n*, 453 U.S. 114, 129 (1981)). In *Greenburgh*, the Court applied forum analysis to restrictions placed on government owned mailboxes even though there was no government real estate involved. *Council of Greenburgh*, 453 U.S. at 129.

227. *Id.*

228. *First Unitarian*, 308 F.3d at 1122 (citing *Cornelius v. NAACP Legal Def. & Educ. Fund*, 473 U.S. 788, 800, 801 (1985)).

229. *Cornelius*, 473 U.S. at 788.

“property interest” in the traditional sense, the Court still applied forum analysis and designated the charity drive as a nonpublic forum.<sup>230</sup>

The case for including easements in the realm of possible traditional public forums is made stronger by the fact that easements are already recognized as constitutionally cognizable property interests.<sup>231</sup> The *First Unitarian* court noted that government condemnation of an easement is sufficient to qualify as a taking under the Fifth Amendment.<sup>232</sup> If easements are constitutionally recognizable as compensable property rights under the Fifth Amendment, it seems odd to argue that they are not recognizable under the First Amendment.

The court’s decision to apply forum analysis seems in harmony with the current trend of public forum jurisprudence.<sup>233</sup> It is after the decision to apply forum analysis that the court seems to run into trouble as the defendants’ defense relating to the deed that conveyed the easement presents the court with a more difficult problem. The court summarizes the defendants’ argument as follows:

The City and the LDS Church respond that the easement cannot be a public forum because of express language in the reservation of easement stating the space does not constitute a public forum. They also argue the physical characteristics of the former Main Street have been changed sufficiently by development of the plaza to eliminate any public forum that existed along the former Main Street.<sup>234</sup>

The defendants’ first contention is a direct appeal to the Supreme Court’s recent focus on government intent as the determining factor in deciding forum status.<sup>235</sup> If the Supreme Court has found that the government can evidence intent to create a nonpublic forum by simply denying certain groups

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230. *Id.* at 806. It is, of course, worth noting that neither *Greenburgh* nor *Cornelius* went so far as to rule that these more unconventional forms of government property were anything more than nonpublic forums. Still, it seems unquestionable that forum analysis is increasingly being applied in unusual contexts. See, e.g., John J. Brogan, *Speak and Space: How the Internet is Going to Kill the First Amendment as We Know It*, 8 VA. J.L. & TECH. 8, 1-3 (2003) (criticizing the current forum analysis framework, and discussing how such a framework will inevitably break down in the face of new communication venues such as the internet).

231. *First Unitarian Church v. Salt Lake City Corp.*, 308 F.3d 1114, 1122-23 (10th Cir. 2002).

232. *Id.* at 1122 (citing *Dolan v. City of Tigard*, 512 U.S. 374 (1994)).

233. Farber & Nowak, *supra* note 30, at 1221-22; Schutte, *supra* note 29, at 564 (stating that the Court is increasingly relying on forum analysis in determining when the public may use government controlled property for speech purposes); Dienes, *supra* note 30, at 110-15.

234. *First Unitarian*, 308 F.3d at 1124.

235. *Int’l Soc’y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 679 (1992) (Rehnquist, C.J., plurality).

access to the property, the addition of an express written document denying public forum status entirely ought to be even more decisive against finding a public forum.<sup>236</sup> The defendants' second contention that the characteristics of the property had been changed seems to have anticipated that the Tenth Circuit might fail to apply the "government intent standard," and use instead, a test focusing on the objective characteristics of the property such as the tests used in *Greer* and *Perry*, and more recently advocated by Justice Kennedy.<sup>237</sup>

The Tenth Circuit first addressed the problem of the deed of conveyance.<sup>238</sup> Interestingly, the court quickly rejects the government intent standard, declaring, "We first reject the contention that the City's express intention not to create a public forum controls our analysis."<sup>239</sup> To back up this assertion, the Tenth Circuit cites both *ISKCON* and *Kokinda*.<sup>240</sup> The choice of supporting cases is strange however, as both opinions are widely regarded as advancing the very intent standard that the Tenth Circuit was trying to reject.<sup>241</sup>

In *ISKCON*, Chief Justice Rehnquist's plurality opinion made prominent reference to government intent as the controlling factor in determining public forum status.<sup>242</sup> Chief Justice Rehnquist began by stating, "In *Cornelius*, we noted that a traditional public forum is property that has as 'a principle purpose . . . the free exchange of ideas.'"<sup>243</sup> He continued, "The

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236. *Id.* at 680-81.

237. *See Greer v. Spock*, 424 U.S. 828, 837-38 (1976) (holding that political campaigning activities are inconsistent with the use and purpose of a military base); *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 44 (1983) ("The existence of a right of access to public property and the standard by which limitations must be evaluated differ depending on the character of the property at issue."). *See also ISKCON*, 505 U.S. at 698-99 (Kennedy, J., concurring); *United States v. Kokinda*, 497 U.S. 720, 737-38 (1990) (Kennedy, J., concurring).

238. *First Unitarian*, 308 F.3d at 1124.

239. *Id.*

240. *Id.* (citing *ISKCON*, 505 U.S. at 694 (Kennedy, J., concurring); *Kokinda*, 497 U.S. at 738 (Kennedy, J., concurring)).

241. *See, e.g., Schutte*, *supra* note 29, at 568; *Day*, *supra* note 149, at 179, 183; *Buchanan*, *supra* note 30, at 949, 965.

242. *ISKCON*, 505 U.S. at 679 (Rehnquist, C.J., plurality).

243. *Id.* (quoting *Cornelius v. NAACP Legal Def. and Educ. Fund*, 473 U.S. 788, 800 (1985)). Interestingly, the easement in question in *First Unitarian* would probably fail to qualify as a traditional public forum under this criteria since its "principle purpose" is to facilitate pedestrian traffic, not provide for free exchange of ideas. Indeed, most streets and sidewalks would probably fail to qualify for public forum status, as Justice Kennedy pointed out:

The notion that traditional public forums are properties that have public discourse as their principal purpose is a most doubtful fiction . . . . It would seem apparent that the principle purpose of streets and sidewalks, like airports, is to facilitate transportation, not public discourse, and we have recognized as much . . . . Thus under the Court's analysis, even the

decision to create a public forum must instead be made 'by *intentionally* opening a nontraditional forum for public discourse.'"<sup>244</sup> While it might be possible to limit these statements as referring only to designated public forums, the Rehnquist opinion certainly contradicts any assertion that government intent is not the primary and controlling factor in public forum analysis.<sup>245</sup>

*Kokinda* is equally problematic for the Tenth Circuit opinion. As noted above, the *Kokinda* Court even denied public forum status to a public sidewalk.<sup>246</sup> After noting that "the mere physical characteristics of the property cannot dictate forum analysis," the Court proceeded to discuss, at length, the government purpose in constructing the sidewalk.<sup>247</sup> The Court then declared,

The Postal Service has not *expressly dedicated* its sidewalks to any expressive activity . . . . To be sure, individuals or groups have been permitted to leaflet, speak, and picket on postal premises, but a regulation prohibiting disruption, and a practice of allowing some speech activities on postal property do not add up to the dedication of postal property to speech activities. We have held that the government does not create a public forum by . . . permitting limited discourse, but only by *intentionally* opening a nontraditional forum for public discourse."<sup>248</sup>

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quintessential public forums would appear to lack the necessary elements of what the Court defines as a public forum.

*Id.* at 696-97.

244. *Id.* at 680 (quoting *Cornelius*, 473 U.S. at 802) (emphasis added). While one might hope that the Main Street plaza's history as a public thoroughfare might allow it to qualify as a traditional public forum even under Rehnquist's test, *Kokinda* and *ISKCON* give little reason for such optimism. *Kokinda*, 497 U.S. at 727 (O'Connor, J., plurality); *ISKCON*, 505 U.S. at 681 (Rehnquist, C.J., plurality). In *Kokinda*, the Court rejected an actual sidewalk for public forum classification on the rather disingenuous argument that while sidewalks may have a tradition of free speech, sidewalks in front of post offices do not. *Kokinda*, 497 U.S. at 727 (O'Connor, J., plurality). Similarly, in *ISKCON*, Rehnquist refused to focus on nodes of transportation generally, and instead focused on the relatively short history of airports. *ISKCON*, 505 U.S. at 681 (Rehnquist, C.J., plurality). Such narrow Court focus renders the fate of a mere public access easement over private property uncertain at best.

245. *ISKCON*, 505 U.S. at 680. Chief Justice Rehnquist stated, "The decision to create a public forum must instead be made by intentionally opening a nontraditional forum for public discourse." *Id.* (citing *Cornelius*, 473 U.S. at 802).

246. *Kokinda*, 497 U.S. at 730 (O'Connor, J., plurality).

247. *Id.* at 727-28.

248. *Id.* at 730 (emphasis added).

The Court concluded by ruling that the public sidewalk was a nonpublic forum, subject to rational basis review.<sup>249</sup>

However, neither the citations to *Kokinda*, or *ISKCON*, in the Tenth Circuit opinion reference to the Supreme Court plurality opinions.<sup>250</sup> In both cases, the Tenth Circuit cites Kennedy's concurrences, and not the O'Connor and Rehnquist plurality opinions.<sup>251</sup> What makes the choice of cited authority most interesting is that Kennedy's concurrences in both cases are highly critical of the methods used by the plurality in applying forum analysis.<sup>252</sup> In both cases, Kennedy rejects the plurality's new government intent test and advocates instead, a test focusing on the objective characteristics of the property.<sup>253</sup> It is Kennedy's test, rather than the intent test that the Tenth Circuit adopts in *First Unitarian*.<sup>254</sup> In essence, the *First Unitarian* decision rejects the recent, highly deferential approach of recent Supreme Court pluralities, in favor of a different test advocated in a concurrence that is highly critical of the plurality approach.<sup>255</sup>

However, since the *ISKCON* decision utterly failed to render a useable majority opinion, the Tenth Circuit's reliance on Kennedy's opinion is probably justified. The court explained, "We cite Justice Kennedy's concurrence as controlling Supreme Court precedent because his concurrence provided the fifth vote on the narrowest grounds."<sup>256</sup> It does seem clear that Kennedy's concurrences provided a necessary "swing-vote" in both *ISKCON* and *Kokinda*.<sup>257</sup> In absence of a bona fide majority opinion to guide the lower courts, it is hard to fault the Tenth Circuit for preferring

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249. *Id.*

250. *Id.*

251. *Id.* (citing *Int'l Soc'y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 694 (Kennedy, J., concurring); *Kokinda*, 497 U.S. at 738 (Kennedy, J., concurring)). It should be noted that the Tenth Circuit is not bound to follow mere plurality opinions that have failed to garner support of a Court majority. *Marks v. United States*, 430 U.S. 188, 193 (1977). However, the Tenth Circuit's preference for Kennedy's test places the court in conflict with the increasingly deferential and speech-restrictive trend of Supreme Court opinion. See *Schutte*, *supra* note 29, at 566-68; *Dienes*, *supra* note 30, at 110.

252. *ISKCON*, 505 U.S. at 693-94 (Kennedy, J., concurring) ("I believe that the Court's public forum analysis in these cases is inconsistent with the values underlying the Speech and Press Clauses of the First Amendment."); *Kokinda*, 497 U.S. at 737 (Kennedy, J., concurring) ("[B]ecause of the wide range of activities that the Government permits to take place on this postal sidewalk, it is more than a nonpublic forum . . . . 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.").

253. *Id.*

254. *First Unitarian Church v. Salt Lake City Corp.*, 308 F.3d 1114, 1125 (10th Cir. 2002).

255. *Id.* at 1124-25.

256. *Id.* at 1125 n.6 (emphasis added) (citing *Hawkins v. Hargett*, 200 F.3d 1279, 1982 (10th Cir. 1999); *Marks*, 430 U.S. at 193).

257. See generally, *U.S. v. Kokinda*, 497 U.S. 720 (1990); *Int'l Soc'y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672 (1992).



Kennedy's concurrence, even if that concurrence seems contrary to the trend of Court opinion throughout the past several decades.<sup>258</sup>

Whatever the validity of the Tenth Circuit's decision to follow Kennedy's objective characteristics test, it is clear that the court has rejected Rehnquist's government intent focus.<sup>259</sup> Having rejected the intent test, the court then explicitly sets forth the Kennedy test from *ISKCON*.<sup>260</sup>

After grasping hold of Kennedy's reference to compatibility of speech as a relevant factor, the Tenth Circuit also cites O'Connor's concurrence in *ISKCON*, stating that "the question we address is whether expressive activity is compatible with the purposes and uses to which the government has lawfully dedicated the property."<sup>261</sup> As with Justice Kennedy's concurrence, the Tenth Circuit holds O'Connor's concurrence as controlling since it also provided the "fifth vote on the narrowest grounds in this case."<sup>262</sup>

The result of the Tenth Circuit Court's reliance on the Kennedy and O'Connor concurrences is an outright rejection of the government intent

258. Interestingly, since the *Kokinda* and *ISKCON* decisions, Kennedy has retreated from his firm position in opposition to the "intent test." Writing for the majority in the more recent case of *Arkansas Educational Television Commission v. Forbes*, Justice Kennedy seems to abandon his objective characteristics test in favor of Rehnquist's focus on government intent. 523 U.S. 666, 678 (1998). See also Day, *supra* note 149, at 174, 192. The Tenth Circuit opinion in *First Unitarian* never addresses this inconsistency.

259. After declaring Kennedy's concurrences as controlling, the court then noted that "for property that is or has traditionally been open to the public, objective characteristics are more important and can override express government intent to limit speech." *First Unitarian*, 308 F.3d at 1125 (citing *Kokinda*, 497 U.S. at 738 (Kennedy, J., concurring)).

260. *First Unitarian*, 308 F.3d at 1125 (citing *ISKCON*, 505 U.S. at 698-99 (Kennedy, J., concurring)). Kennedy described his test as follows:

If the objective, physical characteristics of the property at issue and the actual public access and uses that have been permitted by the government indicate that expressive activity would be appropriate and *compatible with those uses*, the property is a public forum. The most important considerations in this analysis are whether the property shares physical similarities with more traditional public forums, whether the government has permitted or acquiesced in broad public access to the property, and whether expressive activity would tend to interfere in a significant way with the uses to which the government has as a factual matter dedicated the property.

*Id.* (emphasis added).

261. *First Unitarian*, 308 F.3d at 1125-26 (citing *ISKCON*, 505 U.S. at 686 (O'Connor, J., concurring)).

262. *Id.* at 1126. Even under the *Marks* decision, it is difficult to see how *two* different concurrences can be used simultaneously as the official holding in *ISKCON*. The Tenth Circuit almost seems to be picking and choosing among the separate concurrences for the ideas it most agrees with.

focus of *ISKCON* and *Kokinda*.<sup>263</sup> Instead, the court adopts a test based on the objective characteristics of the property, with a heavy focus on whether the speech is incompatible with the basic use of the property.<sup>264</sup> In this sense, *First Unitarian* represents a return to the tests used in older Supreme Court cases such as *Grayned* and *Greer*.<sup>265</sup>

#### *A Better Public Forum Analysis?*

The permissibility or impermissibility of the Tenth Circuit's interpretation of Supreme Court jurisprudence aside, the question becomes whether the court's opinion represents a better application of the First Amendment than that found in the plurality opinions of *ISKCON* and *Kokinda*. This note contends that the *First Unitarian* decision is not only more protective of speech than the *ISKCON* or *Kokinda* pluralities, but it is also a more common-sense application of the values underlying the First Amendment as well.

*First Unitarian's* more protective stance towards freedom of speech derives from its application of forum analysis.<sup>266</sup> Recent Supreme Court history has made clear that determining forum status for a parcel of government property is determinative of whether government restrictions on that property will be upheld.<sup>267</sup> Under current Supreme Court jurisprudence, a finding of a nonpublic forum by the court is generally fatal to any speech interests in question.<sup>268</sup> As Chief Justice Rehnquist summarized in *ISKCON*, while a government regulation on a traditional or designated public forum is "subject to the highest scrutiny," limitations on a nonpublic forum are subject only to the requirement that the regulation be reasonable, and not directed at the specific content of the speech.<sup>269</sup> In short, government restrictions on traditional public fora will receive strict scrutiny, while restriction on nonpublic fora need only be reasonable.<sup>270</sup>

The result is that speech rights on nonpublic fora receive, essentially, no protection at all. Professor C. Thomas Dienes notes,

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263. *ISKCON*, 505 U.S. at 680 (Rehnquist, C.J., plurality); *Kokinda*, 497 U.S. at 730 (O'Connor, J., plurality).

264. *First Unitarian*, 308 F.3d at 1125.

265. See *Grayned v. City of Rockford*, 408 U.S. 104, 116 (1972) ("The crucial question is whether the manner of expression is basically incompatible with the normal activity a particular place at a particular time."). See also *Greer v. Spock*, 424 U.S. 828, 835-39 (1976) (discussing why the attributes of certain military base property show that the property is not a public forum).

266. *First Unitarian*, 308 F.3d at 1124-31.

267. Dienes, *supra* note 30, at 110.

268. *Id.* at 120 ("[T]he conceptualistic, nonpublic-forum doctrine predetermines the judicial answer through the labeling process.").

269. *ISKCON*, 505 U.S. at 678-79 (Rehnquist, C.J., plurality) (citing *Perry Educ. Ass'n v. Perry Local Educator's Ass'n*, 460 U.S. 37, 45-46 (1983)).

270. *Id.*

The failure to successfully challenge government regulation of the nonpublic forum is not hard to understand. The reasonableness standard of judicial review used in such cases is *essentially no review at all*. Indeed, the Court regularly refers to it as rationality review. Those familiar with the plethora of due process and equal protection cases in which rationality review is employed will appreciate the outcome-determinative character of the standard. These cases provide ample testimony that *invocation of rationality review is simply a means of articulating judicial deference to governmental judgment*.<sup>271</sup>

In light of the judicial deference currently surrounding the nonpublic forum, it is apparent that the result of the court's forum analysis will be crucial to the success of a free speech claim concerning government property.<sup>272</sup> It follows that if current Supreme Court analysis of such speech is to offer any First Amendment protection at all, it must offer that protection in the process of classifying the property.<sup>273</sup>

Unfortunately, recent Supreme Court case law indicates that unless the speech occurred in a park or on a public sidewalk, it is unlikely that the property will be classified as a public forum.<sup>274</sup> While the Main Street plaza at issue in *First Unitarian*, bears great resemblance to a traditional sidewalk, the *ISKCON* and *Kokinda* cases illustrate that, at least in respect to traditional or designated public forums, the Court is currently extremely reluctant to expand its definitions to include less conventional types of government property.<sup>275</sup> In *Kokinda*, instead of focusing on sidewalks generally, the

271. Dienes, *supra* note 30, at 117 (emphasis added).

272. Day, *supra* note 30, at 178 ("The non-forum standard dictated, for all practical purposes, government victory as a result.").

273. Dienes, *supra* note 30, at 110.

274. CHEMERINSKY, *supra* note 32, at 1102. See also, *ISKCON*, 505 U.S. at 679-80 (Rehnquist, C.J., plurality) (stating that streets and parks have a long tradition of availability for speech, but concluding that airports brief history fails to qualify them as having a sufficient tradition of availability for speech).

275. CHEMERINSKY, *supra* note 32, at 1102. Chemerinsky notes that the Court's narrow focus makes it difficult to designate a place as a public forum based on a tradition of availability for speech. *Id.* Justice Brennan's dissent in *ISKCON* is openly hostile to the plurality's limitation of the "public forum" classification to certain "archetypes of property," stating,

To treat the class of such forums as closed by their description as "traditional," taking that word merely as a charter for examining the history of the particular public property claimed as a forum, has no warrant in a Constitution whose values are not to be left behind in the city streets that are no longer the only focus of our community life. If that were the line of our direction, we might as well abandon the public forum doctrine altogether.

*ISKCON*, 505 U.S. at 710 (Brennan, J., dissenting).

Court chose to focus specifically on sidewalks in front of a post office.<sup>276</sup> In *ISKCON*, the Court avoided considering places of transportation generally, but instead chose the narrow focus of airports.<sup>277</sup> Having narrowed the focus of inquiry, the Court asked whether the airport in *ISKCON*, and the post office sidewalk in *Kokinda*, had a tradition of availability for speech activities and easily concluded that they did not.<sup>278</sup> Likewise, when considering whether the primary purpose of the location was for speech, the Court also easily answered in the negative.<sup>279</sup>

The new government intent standard articulated in the *ISKCON* and *Kokinda* pluralities compounds the difficulty in obtaining public forum status. The process of analysis via categorization is already likely to obscure First Amendment concerns.<sup>280</sup> Making that classification dependant on a subjective inquiry as to whether the government entity intended to create a public forum buries First Amendment concerns entirely.<sup>281</sup>

It seems difficult to find a situation in which a government entity would be unable to show intent to keep the property as a nonpublic forum.<sup>282</sup> Indeed, it seems that the government could evidence this intent merely by excluding an individual or group. The remarks of Justice Blackmun, in his dissent in *Cornelius*, are instructive in this respect:

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276. *United States v. Kokinda*, 497 U.S. 720, 727 (1990).

277. *ISKCON*, 505 U.S. at 681 (Rehnquist, C.J., plurality).

278. *Id.* at 680.

279. *Id.* at 682. In *Cornelius*, the Court stated that a traditional public forum is property that has as "a principle purpose . . . the free exchange of ideas." *Cornelius*, 473 U.S. at 800. Justice Kennedy noted that it is doubtful whether even streets and parks would qualify under such a strict definition of the public forum. *ISKCON*, 505 U.S. at 696-97 (Kennedy, J., concurring).

280. Farber & Nowak, *supra* note 30, at 1224. The authors state,

Our objection to public forum analysis is not that it invariably yields wrong results (although it sometimes does), but that it distracts attention from the first amendment values at stake in a given case. It almost certainly will hinder lower court judges from focusing on those values or from making sense of Supreme Court precedent. Classifying a medium of communication as a public forum may cause legitimate governmental interests to be thoughtlessly brushed aside; classifying it as something other than a public forum may lead courts to ignore the incompatibility of the challenged regulations with first amendment values.

*Id.*

281. The result is that judicial analysis is moved away from any discussion of the speech in question in favor of a narrow discussion of whether the government intended speech to occur on the property. Furthermore, the *Kokinda* decision indicates that even parks and sidewalks may not be immune to government intent. Day, *supra* note 30, at 187 ("By applying the government intent standard to a traditional forum like a sidewalk, however, *Kokinda* pointedly threatens the anticensorial core of the free speech doctrine.").

282. *ISKCON*, 505 U.S. at 695 (Kennedy, J., concurring).

The Court's analysis empties the limited-public forum concept of meaning and collapses the three categories of public forum, limited public forum, and nonpublic forum into two. The Court makes it virtually impossible to prove that a forum restricted to a particular class of speakers is a limited public forum. If the Government does not create a limited public forum unless it intends to provide an "open forum" for expressive activity, and if the exclusion of some speakers is evidence that the Government did not intend to create such a forum, no speaker challenging denial of access will ever be able to prove that the forum is a limited public forum. The very fact that the Government denied access to the speaker indicates that the Government did not intend to provide an open forum for expressive activity, and under the Court's analysis of that fact alone would demonstrate that the forum is not a limited public forum.<sup>283</sup>

If, as Rehnquist argued in *ISKCON*, the government may only create a public forum "by intentionally opening a nontraditional forum for public discourse," the Court's analysis of whether a public forum has been created might well boil down to: "if the government says there isn't a public forum . . . there isn't a public forum."<sup>284</sup> Because the highly deferential rational basis review accompanies the nonpublic forum, it is hard to see that Rehnquist's version of forum analysis protects First Amendment interests at all.<sup>285</sup>

The *First Unitarian* decision wisely avoids such negative results by advocating Justice Kennedy's focus on the objective characteristics of the property, and the compatibility of that property with speech activity.<sup>286</sup> In *First Unitarian*, this focus yielded a more common-sense treatment of the facts and circumstances surrounding the plaza controversy. In truth, there was little substantive difference between the traditional public forum existing on the Main Street property prior to the sale, and the public access easement retained after the sale.<sup>287</sup>

The central contention in *First Unitarian*, and the argument that ultimately carried the day in the district court, was that the property had been sufficiently altered by the LDS Church to eradicate the public forum that

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283. *Cornelius v. NAACP Legal Def. and Educ. Fund*, 473 U.S. 788, 825 (1985) (Blackmun, J., dissenting). Though Blackmun's remarks were directed toward Court analysis of a potential *designated* public forum, his point seems more generally applicable to all classifications of forum analysis as is suggested by Justice Brennan's use of Blackmun's statement in his dissent in *Kokinda*. *Kokinda*, 497 U.S. at 751 (Brennan, J., dissenting).

284. *ISKCON*, 505 U.S. at 680 (Rehnquist, C.J., plurality).

285. Dienes, *supra* note 30, at 117.

286. *First Unitarian Church v. Salt Lake City Corp.*, 308 F.3d 1114, 1125 (10th Cir. 2002).

287. *Id.* at 1128.

existed there before the sale of the property.<sup>288</sup> However, as the Tenth Circuit correctly pointed out, it was the *easement*, and not the entire plaza, that constituted the property in controversy.<sup>289</sup> Narrowing the analysis to the easement, one actually finds little difference, in either the character or use, between the sidewalks that existed before the sale, and the easement that remained after the sale. The language of the easement itself reads, “Grantor reserves an easement over and across the surface of the Property for pedestrian access and passage . . . .”<sup>290</sup> As the Tenth Circuit opinion noted, this is the exact function that the pre-existing sidewalks on the Main Street property fulfilled.<sup>291</sup>

Furthermore, the defendants’ contention that the purpose of the property in question was merely to provide ingress and egress to and from Church facilities is not convincing. First, as the court noted, such an argument is contradicted by the plain language of the easement itself, which calls for “pedestrian access and passage.”<sup>292</sup> Second, while the defendants cited to the Tenth Circuit decision in *Hawkins* for support, the new Main Street plaza is clearly different from the Denver Performing Arts Center Galleria at issue in *Hawkins*. The Galleria in *Hawkins* was an isolated pedestrian area that was unusable for throughway pedestrian traffic, and its only real use was for access to the Performing Arts Center.<sup>293</sup> The Main Street Plaza, by contrast, is certainly usable to pedestrians passing through to Salt Lake City’s downtown attractions.<sup>294</sup>

However, all other contentions aside, the *First Unitarian* ruling may be most appropriate because it merely gives effect to the City’s true (as opposed to written) intent concerning the plaza. Even before the sale was agreed upon, various entities of the City were stressing the need to keep the property open to public access, and the Planning Commission even urged making the sale contingent on the condition that public expression would be preserved.<sup>295</sup> The subsequent City Council ordinance approving the sale required the City to retain an easement “planned and improved so as to maintain, encourage, and invite public use . . . .”<sup>296</sup> As we have already seen, the easement itself retained similar language.<sup>297</sup> The court also noted that the City indicated that developing downtown pedestrian malls through street

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288. *First Unitarian Church v. Salt Lake City Corp.*, 146 F. Supp. 2d 1155, 1171 (D. Utah 2001).

289. *First Unitarian*, 308 F.3d at 1130.

290. *Id.* at 1118.

291. *Id.* at 1130.

292. *Id.* at 1118, 1131.

293. *Hawkins v. City and County of Denver*, 170 F.3d 1281, 1287 (10th Cir. 1999).

294. *First Unitarian*, 308 F.3d at 1119.

295. *Id.* at 1118.

296. *Id.*

297. *Id.*

closures had been a stated goal of City planning for almost forty years.<sup>298</sup> In fact, the City even admitted that it would not have agreed to the sale without the easement.<sup>299</sup> It seems apparent that the City intended the plaza to be something substantially more than a mere walkway for accessing LDS Church facilities.<sup>300</sup>

Interestingly, the Church of Jesus Christ of Latter Day Saints seemed to be of an entirely different mind regarding the role of the proposed plaza from the outset.<sup>301</sup> Even in presenting their case before the Tenth Circuit, the City and LDS Church disagreed on what effect enforcing free speech on the property would have.<sup>302</sup> While the City contended that the City's easement would survive without the restrictions, the LDS Church argued that the easement would be eliminated entirely, turning the plaza into completely private property.<sup>303</sup> In adopting the restrictions in the reservation of easement, the City seemed to have been trying to give the Church what it wanted while still getting "a little bit of Paris" in its downtown. As Judge Seymour noted, the City did seem to be attempting to "have its cake and eat it too."<sup>304</sup>

However, the advantages of the Tenth Circuit's approach go further than simply promoting a more common-sense forum analysis. The extent of these advantages is seen in the Tenth Circuit decision's stark contrast to the opinion of the Utah District Court. The district court analyzed the changed character of the surrounding property, and the intent of the City of Salt Lake, and arrived at the conclusion that the pedestrian easement was a nonpublic forum. A brief discussion of the inherent problems with the district court ruling may help clarify the advantages of the approach taken by the Tenth Circuit.

The most immediate disadvantage of the Utah court's decision is that such a ruling would jeopardize the forum-status of parcels of land al-

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298. *Id.* at 1126.

299. *Id.*

300. This is not to say that such apparent intent would trump the City's *written* intent when subjected to the highly deferential Rehnquist test from *ISKCON*.

301. Rebecca Walsh, *New Plaza Proposed On Main*, S.L. TRIB., Dec. 2, 1998, at A1. While the City seemed to be hoping for a nice addition to its pedestrian grid, the LDS Church seemed to be planning on an "ecclesiastical park," forming a continuation of its sizeable downtown campus. *Id.* Perhaps with hindsight, it is easy to see trouble brewing even at the announcement of plans to develop the new plaza in late 1998. *Id.* At the news conference Church President Gordon B. Hinckley told reporters, "This beautiful place will inspire faith where now there is only asphalt and moving cars." *Id.* In contrast, Mayor Deedee Corradini commented, "This plaza is going to be another element of making our city pedestrian-friendly . . . We'll have people out of their cars. We're hoping that rather than go somewhere else, they'll walk down Main Street and shop." *Id.*

302. *First Unitarian*, 308 F.3d at 1126.

303. *Id.*

304. *Id.* at 1131.

ready considered traditional public forums. The Tenth Circuit opinion noted that many existing public sidewalks and streets, the “archetype” of a traditional public forum, are mere government easements.<sup>305</sup> The threat of endangering so many established public forums makes it very difficult to dispute the Tenth Circuit interpretation.<sup>306</sup>

Furthermore, upholding the district court ruling would have the detriment of substantially lowering the bar for government entities wishing to close down existing public forums. Justice Kennedy, in his concurrence in *ISKCON*, wrote that “when property is a protected public forum the State may not by fiat assert broad control over speech or expressive activities; it must alter the objective physical characteristics and bear the attendant costs.”<sup>307</sup>

The danger behind upholding the district court decision would be that government actors might enact marginal changes to a traditional public forum and then declare that its characteristics had been altered sufficiently to close the forum to speech rights.<sup>308</sup> An important benefit of the Tenth Circuit decision in *First Unitarian* is that it keeps such government actors honest. As Judge Seymour remarked, “[T]he City may not exchange the public’s constitutional rights even for other public benefits such as the revenue from a sale, and certainly may not provide a public space or passage conditioned on a private actor’s desire that that space be expression-free.”<sup>309</sup> In light of such serious detriments, a little court-enforced caution on the part of parties to public-to-private land sales does not seem so unbearable.

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305. *Id.* at 1123.

306. In light of the recent contortions that the pluralities in *Kokinda* and *ISKCON* have performed in accommodating the government’s stated intent for its own property, it is not difficult to imagine how an easement might be narrowly excluded from public forum classification in spite of its similarities to other archetypes of public forums. Justice Kennedy’s concurrence in *ISKCON* noted that a narrow focus on intent even poses a threat to the archetypes of public forums:

It would seem apparent that the principal purpose of streets and sidewalks . . . is to facilitate transportation, not public discourse . . . Similarly, the purpose for the creation of public parks may be as much for beauty and open space as for discourse. Thus under the Court’s analysis, even the quintessential public forums would appear to lack the necessary elements of what the Court defines as a public forum.

*Int’l Soc’y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 696-97 (1992) (Kennedy, J., concurring).

307. *Id.* at 700 (Kennedy, J., concurring).

308. This appears to have been the concern of the Tenth Circuit when it stated, “We are convinced the City has attempted to change the forum’s status without bearing the attendant costs.” *First Unitarian*, 308 F.3d at 1131, 1132. The court also noted, “The City must bear the attendant costs . . . If it wants an easement, the City must permit speech on the easement. Otherwise, it must relinquish the easement so the parcel becomes entirely private.” *Id.* at 1132.

309. *Id.* (citing *Hawkins v. City and County of Denver*, 170 F.3d 1281, 1288 (1999)).



## CONCLUSION

The Tenth Circuit Court of Appeals ruling in *First Unitarian Church of Salt Lake City* is a clearly reasoned, common-sense approach to a somewhat ambiguous area of First Amendment law. In the past several decades, forum analysis has evolved from a test that focuses on the compatibility of free speech with government property, to a jurisprudence of superficial categories. Through application of modern forum analysis, recent Supreme Court decisions have almost entirely avoided any serious discussion of the societal balance that must be struck between the demands of the First Amendment and government interests. Instead, we are now regularly treated to a mere exercise in judicial name-calling. The entire success of a free speech claim now hinges on whether the government property in question receives the label of “public” or “nonpublic” forum. Once the label is attached all conversation stops. What’s in a name? Everything, it would seem.

Even more disturbingly, the recent Court decisions in *Cornelius*, *Kokinda*, and *ISKCON* show a new trend that would put the whole key to forum analysis, the determination of the correct label, into the hands of the state. In essence, Chief Justice Rehnquist’s intent test from *ISKCON* asserts that citizens only have a right to free speech when the government intends for them to have it. In view of the United States’ long history of First Amendment jurisprudence, it seems self-evident that the government must be required to produce a better rationale for denial of free speech rights than simply declaring: “because I said so.”

Cases such as *Greenburgh* and *Cornelius* indicate that the Court’s application of public forum analysis is being inexorably drawn into more and more unusual contexts of government-controlled property. The increasing demands of new mediums of communication, such as the internet, will make it increasingly difficult for the Court to resist new inclusions into the public forum category. If nothing else, the cases clearly show that the character of public speech has been greatly expanded beyond the traditional contexts of the soapbox and the picket line. What is needed is a framework of court analysis that does more than simply ask where Americans exercised their speech rights in the eighteenth and nineteenth centuries. Rigid historical restrictions are simply inadequate for dealing with the fast changing character of modern public speech. If the Court’s model of the public forum is to avoid becoming a legal anachronism, a more common-sense application of forum analysis will be needed.

The Tenth Circuit’s decision in *First Unitarian* firmly rejects the intent test in favor of a test that asks instead, whether the speech is compatible with the objective characteristics of the government property. Though the Tenth Circuit retains the categorical framework established in *Perry*, the framework is not allowed to obscure the fundamental First Amendment

questions surrounding the property in question. The result is a useful discussion of the tension between government interests and free speech interests that is almost absent from the plurality opinion in *ISKCON*.

The bulk of academic commentary has come to view forum analysis as something akin to the embarrassing relative in the family of constitutional law jurisprudence. Forum analysis has been roundly criticized for its artificial framework, its increasingly pro-government implementation, and the way it has been used to shield the Supreme Court from the obligation to conduct sincere First Amendment analysis.<sup>310</sup> However, it is undeniable that forum analysis is currently the decided judicial tool for dealing with speech activities on government property.<sup>311</sup> The *First Unitarian* ruling has confirmed that reliance, and academic criticism is likely to continue as well. At the very least, however, *First Unitarian* has provided us with an interpretation of forum analysis that involves a serious discussion of the First Amendment. Since the City's appeal to the Supreme Court was denied certiorari, it remains to be seen whether or not our highest Court will follow suit.<sup>312</sup>

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310. See *supra* note 30.

311. See *supra* note 29.

312. In the meantime, the fight continues on in Salt Lake City. At the time of this note's completion, a recent land swap between the City and the LDS Church, championed by Salt Lake City Mayor Rocky Anderson, promised to end the entire controversy by selling the easement back to the LDS Church in exchange for grounds to house a new community center. Heather May, *Plaza Plan; Mayor offers easement in swap for west-side site; Private Groups Would Fund Center*, S.L. TRIB., Dec. 17, 2002, at A1. The ACLU has already filed suit against the City, claiming that Mayor Anderson caved-in to "the extraordinary pressure brought by the LDS Church" abandoning his initial opposition to the plaza deal. Holly Mullen, *Longtime maverick presses fight for Main Street Plaza*, S.L. TRIB., Aug. 14, 2003, at B1. The mayor agreed to the deal following an LDS Church public relations campaign targeted at Salt Lake City constituents. Heather May, *Church Markets Its Side on Plaza; LDS officials send info packets to business owners, city leaders; LDS Church Launches Plaza Media Blitz*, S.L. TRIB., Nov. 17, 2002, at A1. A ruling from United States District Judge Dale Kimball is still pending. Heather May & Linda Fantin, *Plaza guards bounce students*, S.L. TRIB., Mar. 25, 2004, at C1; Brady Snyder, *Judge to rule on plaza suit*, DESERET NEWS, Jan. 27, 2004.

