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I. INTRODUCTION

Whether one considers United States Postal premises a public forum or not, soliciting contributions on a postal sidewalk will simply not be allowed. Postal regulations prohibit solicitation on postal premises.1 In United States v. Kokinda,2 a plurality of the United States Supreme Court held that section 232.1(h)(1) did not violate the first amendment’s protection of free speech.3 The Court found that a sidewalk situated entirely on postal premises was a non-public forum and that a regulation barring solicitation on such a sidewalk was reasonable under the circumstances.

Part II of this note reviews the background, facts, and Supreme Court’s rationale of Kokinda. Part III then discusses specific concerns relating to the public/non-public forum analysis used by the Court and suggests how the Court might have avoided this form of analysis. Finally, this note concludes that the Court should abandon the public/non-public forum analysis and instead apply the traditional time, place, and manner standard to content-neutral restrictions of protected speech.

II. THE Kokinda CASE

A. Background

The government’s reasons for abridging one’s freedom of speech4 can be placed into two broad categories. The first cate-

1. 39 C.F.R. § 232.1(a)-(q) (1990). Section 232.1(h)(1) provides, in pertinent part: “Soliciting alms and contributions, campaigning for election to any public office, collecting private debts, commercial soliciting and vending, and displaying or distributing commercial advertising on postal premises are prohibited.”
3. In Kokinda, Justice O’Connor delivered the opinion of the Court in which Chief Justice Rehnquist and Justices White and Scalia joined. Justice Kennedy filed an opinion concurring in the judgment. Justice Brennan filed a dissenting opinion in which Justices Marshall and Stevens joined and in which Justice Blackmun joined as to Part I. Id. at 3117.
category is the government's restriction on speech because of its content, which Professor Lawrence Tribe describes as government action "aimed at communicative impact." Professor Tribe considers this type of regulation under a theory he labels "track one" analysis. Governmental action under "track one" analysis takes on a number of different forms. "Track one" analysis is typically very rigid. An important general rule under track one" is "[w]henever the harm feared could be averted by a further exchange of ideas, governmental suppression is conclusively deemed unnecessary." When content-based regulations do not fall within one of the traditional "unprotected categories," they are subject to strict scrutiny, requiring the government to "show that its regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end."

The second category of reasons for abridging one's freedom of speech involves government restrictions "aimed at noncommunicative impact but nonetheless having adverse effects on communicative opportunity." Professor Tribe refers to such content-neutral regulations as "track two" analysis. Examples of content-neutral regulations include prohibiting the use of

6. Id. at 791.
7. See, e.g., Consolidated Edison Co. v. Public Serv. Comm'n, 447 U.S. 530 (1980) (statute barring the inclusion of inserts that discussed political matters in monthly utility bills struck down on the ground that the government may not choose which subjects are appropriate for speech); Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1976) (prohibition of information about the price of over-the-counter drugs invalidated); Cohen v. California, 403 U.S. 15 (1971) (conviction of an individual for disturbing the peace due to the content of a message on the person's jacket reversed); Meyer v. Nebraska, 262 U.S. 396 (1923) (ban on the teaching of foreign languages invalid); Debs v. United States, 249 U.S. 211 (1919) (conviction of an individual who violated a statute forbidding one from obstructing the draft or causing military insubordination upheld).
8. Tribe, supra note 5, at 833-34.
11. Tribe, supra note 5, at 790.
12. Id. at 792.
of sound trucks which emit "loud and raucous noises" while operating on the streets,\textsuperscript{13} forbidding leaflet distribution to prevent littering,\textsuperscript{14} and disallowing doorbell ringing when distributing literature is necessary to protect residents from annoyance and crime.\textsuperscript{15} This note discusses only the second category—content-neutral regulation.

When confronting a governmental action which abridges one's freedom of speech, the Court must first determine the level of judicial scrutiny to apply to the protected speech regulation.\textsuperscript{16} Previously, the Court adopted a forum analysis to determine the appropriate level of scrutiny to apply.\textsuperscript{17} If the regulation is content-neutral (track two) and the speech occurs in a public forum (e.g., public parks, streets, or other property expressly or by tradition dedicated to speech activity), then strict scrutiny applies.\textsuperscript{18} Strict scrutiny requires the regulation to "be finely tailored to serve substantial state interests, and the justifications offered for any distinctions it draws must be carefully scrutinized."\textsuperscript{19} Furthermore, under strict scrutiny, the regulation must not close "adequate alternative channels for communication."\textsuperscript{20} If the speech activity occurs in a non-public forum, however, the regulation is subject only to rational basis scrutiny.\textsuperscript{21}

Not all government-owned property is considered a public forum. Some government-owned facilities, although public, are used for purposes not particularly linked to expression and are thus considered non-public fora.\textsuperscript{22} Previous to the Court's deci-
sion in Kokinda, a conflict existed among the various United States Courts of Appeals concerning the status of sidewalks on Postal Service property.\textsuperscript{23}

B. Facts of Kokinda

Volunteers for the National Democratic Policy Committee set up a table on a post office sidewalk “to solicit contributions, sell books and subscriptions to the organization’s newspaper, and distribute literature addressing a variety of political issues.”\textsuperscript{24} The sidewalk is the only path to the front doors of the post office from the parking lot and lies entirely on Postal Service property.\textsuperscript{25} After receiving between forty and fifty complaints, the postmaster asked the volunteers to leave.\textsuperscript{26} They refused and were arrested.\textsuperscript{27}

Respondents were convicted of violating 39 C.F.R. § 232.1(h)(1) by a United States Magistrate in the District of Maryland and received modest fines and imprisonment.\textsuperscript{28} Respondents appealed to the United States District Court for the District of Maryland, which affirmed their convictions.\textsuperscript{29} Their convictions, however, were reversed by a divided panel of the United States Court of Appeals for the Fourth Circuit.\textsuperscript{30} The Fourth Circuit held that the postal sidewalk was a public forum and that no significant governmental interest was served by banning solicitation.\textsuperscript{31} Because of conflicting decisions among the federal courts of appeals, the Supreme Court granted certiorari.\textsuperscript{32}

\textsuperscript{23} government"); Greer v. Spock, 424 U.S. 828 (1976) (sidewalks and streets on a military base may be placed off limits to political speakers since the purpose of a military base is to train soldiers, not to provide a public forum).


\textsuperscript{26} \textit{Id.}

\textsuperscript{27} \textit{Id.}

\textsuperscript{28} Kokinda received a $50 fine and 10 days in prison. Pearl received a $100 fine and 30 days imprisonment. United States v. Kokinda, 866 F.2d 699, 700 (4th Cir. 1989), \textit{rev'd}, 110 S. Ct. 3115 (1990).

\textsuperscript{29} \textit{Id. at} 701.

\textsuperscript{30} \textit{Id. at} 700.


\textsuperscript{32} \textit{Id.}
C. The Plurality’s Reasoning

The Court first determined whether the postal sidewalk was a public or non-public forum. Finding it to be a non-public forum, the plurality applied a minimum scrutiny (reasonableness) analysis and found the regulation to pass constitutional muster.

1. Postal premises as a non-public forum

The Court rejected the argument that despite being on postal premises, the sidewalk is indistinguishable from the municipal sidewalk on the opposite side of the parking lot. The mere fact that the property in question was a sidewalk does not dictate forum analysis. A municipal sidewalk running parallel to a road is a public passageway and therefore a traditional public forum sidewalk. The Postal Service sidewalk merely gave persons engaged in postal business access to the post office building.

Continuing its analysis, the Court found that the postal sidewalk had not been dedicated to any “expressive activity.” The Court pointed out that postal premises are only dedicated to “the posting of public notices on designated bulletin boards.” However, the Court recognized that other first amendment activities had been permitted on postal property. Nevertheless, the Court stated that the existence of a regulation prohibiting disruption and the allowance of some

33. Id. at 3121.
34. Justice Kennedy, in his concurrence, found that it was unnecessary to determine whether the sidewalk was a public or non-public forum, since the postal regulation at issue met the traditional standards applied to time, place, and manner restrictions. Id. at 3125; see also infra part III.B.
35. Id. at 3120.
36. Id.
37. Id.
38. Id.
39. Id. at 3121.
40. Id. (citing 39 C.F.R. § 232.1(o) (1990)).
41. Id. (“To be sure, individuals or groups have been permitted to leaflet, speak, and picket on postal premises . . . .”)
42. 39 C.F.R. § 232.1(e) (1990) provides, in pertinent part: “Disorderly conduct, or conduct which creates loud and unusual noise, or which obstructs the usual use of entrances . . . , stairways, and parking lots, or which otherwise . . . impedes or disturbs the general public in transacting business or obtaining the services provided on property, is prohibited.”
speech activities did "not add up to the dedication of postal property to speech activities."43 Thus, even though the forum in Kokinda was not a purely non-public forum because it had been dedicated to some expressive activity, the Court held that "regulation of the reserved non-public uses would still require application of the reasonableness test."44

2. Reasonableness of the postal regulation

Having determined that the postal sidewalk in question was a non-public forum, the Court then applied the minimum scrutiny standard. Under this standard, the regulation not only must be reasonable45 but also must not be "an effort to suppress expression merely because public officials oppose the speaker's view."46

The Postal Service has regulated solicitation for years.47 An important reason for finding the regulation at issue to be reasonable48 was that "[t]he purpose of the forum in this case was to accomplish the most efficient and effective postal delivery system"49 possible. The Court reasoned that the disruption and delay caused by solicitation was a significant enough interference with "Congress' mandate to ensure the most effective and efficient distribution of the mails" to enable the Postal Service to regulate such solicitation.50

43. Kokinda, 110 S. Ct. at 3121; see also Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 47 (1983) ("selective access does not transform government property into a public forum").
44. Kokinda, 110 S. Ct. at 3121.
45. "The Government's decision to restrict access to a non-public forum need only be reasonable; it need not be the most reasonable or the only reasonable limitation." Cornelius v. NAACP Legal Def. & Educ. Fund, Inc., 473 U.S. 788, 808 (1985) (emphasis in original).
46. Id. at 800 (quoting Perry, 460 U.S. at 46).
47. The Court recites a history of postal regulation of solicitation since 1958, when "internal guidelines 'strictly prohibited' the ['s]oliciting [o]f subscriptions, canvassing for the sale of any article, or making collections . . . in buildings operated by the Post Office Department, or on the grounds or sidewalks within the loc lines' of postal premises." Kokinda, 110 S. Ct. at 3122 (quoting Postal Service Manual, Facilities Transmittal Letter 8, Buildings Operation: Buildings Operated by the Post Office Department § 622.8 (1958)). The Postal Service gradually created various exceptions to its ban on solicitation until it became unmanageable. The Postal Service decided that a categorical ban on solicitation was again necessary. "Finally, in 1978, the [Postal] Service promulgated the regulation at issue here." Kokinda, 110 S. Ct. at 3122.
48. Id. at 3125.
49. Id. at 3122.
50. Id. at 3124.
3. The regulation found to be content-neutral

The Court held the regulation to be a categorical ban on solicitation and thus content-neutral.\(^\text{51}\) The Court recognized that "[n]othing suggests the Postal Service intended to discourage one viewpoint and advance another... By excluding all... groups from engaging in [solicitation]... the Postal Service is not granting 'one side of a debatable public question... a monopoly in expressing its views.'"\(^\text{52}\)

III. ANALYSIS

The Supreme Court's use of public/non-public forum analysis may not have been necessary to validate the postal regulation at issue. The Court could have achieved a similar result by applying the traditional standards of time, place, and manner restrictions.\(^\text{53}\) By applying these restrictions, the Court could have avoided the forum labeling that has and will probably continue to be the source of much controversy.\(^\text{54}\)

A. Non-public Forum Analysis

1. Development of public/non-public forum doctrine

The public forum doctrine found its genesis in a line of cases decided during the 1930s and 1940s.\(^\text{55}\) During the 1930s, streets, sidewalks, and parks were recognized as the clearest examples of a completely public forum.\(^\text{56}\)

During the mid-1960s, university students were convicted of trespassing for having engaged in a demonstration on jailhouse grounds to protest the arrest of fellow students who had

\(^{51}\) Id. at 3124-25.

\(^{52}\) Id. (quoting Monterey County Democratic Cent. Comm. v. United States Postal Serv., 812 F.2d 1194, 1198-99 (9th Cir. 1987) (citation omitted)).

\(^{53}\) 16A AM. JUR. 2D Constitutional Law § 517 (1979).


\(^{55}\) TRIBE, supra note 5, at 986 n.2.

\(^{56}\) See Hague v. Committee for Indus. Org., 307 U.S. 496, 515 (1939) ("use of the streets and public places [for assembly and debate of public questions] has, from ancient times, been a part of the privileges, immunities, rights and liberties of citizens").
sought to desegregate public theaters. In Adderley v. Florida, the Supreme Court upheld the trespass convictions. In doing so, the Court returned to pre-Hague v. Committee for Industrial Organization emphasis on the government as a private property owner with the “power to preserve the property under its control for the use to which it is lawfully dedicated.” Adderley laid the foundation for the non-public forum doctrine.

The doctrine “emerged as a fully viable creation as a group of decisions in the 1970s.” In Perry Education Association v. Perry Local Educators’ Association, the Supreme Court set out three types of forums. The first type is the “quintessential public forum, [such as] streets and parks [that] by long tradition or by government fiat have been devoted to assembly and debate . . . .” The second type is the semi-public forum, “consist[ing] of public property which the State has opened for use by the public as a place for expressive activity.” Examples of the second type include libraries, schools, and fairgrounds. The third type is “[p]ublic property which is not by tradition or designation a forum for public communication . . . .” To determine the appropriate level of judicial scrutiny, the courts must first categorize the property in question.

58. Id. at 48.
59. Hague, 307 U.S. 496 (recognizing a right of minimum access to a public forum for speech purposes). Prior to Hague, the Court did not recognize a right of access to public places for free speech purposes since it viewed the government as a private property owner with the right to exercise domain over its property.
60. Adderley, 385 U.S. at 47.
61. TRIBE, supra note 5, at 986.
63. Id. at 45.
64. Id.
66. See, e.g., Grayned v. City of Rockford, 408 U.S. 104 (1972) (upholding an anti-noise ordinance prohibiting noise or interference while classes were in session so that the basic educational function of the school was not disturbed).
2. Appropriateness of the non-public forum doctrine

As previously mentioned, the standard used to examine non-public forum restrictions on protected speech is that of minimum scrutiny. In addition, the regulation in question may not "suppress expression merely because public officials oppose the speaker's view." Applying this standard, the Court has upheld restrictions on access to military bases, restrictions refusing to allow political candidates to advertise on city buses, restrictions banning the placement of unstamped mail in home mailboxes, restrictions denying access to a school's internal mail system, and restrictions excluding political advocacy groups from participating in a federal employee charity fund drive. In fact, no one has successfully challenged government regulation of a non-public forum. This is most likely because the reasonableness standard is an extremely low standard to satisfy. In contrast, strict scrutiny provides a standard "strict' in theory, but usually 'fatal' in fact."

Given a lower level of scrutiny for non-public fora, categorizing the property becomes extremely important. The Court has increasingly emphasized governmental intent. Unless the public property falls into a traditional public forum, it may become a public forum only by governmental designation as a suitable place for general or limited expression.

69. Id. (citing United States postal Serv. v. Council of Greenburgh Civic Ass'ns, 453 U.S. 114, 131 n.7 (1981)).
76. Perry, 460 U.S. at 45-46.
77. United States v. Grace, 461 U.S. 171, 177 (1983) ("streets, sidewalks, and parks, are considered, without more, to be 'public forums'").
78. In Cornelius v. NAACP Legal Defense & Education Fund, Inc., Justice Blackmun, in a dissenting opinion, argues that the Court effectively reduced the three categories of general public forum, limited public forum, and non-public forum into two categories. He stated:

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 Govern-
This would be true even where public access would not be incompatible with the primary function of the place. Arguably, the solicitation of funds outside the post office building, whether on the street, sidewalk, or the sidewalk leading to the building, would not be incompatible with or interfere with the functioning of the post office itself. The public forum doctrine has perhaps been formulated and reformulated to the point of becoming manipulative and problematic.

a. Manipulation of the definition of “public forum.” The Court appears from time to time to “have circumscribed the category of ‘traditional’ public forums by focusing on appearance rather than function—on whether the place looks like a forum for expressive activity rather than on whether it does in fact serve as a significant medium of communication.” In *United States v. Grace*, the Court struck down a prohibition of expressive activity on sidewalks, relying “more on imagery than on the functional importance” of the sidewalks around the Supreme Court building and grounds. The Court pointed out that “[t]here is no separation, no fence, and no indication whatever to persons stepping from the street to the curb and sidewalks that serve as the perimeter of the Court grounds that they have entered some special type of enclave.”

Similarly, as Justice Brennan argues in his dissent, the sidewalk at issue in *Kokinda* could also be regarded as a public forum rather than a non-public forum. “[S]treets, sidewalks, and parks, are considered, without more, to be ‘public forums.’” The sidewalk at issue, like other sidewalks, acts as a public thoroughfare and

[for the most part, on streets and sidewalks, including the

473 U.S. at 825 (citation omitted) (emphasis in original).
79. TRIBE, supra note 5, at 994 (emphasis in original).
81. TRIBE, supra note 5, at 995.
82. Grace, 461 U.S. at 180.
83. Id. at 177.
single-purpose sidewalk at issue here, communication between citizens can be permitted according to the principle that "one who is rightfully on a street which the state has left open to the public carries with him as elsewhere the constitutional right to express his views in an orderly fashion."\textsuperscript{84}

Accordingly, Justice Brennan would have held the postal sidewalk to be a public forum.\textsuperscript{85} In addition, strict scrutiny would have been applied, which would have meant the end of the postal regulation at issue.

\textbf{b. Labeling and first amendment values.} Akin to the manipulation problem,\textsuperscript{86} another potential danger of public/non-public forum analysis applied by the Court in this case is the disposition of free speech cases through labeling. By invoking the non-public forum label, the Court is able to hide its first amendment value choices that led to either granting, denying, or limiting access to public property. A case-by-case interest balancing approach may be more desirable than the public/non-public forum analysis. In \textit{Kokinda}, a balancing approach may not have produced a different result, but it would have allowed a more candid evaluation of the competing values. The "public forum" language seems to be used at times by the Court to "signal conclusions it has reached on other grounds . . . ."\textsuperscript{87} Instead, it may have been more helpful if the Court were to focus more directly and explicitly on the degree to which the regulation at issue impinges on the first amendment interest in the free flow of information; whereas translating this inquiry into public forum language may simply "confuse[] the development of first amendment principles."\textsuperscript{88}

\textbf{B. Traditional Time, Place, and Manner Standard}

Public forum analysis is not necessary to find the postal regulation constitutional. As Justice Kennedy stated in his
It is not necessary, however, to make a precise determination whether this sidewalk and others like it are public or non-public forums; in my view, the postal regulation at issue meets the traditional standards we have applied to time, place, and manner restrictions of protected expression.

"[E]ven in a public forum the government may impose reasonable restrictions on the time, place, or manner of protected speech, provided the restrictions 'are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information.'" 89

1. Justified without reference to the content of the speech

The plurality stated that "[c]learly the regulation does not discriminate on the basis of content or viewpoint." 90 This is true because the categorical ban is on all solicitation and does not pick and choose among speakers. 91 Since the regulation does not refer to the content of the regulated speech, reasonable restrictions on time, place, and manner may be imposed. 92

2. Narrowly tailored to serve a significant government interest

The regulation at issue in this case only prohibits "personal solicitations on postal property for the immediate payment of money." 93 Anyone is allowed to participate in other forms of expressive activity such as political discussions or distributing literature which solicits support and/or contributions, "provided there is no in-person solicitation for payments on the premises." 94

90. Kokinda, 110 S. Ct. at 3124.
91. Justice Brennan contends that the regulation is not content-neutral since it is directly tied to what is said. "If a person on postal premises says to members of the public, 'Please support my political advocacy group,' he cannot be punished. If he says, 'Please contribute $10,' he is subject to criminal prosecution. His punishment depends entirely on what he says." Id. at 3134 (Brennan, J., dissenting).
92. See supra text accompanying notes 4-10.
93. Kokinda, 110 S. Ct. at 3126 (Kennedy, J., concurring).
94. Id.
The government has a significant "interest in reducing congestion and maintaining the flow of traffic on access walkways leading to its facilities and in protecting postal patrons from unnecessary distractions or impediments to the conduct of their business." Also, Congress has mandated for the Postal Service the goal of being financially self-sufficient. In order to accomplish this goal, it is important for the Postal Service to effectively compete with private-sector businesses providing similar services. Therefore, the Postal Service should be able to prevent interference and annoyance of its customers, as well as provide a quiet, businesslike setting where patrons may obtain the services they are seeking. Solicitation is different from other forms of conduct in that it is inherently more aggressive, more intrusive, and more likely to provoke negative reactions. It thus appears that the regulation is drawn sufficiently narrow to serve an important governmental interest.

3. Ample alternative channels to communicate the information

Sufficient alternatives existed for respondents to communicate the information they sought to convey. The regulation does not prohibit the distribution of literature soliciting contributions or membership subscriptions. Such literature may be read later by the postal customer away from the pressure of a face-to-face encounter with the solicitor. Nor does it prevent such person from moving to the sidewalk adjacent to the street.

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98. In Heffron v. International Soc'y for Krishna Consciousness, Inc., 452 U.S. 640 (1981), Justice Blackmun noted the following distinction about solicitation:

"The distribution of literature does not require that the recipient stop in order to receive the message the speaker wishes to convey; instead, the recipient is free to read the message at a later time . . . . [S]ales and the collection of solicited funds not only require the fairgoer to stop, but also "engender additional confusion . . . because they involve acts of exchanging articles for money, fumbling for and dropping money, making change, etc.""

Id. at 665 (Blackmun, J., concurring in part and dissenting in part) (quoting International Soc'y for Krishna Consciousness, Inc. v. Heffron, 299 N.W.2d 79, 87 (Todd, J., dissenting in part)).
to engage in the personal solicitation of immediate contributions.

IV. CONCLUSION

The Supreme Court held that section 232.1(h)(1) of the United States postal regulations,\textsuperscript{100} prohibiting soliciting, electioneering, collecting debts, vending, and advertising, did not violate the first amendment's protection of free speech. In doing so, the Court used the public/non-public forum analysis and found the postal sidewalk to be a non-public forum. The Court accordingly applied the minimum scrutiny standard and found the regulation to be reasonable under the rational basis test. The use of the public forum analysis, however, is somewhat troubling. As applied, the Court may either manipulate the definition of public forum or simply label government property as a non-public forum and thereby not only examine the regulation in question under the lowest level of scrutiny but also effectively hide its first amendment value choices. While possibly true that many areas of law require manipulation and labeling to reach "fair" results, such devices may also be used in cases which reach seemingly "unfair" results. The continued use of the public/non-public forum analysis on areas of first amendment protection has and will provoke considerable critical commentary. Such critical thought and commentary is important to our legal system in promoting change. Perhaps the time has come for the Court to not be so concerned with whether a forum is public or non-public in content-neutral cases but to simply apply the traditional time, place, and manner standard to content-neutral restrictions of protected speech.

\textit{Jay R. Larsen}

\textsuperscript{100} 39 C.F.R. §§ 232.1(a)-(q) (1990).