BEGGING AND THE PUBLIC FORUM DOCTRINE IN THE FIRST AMENDMENT

Begging, in its various forms, from the passive extension of a paper cup, to more aggressive tactics, has become an inseparable component of the modern urban landscape.[1] Each beggar represents a unique path into poverty, but they all seek alms for the same reason, survival.[2] Although impossible to estimate with certainty, a general consensus exists that the homeless population has increased in recent times.[3]

Many urban residents' and commuters' daily contact with beggars reinforces these estimates.[4] As homelessness has apparently reached critical mass, so has the public's frustration with begging.[5] Panhandlers are viewed as another manifestation of the deterioration afflicting American cities,[6] and beggars consequently experience backlash from the mainstream, as attempts to salvage the inner cities have intensified.[7] Thus, beggars on the fringes of society ironically now find themselves amidst the central paradox of our day, the conflict between individual liberty and the power of the majority.[8]

Recently, beggars have begun to use the First Amendment to challenge the government's attempts to prohibit begging.[9] In 1990, in

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[1] *See* Tony Perry, *No Alms for the 'Panhasslers,'* L.A. TIMES, Jan. 12, 1993, at A3 ("[e]ven the police grudgingly accept panhandling as part of the cityscape").

[2] *See* Perry, *supra* note 1, at A3. *But see* Dan Williams, *Phony Homeless People Panhandle for Money* (CNN News television broadcast, Jan. 14, 1993) (police allege scam artists pose as homeless beggars to get money from public).

[3] *See* LAURA D. WAXMAN, THE UNITED STATES CONFERENCE OF MAYORS, A STATUS REPORT ON HUNGER AND HOMELESSNESS IN AMERICA'S CITIES: 1991, at 25 (1991).

[4] *See* Paul G. Chevigny, *Begging and the First Amendment:* Young v. New York City Transit Authority, 57 BROOK. L. REV. 525, 528 (1991); Sonya Rose, *Street View: Daily Walks Sharpen Sense of Disparity,* CHI. TRIB., July 12, 1992, at 8.

[5] *See* WAXMAN, *supra* note 3, at 59–62; Perry, *supra* note 1, at A3; J.L. Pimsleur, *Police Commission OKs Anti-Panhandling Rules,* S.F. CHRON., Jan. 7, 1993, at A20 (voters approve anti-begging ordinance claiming that beggars are "trashing" the city).

[6] *See* John Leo, *Fighting For Our Public Spaces,* U.S. NEWS & WORLD REP., Feb. 3, 1992, at 18 [hereinafter *Fighting*]; John Leo, *Rightsmongering and Urban Decay,* U.S. NEWS & WORLD REP., Dec. 14, 1992, at 23 [hereinafter *Rightsmongering*]; James Q. Wilson & George L. Kelling, *Broken Windows,* THE ATLANTIC MONTHLY, Mar. 1982, at 29, 34.

[7] Williams, *supra* note 2 (notes crackdown to get beggars off the streets for the public's sake).

[8] *See* JOHN STUART MILL, ON LIBERTY, 1 (Elizabeth Rapaport ed., 1978); *see also* Williams, *supra* note 2 (classic battle between safety of masses and rights of few).

[9] *See* Young v. New York City Transit Auth., 903 F.2d 146, 147 (2d Cir.), *cert. denied,* 498 U.S. 984 (1990); Loper v. New York City Police Dep't, 802 F. Supp. 1029, 1031 (S.D.N.Y. 1992); Blair v. Shanahan, 775 F. Supp. 1315, 1317 (N.D. Cal. 1991); *see also* Jordana Hart, *Street Begging Focus*

Young v. New York City Transit Authority, the United States Court of Appeals for the Second Circuit upheld an ordinance banning begging in the New York subway system.[10] In 1991, however, in *Blair v. Shanahan*, the United States District Court for the Northern District of California declined to follow *Young* and held a California prohibition on begging unconstitutional.[11] One year later, in *Loper v. New York City Police Department*, the United States District Court for the Southern District of New York also sidestepped *Young* and invalidated a New York ordinance banning begging on the city streets.[12] Thus, beggars' First Amendment challenges have yielded inconsistent results.[13]

A 1992 United States Supreme Court decision, *International Society of Krishna Consciousness v. Lee* ("*ISKCON*") may foreshadow the approach courts will take to reconcile the seemingly inconsistent treatment of begging.[14] In *ISKCON*, the Court struck down a ban on the distribution of literature while upholding a ban on charitable solicitation in New York area airports.[15] Despite generating five separate opinions, all the Justices grounded their reasoning in the Public Forum doctrine, linking the degree of scrutiny accorded speech restrictions to a classification of its context.[16]

This Note argues that begging generally should be protected because it constitutes "speech" within the meaning of the First Amendment, and regulations banning begging should be analyzed under the Public Forum doctrine analysis.[17] Section I discusses First Amendment jurisprudence, focusing on three aspects: what is meant by "speech;" the degree of scrutiny to which regulations are subjected; and the values underlying the First Amendment.[18] Section II traces the treatment of charitable solicitation in the United States Supreme Court under the First Amendment.[19] Section III explores the history of beg-

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of Lawsuit; ACLU Challenges Cambridge Arrests, BOSTON GLOBE, July 26, 1993, at 13; *CLUM Challenges Arrests for Begging*, THE DOCKET, Sept. 1992, at 1.

[10] 903 F.2d at 164.

[11] 775 F. Supp. at 1323, 1329.

[12] 802 F. Supp. at 1036, 1048.

[13] *See* Anthony J. Rose, Note, *The Beggar's Free Speech Claim*, 65 IND. L. REV. 191, 193 (1989).

[14] *See* 112 S. Ct. 2701, 2705–06 (1992) [hereinafter *ISKCON I*]; Lee v. International Soc'y of Krishna Consciousness, 112 S. Ct. 2709, 2710 (1992) [hereinafter *ISKCON II*]; International Soc'y of Krishna Consciousness v. Lee, 112 S. Ct. 2711, 2712, 2716, 2724 (1992) [hereinafter *ISKCON III*]. This note will refer to the opinions collectively as "*ISKCON*."

[15] *ISKCON II*, 112 S. Ct. at 2710; *ISKCON I*, 112 S. Ct. at 2709.

[16] *See ISKCON I*, 112 S. Ct. at 2705–06; *ISKCON II*, 112 S. Ct. at 2710; *ISKCON III*, 112 S. Ct. at 2712 (O'Connor, J., concurring); *Id.* at 2716 (Kennedy, J., concurring); *Id.* at 2724 (Souter, J., concurring in part, dissenting in part).

[17] *See infra* notes 399–411 and accompanying text.

[18] *See infra* notes 22–109 and accompanying text.

[19] *See infra* notes 110–256 and accompanying text.

gars' First Amendment challenges.[20] Finally, Section IV explores begging's role in society and argues that it constitutes protected expression under the First Amendment. The section concludes that begging restrictions should be reviewed under the Public Forum doctrine.[21]

I. First Amendment Jurisprudence

First Amendment jurisprudence represents uneven terrain, battle-scarred by years of philosophical warfare.[22] Although the First Amendment occupies a preferred position in constitutional law, reflecting its fundamental role in our society, the Supreme Court has held that the guarantee of free expression is not absolute.[23] Demarcating the scope of expressive freedom raises three initial concerns: the definition of "speech," the degree of scrutiny under which regulations are evaluated, and the fundamental values that guide First Amendment analysis.[24]

A. *Speech v. Conduct Distinction*

As a threshold issue, the courts examine whether an activity constitutes "speech" within the meaning of the First Amendment.[25] The Supreme Court has not limited the First Amendment to the spoken or written word, but has extended the Amendment's sweep to include conduct that conveys a message.[26] The protection of expressive conduct reflects the notion that the desire to promote ideas, not simply words,

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[20] *See infra* notes 257–377 and accompanying text.

[21] *See infra* notes 378–407 and accompanying text.

[22] *See* Martin H. Redish, *The Value of Free Speech*, 130 U. Pa. L. Rev. 591, 591 (1982).

There seems to be general agreement that the Supreme Court has failed in its attempts to devise a coherent theory of free expression. These efforts have been characterized by a "pattern of aborted doctrines, shifting rationales, and frequent changes of position by individual Justices." *Id.; see also* Thomas Emerson, The System of Freedom of Expression 15 (1970). The First Amendment of the United States Constitution states in pertinent part: "Congress shall make no law . . . abridging the freedom of speech . . . ."

[23] Cohen v. California, 403 U.S. 15, 19 (1971); Murdock v. Pennsylvania, 319 U.S. 105, 110, 115 (1943); Rose, *supra* note 13, at 196.

[24] *See* Laurie Magid, Note, *First Amendment Protection of Ambiguous Conduct*, 84 Colum. L. Rev. 467, 468 (1984).

[25] Magid, *supra* note 24, at 468.

[26] Melville B. Nimmer, *The Meaning of Symbolic Speech Under the First Amendment*, 21 UCLA L. Rev. 29, 30 (1973); Aaron Johnson, Note, *The Second Circuit Refuses to Extend Beggars a Helping Hand:* Young v. New York City Transit Auth., 69 Wash. U. L.Q. 969, 971 (1991); Sally A. Specht, Comment, *The Wavering, Unpredictable Line Between "Speech" and Conduct: The Fate of Expressive Conduct After* Young v. New York City Transit Auth., 40 Wash. U. J. Urb. & Contemp. L. 173, 173 (1991); *see also* Texas v. Johnson, 491 U.S. 397, 406 (1989) (burning American flag conveys message); Spence v. Washington, 418 U.S. 405, 410 (1974) (taping peace symbol on American flag is expressive conduct); Tinker v. Des Moines Indep. Community Sch. Dist., 393 U.S. 503, 508 (1969) (wearing black armbands to protest Vietnam War conveys message); Brown v. Louisiana, 383 U.S. 131, 141–42 (1966) (sit-in at segregated library is expressive conduct).

underpins the First Amendment.[27] Protecting conduct, therefore, expands the potential range of messages and speakers.[28]

The Supreme Court has struggled to distinguish between protected expression and ordinary conduct.[29] Commentators have noted that, unless telepathic, all speech necessarily involves conduct.[30] Conversely, every act contains within it, a "kernel of expression."[31] Despite this tangled web of speech and conduct, the Supreme Court has made clear that First Amendment protection does not extend to an unlimited variety of acts.[32] Commentators observe that the courts attempt to separate the expressive from the non-expressive elements of an act and then determine which aspect predominates.[33] This approach, however, becomes exceedingly difficult when the Court is faced with ambiguous conduct, that is, acts that may typically, but not always, be done for noncommunicative reasons.[34]

In 1974, in *Spence v. Washington*, the Supreme Court articulated a two-factor test for distinguishing expressive from ordinary conduct.[35] The case involved the flag desecration conviction of a student who hung an American flag adorned with a peace symbol from his window to protest the U.S. invasion of Cambodia.[36] The Court held that, in order to be expressive conduct, first, the speaker must intend the conduct to convey a particularized message.[37] Second, the Court required a strong likelihood that the audience could discern the intended message.[38] Applying this standard, the Court concluded that

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[27] Nimmer, *supra* note 26, at 33–34; *see also* Johnson, *supra* note 26, at 970–71.

[28] *See* Magid, *supra* note 24, at 471. Magid notes that protecting conduct avoids unduly benefitting those with high verbal abilities at the expense of those with other skills. *Id.* She also notes that "action . . . may be the only way [for small or unpopular groups] to effectively convey [their] views" to a wide audience. *Id.* Moreover, Magid emphasizes that protecting conduct expands the range of messages to a) those difficult to express in words and b) those in which the medium of conduct *is* the message. *Id.* (emphasis in the original).

[29] *See* Johnson, *supra* note 26, at 971–72; Magid, *supra* note 24, at 467.

[30] Nimmer, *supra* note 26, at 33; Johnson, *supra* note 26, at 971.

[31] City of Dallas v. Stanglin, 490 U.S. 19, 25 (1989); *see also* Nimmer, *supra* note 26, at 36; Johnson, *supra* note 26, at 971.

[32] United States v. O'Brien, 391 U.S. 367, 376 (1968); Johnson, *supra* note 26, at 971; Magid, *supra* note 24, at 471; Specht, *supra* note 26, at 178.

[33] *See* John H. Ely, *Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis*, 88 HARV. L. REV. 1482, 1495 (1975); Magid, *supra* note 24, at 475.

[34] *See* Magid, *supra* note 24, at 495 (sleeping); Chevigny, *supra* note 4, at 525.

[35] 418 U.S. 405, 411 (1974); *see also* Johnson, *supra* note 26, at 973; Stephanie M. Kaufman, Note, *The Speech/Conduct Distinction and First Amendment Protection of Begging in Subways*, 79 GEO. WASH. L.J. 1803, 1820; Specht, *supra* note 26, at 179.

[36] *Spence*, 418 U.S. at 406–07.

[37] *See id.* at 410–11; *see also* Johnson, *supra* note 26, at 973; Kaufman, *supra* note 35, at 1820; Specht, *supra* note 26, at 179.

[38] *See Spence*, 418 U.S. at 410–11; *see also* Johnson, *supra* note 26, at 973; Kaufman, *supra* note 35, at 1820; Specht, *supra* note 26, at 179.

the student's actions intended a clearly discernible message that was protected by the First Amendment.[39] Therefore, the Court invalidated the student's conviction.[40]

Commentators have criticized the reliance on separating expression from ordinary conduct as a First Amendment technique.[41] Some argue that the distinctions are conclusory and represent a hidden balancing of indeterminate factors.[42] Others have criticized the *Spence* standard as too narrow, overlooking a powerful range of expression that defies being distilled into words.[43] Nevertheless, a court begins its First Amendment analysis by determining if a given activity constitutes speech, and must wrestle with distinguishing expressive from ordinary conduct under the *Spence* standard.[44]

B. *Degree of Scrutiny*

1. Two-Track Analysis

Once an activity is found to be protectable speech, a court must determine the level of scrutiny to apply to restrictions on that activity.[45] The United States Supreme Court has developed a bifurcated approach to judicial scrutiny, the two-track analysis, that hinges on the governmental purpose behind the restriction.[46] "Content-based" restrictions directly aim at suppressing speech, whereas "content-neutral" regulations incidentally affect speech while targeting other activity.[47]

A content-based restriction is on track one and faces the most "exacting scrutiny."[48] A court first examines whether the activity being

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[39] *Spence*, 418 U.S. at 415.

[40] *Id.*

[41] *See, e.g.*, Chevigny, *supra* note 4, at 545; Kaufman, *supra* note 35, at 1824; Harry Kalven, Jr., *The Concept of the Public Forum:* Cox v. Louisiana, 1965 SUP. CT. REV. 1, 12 (1965); Helen Hershkoff & Adam S. Cohen, *Begging to Differ: The First Amendment and the Right to Beg*, 104 HARV. L. REV. 896, 908 (1991).

[42] *See* Kaufman, *supra* note 35, at 1821.

[43] Chevigny, *supra* note 4, at 545 ("too narrow, encompassing the discursive, the descriptive, even the polemical, and slighting the representational . . . one may give information about a social artifact . . . simply by representing it, by embodying the phenomenon"); *see also* C. Edwin Baker, *Scope of the First Amendment Freedom of Speech*, 25 UCLA L. REV. 964, 993 (1978); Kaufman, *supra* note 35, at 1824–25.

[44] Magid, *supra* note 24, at 468.

[45] *Id.*

[46] LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW, 827, 791–92 (2d. ed. 1988); C. Thomas Dienes, *The Trashing of the Public Forum: Problems in First Amendment Analysis*, 55 GEO. WASH. L. REV. 109, 114 (1986); Rose, *supra* note 13, at 211.

[47] *See* TRIBE, *supra* note 46, at 789–90.

[48] *See id.* at 791–92; Dienes, *supra* note 46, at 114; Hershkoff & Cohen, *supra* note 41, at 906; Rose, *supra* note 13, at 211.

regulated fits into an established category of unprotected speech, defined as such because public order and morality outweigh the speech's "slight social value."[49] Unprotected speech includes fighting words, libel, obscenity and speech that "incite[s] an immediate breach of the peace."[50] If the speech or activity is protected, a court will then determine if it falls into a category that deserves reduced protection, such as commercial speech.[51]

If the speech does not fall into an excludable category, however, then content-based restrictions on that speech must survive strict scrutiny in order to be upheld.[52] Under strict scrutiny, a court will determine whether the restriction is necessary to the furtherance of a compelling state interest, and narrowly tailored to serve that interest.[53] One commentator suggests that a critical factor in this evaluation is whether the government has used the "least speech-restrictive means."[54]

Conversely, the courts evaluate content-neutral regulations under a lower level of scrutiny, the track two analysis.[55] In 1968, in *United States v. O'Brien,* the Supreme Court articulated the standard for reviewing such incidental restrictions on expressive conduct.[56] The defendant in the case had been convicted for burning his draft card in protest to the Vietnam War.[57] The Court determined that a restriction on expressive conduct was justified if: 1) the regulation was within the police power of the government; 2) the regulation furthered an important or substantial governmental interest; 3) the governmental interest was unrelated to the suppression of free expression; and 4) the incidental restriction was no greater than essential to the furtherance of the government's interests.[58] Under this standard, the Court upheld the defendant's conviction, reasoning that the Selective Service

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[49] Chaplinsky v. New Hampshire, 315 U.S. 568, 571–72 (1942); Dienes, *supra* note 46, at 114; Rose, *supra* note 13, at 211 & n.108.

[50] *See Chaplinsky,* 315 U.S. at 571–72.

[51] *See* Hershkoff & Cohen, *supra* note 41, at 907 (commercial speech does no more than propose a commercial transaction) (citing Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748, 762 (1976)).

[52] *See* Dienes, *supra* note 46, at 114; Hershkoff & Cohen, *supra* note 41, at 906; Rose, *supra* note 13, at 211–12.

[53] Dienes, *supra* note 46, at 114; Hershkoff & Cohen, *supra* note 41, at 906; Rose, *supra* note 13, at 211–12.

[54] Rose, *supra* note 13, at 212.

[55] *See* TRIBE, *supra* note 46, at 792; Dienes, *supra* note 46, at 114; Rose, *supra* note 13, at 212.

[56] *See* 391 U.S. 367, 377 (1968).

[57] *Id.* at 369.

[58] *Id.* at 377.

Board had a substantial interest in efficient operation of the draft that justified the regulation.[59]

Viewing the third prong as the content-neutrality threshold requirement, track two analysis can therefore be summarized as requiring incidental restrictions on speech to be narrowly tailored to achieve a significant government interest.[60] Commentators have observed that an important factor in being "narrowly tailored" is the existence of ample alternative channels of communication.[61] Commentators have described the looser scrutiny of incidental restrictions as a "form of interest balancing."[62]

The Supreme Court has thus developed a two-track analysis for determining the level of scrutiny applicable to restrictions on expression.[63] On track one, a direct restriction on speech receives strict scrutiny, unless the speech falls into an excludable category.[64] On track two, an incidental restriction on expression receives a lower level of scrutiny and must only be narrowly tailored to serve a significant state interest.[65]

2. The Public Forum Doctrine

In recent years, the Supreme Court has increasingly resorted to an alternative method to the two-track analysis for reviewing restrictions of expression on public property, the Public Forum doctrine.[66]

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[59] *Id.* at 382.

[60] Young v. New York City Transit Auth., 903 F.2d 146, 157 (2d Cir.), *cert. denied*, 498 U.S. 984 (1990).

[61] Dienes, *supra* note 46, at 114; Rose, *supra* note 13, at 213.

[62] Dienes, *supra* note 46, at 114; Rose, *supra* note 13, at 212–13.

[63] TRIBE, *supra* note 46, at 791–92; Dienes, *supra* note 46, at 114; Rose, *supra* note 13, at 211.

[64] Dienes, *supra* note 46, at 114; Hershkoff & Cohen, *supra* note 41, at 906; Rose, *supra* note 13, at 211–12.

[65] Dienes, *supra* note 46, at 114; Rose, *supra* note 13, at 212–13.

[66] 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, 1220, 1221 & n.15 (1984). Based on LEXIS and WESTLAW searches, the authors asserted that the phrase "public forum" had only appeared in 32 Supreme Court decisions, twice prior to 1970 and 13 times after 1980. *Id.* at 1221 & n.15. Recent LEXIS and WESTLAW searches of the phrase "public forum" reinforce their observation; since 1984, the phrase arises in 14 cases, 5 after 1990: *ISKCON I*, 112 S. Ct. 2701, 2705 (1992); Forsyth County, Ga. v. Nationalist Movement, 112 S. Ct. 2395, 2401 (1992); Burson v. Freeman 112 S. Ct. 1846, 1850 (1992); Renne v. Geary, 111 S. Ct. 2331, 2345 (1991); United States v. Kokinda, 497 U.S. 720, 727 (1990); Ward v. Rock Against Racism, 491 U.S. 781, 790 (1989); Frisby v. Schultz, 487 U.S. 474, 479 (1988); City of Lakewood v. Plain Dealer Pub., 486 U.S. 750, 777 (1988); Boos v. Barry, 485 U.S. 312, 321 (1988); Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 267 (1988); Board of Airport Comm'rs v. Jews for Jesus, 482 U.S. 569, 572 (1987); Pacific Gas & Elec. v. Public Utils. Comm'n of Cal., 475 U.S. 1, 33 (1986); Cornelius

This geographical approach hinges the degree of scrutiny accorded speech restrictions on a determination of the nature of the speech's forum.[67] Commentators theorize that the doctrine represents an attempt to formally accommodate competing societal interests.[68]

The Public Forum doctrine originated in Professor Harry Kalven's 1965 article, *The Concept of the Public Forum:* Cox v. Louisiana, which wrestled with the fundamental tension between expressive activity and the primary uses of government property.[69] The article argued for "a kind of First Amendment easement" to public property such as streets and parks, for all citizens.[70] Dismissing attempts to separate speech from conduct as confusing, Professor Kalven called for the development of a "New Robert's Rules of Order" for public fora.[71] According to the article, accommodating as many speakers as possible without thwarting a forum's primary purposes should be the courts' focus.[72]

Using Professor Kalven's article as a springboard, the Supreme Court has developed the modern public forum approach.[73] Although the doctrine's early usage primarily expanded speech opportunities by focusing on public fora, the Supreme Court recently has sharpened the original thesis by emphasizing the corollary that speech in nonpublic fora can be more freely restricted and such restrictions will be subject to a lesser degree of scrutiny.[74] Commentators articulate three general categories established by the Court to aid in determining the level of scrutiny: the traditional public forum, the designated public forum and the nonpublic forum.[75]

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v. NAACP Legal Defense and Educ. Fund, 473 U.S. 788, 800 (1985); United States v. Albertini, 472 U.S. 675, 684 (1985).

[67] Farber & Nowak, *supra* note 66, at 1220; Rose, *supra* note 13, at 202.

[68] Dienes, *supra* note 46, at 115; Rose, *supra* note 13, at 202.

[69] *See* Kalven, *supra* note 41, at 15; Farber & Nowak, *supra* note 66, at 1221; Dienes, *supra* note 46, at 111–12; Stephen R. Welby, Note, *Formalism in the Forum?* United States v. Kokinda *and the Extension of the Public Forum Doctrine*, 69 WASH. U. L.Q. 957, 957 n.2 (1991). Professor Kalven derived the inspiration for his theory from Justice Roberts' reasoning twenty-six years prior:

> Wherever the title of street 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 thoughts between citizens and discussing public questions. Such use of the streets and public places has from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens.

Hague v. Committee for Indus. Org., 307 U.S. 496, 515 (1939).

[70] *See* Kalven, *supra* note 41, at 13.

[71] *See id.* at 11–12.

[72] *See id.* at 26–27.

[73] *See* Welby, *supra* note 69, at 957 n.2.

[74] *See* Dienes, *supra* note 46, at 110, 116.

[75] *E.g.* Farber & Nowak, *supra* note 66, at 1220–21 (citing Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45, 46 (1983)); Cindy L. Meyer, Chapter, *Free Speech v. Public Safety Within Public Forum Analysis*, 59 GEO. WASH. L. REV. 1285, 1291 (citing Cornelius v. NAACP Legal

Commentators describe traditional public fora as areas where expressive activity, such as speech and assembly, has historically occurred and, thus receives the greatest degree of protection.[76] Commentators frequently cite public parks, streets and sidewalks as "quintessential examples."[77] In traditional public fora, regulations must be narrowly tailored to achieve a compelling state interest, and leave open ample alternatives in order to withstand scrutiny.[78]

The second category, the designated public forum, encompasses property that the government has intentionally opened to the public for expression.[79] Restrictions on speech in these fora receive the same strict scrutiny as those in traditional public fora.[80] Commentators note that, because the government decides whether the forum becomes public, it can also limit the forum to certain times or speakers or return the forum to nonpublic status.[81] Justices Kennedy and Souter have proposed an alternative approach, however, that emphasizes examining the speech's compatibility with the property's normal uses.[82]

The third category, nonpublic fora, comprises property that does not fit into the first two categories.[83] Commentators explain that speech

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& Educ. Defense Fund, 473 U.S. 788, 800 (1985)); Rose, *supra* note 13, at 203. *But see* David Goldberger, *Judicial Scrutiny in Public Forum Cases: Misplaced Trust in the Judgment of Public Officials*, 32 BUFF. L. REV. 175, 185–202, 202 n.111 (1983) (views forum analysis as more of a continuum than separate categories).

[76] Farber, *supra* note 66, at 1220; Rose, *supra* note 13, at 203; Welby, *supra* note 69, at 960, 961; *e.g.*, Frisby v. Schultz, 487 U.S. 474, 480 (1988) (sidewalk in residential neighborhood); United States v. Grace, 461 U.S. 171, 179 (1983) (sidewalk surrounding the Supreme Court building).

[77] Farber, *supra* note 66, at 1220; Rose, *supra* note 13, at 203; Welby, *supra* note 69, at 960. One commentator argues that if pushed to make a distinction, sidewalks deserve more protection than streets. Rose, *supra* note 13, at 204–05.

[78] *See* Farber, *supra* note 66, at 1220; Welby, *supra* note 69, at 961. One commentator reasoned that speech must be highly protected in public fora because such fora are often the last resort of the "little man," the unpopular and poorly financed. Rose, *supra* note 13, at 204.

[79] Farber, *supra* note 66, at 1221; Dienes, *supra* note 46, at 119; Welby, *supra* note 69, at 960; *see, e.g.*, Heffron v. International Soc'y for Krishna Consciousness, 452 U.S. 640, 655 (1981) (state fairgrounds); Widmar v. Vincent, 454 U.S. 263, 267 (1981) (university meeting facilities). One commentator argues that whether the government intended to designate the forum for speech purposes should depend on three factors: 1) the government's policy and practice, 2) the property's nature, and 3) compatibility with expression. Welby, *supra* note 69, at 962.

[80] *See, e.g.*, *ISKCON I*, 112 S. Ct. 2701, 2705 (1992); Cornelius v. NAACP Legal & Educ. Defense Fund, 473 U.S. 788, 800 (1985); Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 46 (1983).

[81] Dienes, *supra* note 46, at 119; *see also Perry*, 460 U.S. at 46; Farber, *supra* note 66, at 1221.

[82] *ISKCON III*, 112 S. Ct. 2711, 2716 (1992) (Kennedy, J., concurring); *ISKCON III*, 112 S. Ct. at 2724 (1992) (Souter, J., concurring in part and dissenting in part); *see also* Dienes, *supra* note 46, at 118.

[83] *See* Farber, *supra* note 66, at 1221; Welby, *supra* note 69, at 960–61 (citing cases); *see also* United States v. Kokinda, 110 S. Ct. 3115, 3120 (1990) (sidewalk leading to post office); Greer v. Spock, 424 U.S. 828, 838 (1976) (military reservation); Lehman v. Shaker Heights, 418 U.S. 298, 302 (1974) (advertising space in city buses).

restrictions in these fora only have to be reasonable, and not aimed at a particular viewpoint to withstand scrutiny.[84] In these areas, the government's interests in promoting the forum's primary purpose overshadow the public's expressive easement.[85]

Thus, the Public Forum doctrine attempts to reconcile competing societal interests by varying the scrutiny of speech restrictions according to a categorization of the speaker's forum.[86] Although, speech receives heightened protection in traditional and designated public fora, nonpublic fora regulations must only face a reasonableness standard.[87] The doctrine therefore promotes the maximization of expression by focusing on accommodating the multiplicity of interests and voices.[88]

C. *Values Underlying the First Amendment*

Ultimately, theories on the meaning of freedom of expression and its importance guide the resolution of free speech controversies.[89] Commentators assert three general theories behind the First Amendment's guarantee of free speech: the Marketplace of Ideas, Democratic Process and Self-Realization.[90] If begging is to be protected under the First Amendment, it must advance at least one of these theories.[91]

The Marketplace of Ideas theory values freedom of speech as a means of uncovering the best possible perspective or solution.[92] Theorists predicate this model on the belief that truth emerges from open and robust debate.[93] By refraining from interfering with expression, the government allows truth and falsehood to grapple openly and the resulting enlightenment benefits society as a whole.[94]

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[84] Dienes, *supra* note 46, at 116; Rose, *supra* note 13, at 203; Welby, *supra* note 69, at 961; *see also Cornelius*, 473 U.S. at 800. One commentator determines reasonableness "in light of the forum's purpose and all surrounding circumstances." Welby, *supra* note 69, at 962.

[85] *See Cornelius*, 473 U.S. at 800.

[86] Dienes, *supra* note 46, at 115; Rose, *supra* note 13, at 202.

[87] Farber, *supra* note 66, at 1220; Rose, *supra* note 13, at 202; Welby, *supra* note 69, at 960, 961.

[88] *See* Kalven, *supra* note 41, at 26–27.

[89] *See* Hershkoff & Cohen, *supra* note 41, at 898.

[90] *See* EMERSON, *supra* note 22, at 6–7; Hershkoff & Cohen, *supra* note 41, at 898.

[91] *See* Hershkoff & Cohen, *supra* note 41, at 898.

[92] JOHN E. NOWAK & RONALD R. ROTUNDA, CONSTITUTIONAL LAW 940 (4th ed. 1991); Baker, *supra* note 43, at 964; Hershkoff & Cohen, *supra* note 41, at 898.

[93] Baker, *supra* note 43, at 964; Hershkoff & Cohen, *supra* note 41, at 898; *see also* Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) ("[T]he best test of truth is the power of thought to get itself accepted in the competition of the market").

[94] NOWAK & ROTUNDA, *supra* note 92, at 940 (citing J. MILTON, AREOPAGITICA, A SPEECH FOR THE LIBERTY OF UNLICENSED PRINTING TO THE PARLIAMENT OF ENGLAND (John W. Hales ed., 1898)); *see also* Baker, *supra* note 43, at 964–65; Hershkoff & Cohen, *supra* note 41, at 898.

The Democratic Process theory views freedom of speech as essential to the most effective operation of a democracy.[95] The best interests of the community necessitate that the decision-makers and the populace fully understand the public issues.[96] This model restricts First Amendment protection to public discussion of explicitly political issues, but within this sphere grants virtually absolute protection.[97] All other speech, including scientific and literary speech receives minimal protection.[98]

Shifting away from societal justifications, the Self-Realization model emphasizes the primacy of freedom of expression in individual self-development.[99] Commentators note that expressive freedom enables individuals to define themselves and to give voice to their basic "human spirit."[100] This model carves a broad sphere for protected expression, possibly even encompassing all nonviolent, noncoercive behavior.[101] Having such a broad sweep allows the First Amendment to cover the many "inexpressible emotions" and ideas that defy being distilled into a discrete message.[102]

These three general theories guide interpretation of the First Amendment guarantee of free speech.[103] The Marketplace of Ideas theory values free speech as the most effective means for uncovering truth.[104] The Democratic Process theory views freedom of speech as a means to improve citizens functioning within a democratic society.[105] The Self-Realization theory values expressive freedom for its role in individual development.[106]

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[95] *See* Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 26 (1971); Alexander Meiklejohn, *The First Amendment is an Absolute*, 1961 SUP. CT. REV. 245, 255 (1961) [hereinafter *Absolute*]; *see generally* ALEXANDER MEIKLEJOHN, POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE 24 (1948) (discussing role of freedom of speech in representative democracy) [hereinafter POLITICAL FREEDOM].

[96] POLITICAL FREEDOM, *supra* note 95, at 26; Hershkoff & Cohen, *supra* note 41, at 901.

[97] TRIBE, *supra* note 46, at 786. *But see Absolute*, *supra* note 95, at 256–57 (advocating inclusion of education, philosophy/science, literature/art).

[98] TRIBE, *supra* note 46, at 786.

[99] *See* TRIBE, *supra* note 46, at 787; Baker, *supra* note 43, at 966; Redish, *supra* note 22, at 593.

[100] Hershkoff & Cohen, *supra* note 41, at 903; Redish, *supra* note 22, at 593.

[101] *See* Baker, *supra* note 43, at 964.

[102] *See* Cohen v. California, 403 U.S. 15, 25, 26 (1971) ("the inexpressible emotions" that come "under the protection of free speech as fully as do Keats' poems or Donne's sermons"); Baker, *supra* note 43, at 993 (storytelling as example).

[103] *See* EMERSON, *supra* note 22, at 6–7; Hershkoff & Cohen, *supra* note 41, at 898.

[104] *See* NOWAK & ROTUNDA, *supra* note 92, at 940; Baker, *supra* note 43, at 964.

[105] *See* Bork, *supra* note 95, at 26; *Absolute*, *supra* note 95, at 255.

[106] *See* TRIBE, *supra* note 46, at 787; Baker, *supra* note 43, at 962; Redish, *supra* note 22, at 593.

In sum, a court begins its First Amendment analysis by defining "speech," and thereby delimiting the scope of protection.[107] A court must then determine the appropriate level of scrutiny to apply in evaluating a regulation of protected speech via the two-track analysis or under the Public Forum doctrine.[108] Overall, a court will proceed with its First Amendment analysis guided by various theories of the speech's importance.[109]

II. History of Charitable Solicitation

Courts have used a First Amendment analysis to determine the relationship between free speech and the solicitation of funds by organized charities.[110] Part A of this section explores three Supreme Court cases in this area from the 1980s, known as the *Schaumburg* trilogy, that taken collectively, lay out a broad vision of charitable solicitation as protected expression.[111] Part B of this section explores *International Society of Krishna Consciousness v. Lee,* a recent Supreme Court case that dealt with charitable solicitation under the Public Forum doctrine.[112]

A. *The* Schaumburg *Trilogy*

In 1980, in *Village of Schaumburg v. Citizens for a Better Environment,* the United States Supreme Court held a regulation of charitable solicitation to be unconstitutional.[113] Under the regulation, the Village of Schaumburg ("Village") denied the Citizens for a Better Environment ("CBE") a solicitation permit because less than seventy-five percent of CBE's contributions went toward "charitable purposes."[114] First, the Court reasoned that charitable solicitation constituted protected speech under the First Amendment.[115] Second, under strict scrutiny, the Court determined that the regulation did not sufficiently further the Village's asserted interests to outweigh the infringement on expres-

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[107] *See supra* notes 25–44 and accompanying text.

[108] *See supra* notes 45–88 and accompanying text.

[109] *See supra* notes 89–106 and accompanying text.

[110] *See* Riley v. National Fed'n of the Blind of N.C., 487 U.S. 781, 787–802 (1988); Secretary of State of Md. v. Joseph H. Munson Co., 467 U.S. 947, 959–69 (1984); Village of Schaumburg v. Citizens for a Better Env't, 444 U.S. 620, 629–39 (1980); Hershkoff & Cohen, *supra* note 41, at 904.

[111] *See infra* notes 113–207 and accompanying text.

[112] *See infra* notes 208–256 and accompanying text.

[113] 444 U.S. at 639.

[114] *Id.* at 622–25.

[115] *Id.* at 633.

sion.[116] Thus, the Court concluded that the regulation failed First Amendment scrutiny.[117]

The Village regulated solicitation on public property within its borders by means of a permit scheme.[118] Before granting a permit, the Village required organizations to show that at least seventy-five percent of their receipts went toward charitable purposes.[119] The Village denied the application of CBE, an environmental advocacy group, for failure to meet this standard.[120] In response, CBE sued the Village alleging that the seventy-five percent rule contravened the First Amendment.[121]

First, the Court held that the First Amendment protected charitable solicitation.[122] The Court reasoned that the solicitation of funds by organized groups involved several protectable speech interests —"communication of information, the dissemination and propagation of views and ideas, and the advocacy of causes."[123] The Court also emphasized that a group's ability to speak depended on donated funds and thus, the Court considered CBE's door-to-door solicitation protectable.[124]

Next, the Court determined that the regulation directly restricted speech.[125] The Court reasoned that the regulation prevented groups with advocacy as their primary purpose from soliciting in the town.[126] The Court emphasized that advocacy groups could reasonably expend more than twenty-five percent of their funds on administrative costs.[127] Under a track one analysis, the Court concluded that the regulation unconstitutionally abridged the expressive freedom of advocacy groups unless justified by sufficiently strong interests of the Village.[128]

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[116] *Id.* at 636.

[117] *Id.* at 639.

[118] *Schaumburg*, 444 U.S. at 622–23. SCHAUMBURG VILLAGE, ILL., CODE, ch. 22, art. III, § 22–20 states: "Every charitable organization, which solicits or intends to solicit contributions from persons in the village by door-to-door solicitation or the use of the public streets and public ways, shall prior to such solicitation apply for a permit."

[119] *Schaumburg*, 444 U.S. at 624. SCHAUMBURG VILLAGE, ILL., CODE, ch. 22, art. III, § 22–20(g) requires: "[s]atisfactory proof that at least seventy-five per cent [sic] of the proceeds of such solicitations will be used directly for the charitable purpose of the organization."

[120] *Schaumburg*, 444 U.S. at 625. Affidavits revealed that in 1975, the Citizens for a Better Environment ("CBE") spent 23.3% of proceeds on fundraising and 21.5% on administration while, in 1976, 23.3% went to fundraising and 16.5% to administration. *Id.* at 626.

[121] *Id.* at 625.

[122] *See id.* at 628–32 (citing cases).

[123] *Id.* at 632.

[124] *Id.* at 632–33.

[125] *Schaumburg*, 444 U.S. at 636.

[126] *See id.* at 635–37.

[127] *Id.* at 635.

[128] *See id.* at 636.

Finally, the *Schaumburg* Court determined that the seventy-five percent rule only "peripherally" advanced the Village's interests while less speech-restrictive alternatives existed.[129] The Court addressed three alleged interests of the Village: preventing fraud, protecting public safety, and protecting residential privacy.[130] First, the Court reasoned that the Village's principal justification, the prevention of fraud, rested on the mistaken correlation between the amount spent on administration and fraud.[131] The Court again stressed that advocacy groups might reasonably need to spend more than twenty-five percent of receipts on administration.[132] In addition, the Court noted that less intrusive means would better prevent fraud.[133]

Second, the Court dismissed any relation between public safety and the amount spent on administration.[134] Finally, the Court noted that the seventy-five percent rule only furthered residential privacy indirectly, by reducing the overall number of solicitors.[135] The Court stressed that solicitors who spent less than twenty-five percent on costs, and those that spent more, annoyed residents equally.[136] The Court also suggested that the ability of homeowners to bar solicitors from their property maintained privacy more effectively, and less intrusively.[137]

Justice Rehnquist dissented from the Court's decision extending First Amendment protection to solicitation.[138] He reasoned that a community had the right to insulate itself from causes it deems unworthy.[139] Justice Rehnquist charged the majority's opinion with eviscerating community control over itself, overvaluing the constitutional importance of door-to-door solicitation and failing to provide any useful or coherent guidance to towns affected by the ruling.[140]

Thus, in *Schaumburg*, the Supreme Court held that the First Amendment's guarantee of free speech protected solicitation by organized charities.[141] In its reasoning, the Court emphasized that the Village

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[129] *Id.* at 636.

[130] *Schaumburg*, 444 U.S. at 636–38.

[131] *See id.* at 636–37.

[132] *Id.* at 636–37.

[133] *Id.* at 637. The Court suggested criminalizing fraudulent representations and promoting disclosure of a charitable organizations' finances as less intrusive alternatives. *Id.* at 637–38.

[134] *Id.* at 638.

[135] *Schaumburg*, 444 U.S. at 638.

[136] *Id.*

[137] *Id.* at 639.

[138] *Id.* at 644 (Rehnquist, J., dissenting).

[139] *Id.* at 644 (Rehnquist, J., dissenting).

[140] *See Schaumburg*, 444 U.S. at 643–44 (Rehnquist, J., dissenting).

[141] *See id.* at 632.

ordinance hindered the ability of organizations oriented toward the advocacy of causes to effectively solicit contributions.[142] The Court concluded that the seventy-five percent rule was not narrowly tailored to prevent fraud, especially in light of less speech-restrictive alternatives.[143]

Similarly, in 1984, in *Secretary of State of Maryland v. Joseph H. Munson Co.*, the Court struck down a Maryland regulation on charitable solicitation.[144] The regulation allowed for the waiver of a twenty-five percent limitation on contributions used to finance fundraising activities if the group would be unable to solicit otherwise.[145] First, the Court relied on *Schaumburg* to hold that charitable solicitation constituted protected expression.[146] Next, the Court reasoned that the possibility of waiver did not correct the deficiencies in the *Schaumburg* regulation.[147] The Court concluded that the regulation violated the First Amendment.[148]

In *Munson,* the State prohibited charitable organizations from using more than twenty-five percent of donations to pay their fundraising expenses.[149] The regulation, however, allowed the Secretary of State to waive the limitation upon determination that it prevented a charity from effectively soliciting.[150] The plaintiff, a professional fundraiser, regularly charged a client more than the mandated twenty-five percent of receipts.[151] After being notified of its non-compliance with the regulation, the plaintiff sued, alleging that the statute infringed its First Amendment rights.[152]

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[142] *Id.* at 635.

[143] *Id.* at 636.

[144] 467 U.S. 947, 950 (1984).

[145] *Id.* at 950 & n.2.

[146] *See id.* at 959.

[147] *See id.* at 962–68.

[148] *Id.* at 970.

[149] *Munson*, 467 U.S. at 950. MD. ANN. CODE OF 1957, art. 41, § 103D stated in pertinent part: "(a) A charitable organization other than a charitable salvage organization may not pay or agree to pay as expenses in connection with any fundraising activity a total amount in excess of 25 percent of the total gross income raised or received by reason of the fund-raising activity."

[150] *See Munson*, 467 U.S. at 952. MD. ANN. CODE of 1957, art. 41, § 103D stated in pertinent part:

> The Secretary of State shall issue rules and regulations to permit a charitable organization to pay or agree to pay for expenses in connection with a fund-raising activity more than 25% of its total gross income in those instances where the 25% limitation would effectively prevent the charitable organization from raising contributions.

[151] *Munson*, 467 U.S. at 950–51.

[152] *Id.* at 951–52.

After reviewing *Schaumburg*, the Court observed that the regulation must fall unless it could be distinguished.[153] The Court reasoned, however, that the waiver provision was too narrow to distinguish this regulation from the one in *Schaumburg* because the waiver restricted the exception to financial necessity.[154] The Court emphasized that the waiver did not apply to organizations that chose to divert more than twenty-five percent of their receipts to administration for strategic reasons.[155] The Court also determined that the waiver provision failed to address the regulation's flawed premise, that high solicitation costs correlate to fraud.[156] The Court noted that the regulation in no way prevented the actual fraudulent misdirection of funds, although it did restrict the speech of groups that chose high-cost strategies.[157] Thus, the Court concluded that the twenty-five percent limitation unnecessarily chilled the exercise of free speech.[158]

In a dissenting opinion, Justice Rehnquist distinguished the regulation from the *Schaumburg* ordinance.[159] He first reasoned that the statute merely regulated the organizations' economic relations with professional fundraisers.[160] Justice Rehnquist noted that any impact on speech was indirect and outweighed by governmental interests.[161] Furthermore, Justice Rehnquist emphasized the statute's "crucial" differences from the *Schaumburg* regulation.[162] Justice Rehnquist concluded that the regulation survived First Amendment scrutiny.[163]

In sum, in *Munson*, the Supreme Court further developed the *Schaumburg* holding that charitable solicitation constituted protected speech.[164] In its reasoning, the *Munson* Court highlighted the mistaken premise of the regulation at issue, that high administrative costs indi-

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[153] *Id.* at 959–62.

[154] *See id.* at 963.

[155] *See id.* The Court used the example of a group enduring high costs because they elected to disseminate information as part of fundraising. *Id.*

[156] *Munson*, 467 U.S. at 966.

[157] *Id.* at 966–67.

[158] *See id.* at 968.

[159] *Id.* at 975 (Rehnquist, J., dissenting).

[160] *Id.* at 978–79 (Rehnquist, J., dissenting).

[161] *Munson*, 467 U.S. at 979–80 (Rehnquist, J., dissenting).

[162] *Id.* at 981–83 (Rehnquist, J., dissenting). First, Justice Rehnquist observed that the regulation did not include administrative and overhead costs unrelated to solicitation in calculating the 25%. *Id.* at 982. Second, he noted that the statute also excluded many costs from combined solicitation-advocacy events. *Id.* Third, Justice Rehnquist emphasized the waiver provision. *Id.* at 983. Fourth, he observed that the regulation apparently allocated remaining expenses pro rata between solicitation and advocacy. *Id.* at 983–84.

[163] *See id.* at 985 (Rehnquist, J., dissenting).

[164] *See id.* at 962.

cated fraud.[165] Therefore, the Court concluded that despite the waiver provisions, the regulation in *Munson* was unconstitutional.[166]

In 1988, in the final case of the trilogy, *Riley v. National Federation of the Blind of North Carolina,* the Supreme Court struck down a regulation on solicitation by professional fundraisers.[167] A group of professional fundraisers, charities and possible donors challenged a statute that set fundraisers' fees and governed their activities.[168] The Court reiterated that the First Amendment protected charitable solicitation.[169] The Court also emphasized that the fundraisers' professional status did not alter their First Amendment rights.[170] Thus, the Court held the regulation unconstitutional.[171]

The regulation in *Riley* had three relevant provisions.[172] First, the reasonable fee provision set up a three-tier scheme for evaluating professional fundraisers' fees against total contributions.[173] The regulation deemed fees constituting up to twenty percent of the gross receipts of all solicitations to be reasonable, those between twenty and thirty-five percent presumptively reasonable unless shown not to involve advocacy interests, and fees over thirty-five percent presumptively

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[165] *Id.* at 966.

[166] *Munson,* 467 U.S. at 970.

[167] 487 U.S. 781, 784 (1988).

[168] *See id.* at 786–87.

[169] *Id.* at 789.

[170] *See id.* at 801–02.

[171] *Id.* at 803.

[172] *See Riley,* 487 U.S. at 784.

[173] *See id.;* N.C. GEN. STAT. § 131C-17.2 (1986) provided:

> (a) No professional fund-rais[er] . . . may charge . . . an excessive and unreasonable fund-raising fee. . . .
>
> (b) [A] fund-raising fee of twenty percent (20%) or less of the gross receipts of all solicitations . . . is deemed to be reasonable and nonexcessive.
>
> (c) [A] fund-raising fee greater than twenty percent (20%) but less than thirty-five percent (35%) of the gross receipts of all solicitations . . . is excessive and unreasonable if the party challenging the fund-raising fee also proves that the solicitation does not involve the dissemination of information, discussion, or advocacy relating to public issues as directed by the [charitable organization] which is to benefit from the solicitation.
>
> (d) [A] fund-raising fee of thirty-five percent (35%) or more of the gross receipts of all solicitations . . . may be excessive and unreasonable without further evidence. . . . The professional fund-rais[er] . . . may successfully defend the fund-raising fee by proving that the level of the fee charged was necessary:
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> (1) Because of the dissemination of information, discussion, or advocacy relating to public issues as directed by the [charitable organization] which is to benefit from the solicitation, or
>
> (2) Because otherwise the ability of the [charitable organization] which is to benefit from the solicitations to raise money or communicate its ideas, opinions, and positions to the public would be significantly diminished.

unreasonable unless justifiable on the grounds of advocacy or financial necessity.[174] Second, the regulation required professional fundraisers to disclose to potential donors the percentage of revenues retained as a fee in prior solicitations.[175] Finally, the regulation required professional fundraisers to obtain a license before engaging in charitable solicitation.[176]

The Court first held that the reasonable fee provision was indistinguishable from the percentage based fee schemes held unconstitutional in *Schaumburg* and *Munson*.[177] The plaintiff in *Riley* attempted to distinguish the statute by asserting an interest in promoting the maximum yield to the charity, but the Court disagreed for three reasons.[178] First, the Court thought this justification reflected an incorrect view of solicitation as merely commercial speech, and thus subject to less protection under the First Amendment, an issue firmly settled by *Schaumburg*.[179] Second, the Court considered paternalistic protection of charities misplaced in areas of free speech.[180] Third, the Court stressed valid reasons that charities may stray from the statutory guidelines.[181] Finally, the Court determined that the ability to rebut the fee presumptions chilled free expression, rather than distinguishing the regulation.[182] The Court observed that this system forced charities to defend their tactics on a case-by-case basis.[183] Therefore, according to the Court, the specter of litigation would always overshadow efforts at

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[174] *Riley*, 487 U.S. at 784–85.

[175] *Id.* at 784; N.C. GEN. STAT. § 131C-16.1 (1986) provided:

> During any solicitation and before requesting or appealing either directly or indirectly for any charitable contribution a professional solicitor shall disclose to the person solicited:
>
> (1) His name; and,
>
> (2) The name of the . . . professional fund-rais[er] . . . by whom he is employed and the address of his employer; and
>
> (3) The average of the percentage of gross receipts actually paid to the [charitable organizations] by the professional fund-rais[er] . . . conducting the solicitation for all charitable sales promotions conducted in this State by that professional fund-rais[er] . . . for the past 12 months, or for all completed charitable sales promotions where the professional fund-rais[er] . . . has been soliciting funds for less than 12 months.

[176] *Riley*, 487 U.S. at 784; N.C. GEN. STAT. § 131C-6 (1986) provided: "Any person who acts as a professional fund-rais[er] . . . shall apply for and obtain an annual license from the Department, and shall not act as a professional fund-rais[er] . . . until after obtaining such license."

[177] *See Riley*, 487 U.S. at 787–95.

[178] *Id.* at 789–90.

[179] *Id.* at 790.

[180] *Id.* at 790–91.

[181] *Id.* at 791–92.

[182] *Riley*, 487 U.S. at 792–94.

[183] *Id.* at 793.

solicitation and obtaining professional help, especially for small and unpopular groups.[184] Thus, the Court declared the statute's reasonable fee scheme unconstitutional.[185]

The Court next considered the disclosure requirement and concluded that it directly restricted speech.[186] The Court reasoned that by mandating specific speech, the provision became a content-based restriction, properly subject to exacting scrutiny.[187] Noting that existing law already required disclosure of professional status upon request, the Court determined that the intangible benefits from wider publicity of the message outweighed the state's asserted interests in fraud prevention.[188] Furthermore, the Court again emphasized the undue injury to small and unpopular charities forced to rely on professionals.[189] Finally, the Court noted the existence of more narrowly tailored alternatives.[190] Thus, the Court concluded that the disclosure requirement failed to withstand First Amendment strict scrutiny.[191]

Finally, the Court invalidated the licensing requirement, stressing that speakers do not lose First Amendment rights merely because they are compensated.[192] By allowing a limitless delay, the Court reasoned that the statute accorded the licensor too much discretion.[193] Thus, the Court concluded that the licensing scheme unreasonably regulated the time, place and manner of speech.[194]

In a dissenting opinion, Chief Justice Rehnquist argued against subjecting the regulation of professional fundraisers to strict scrutiny.[195]

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[184] *See id.* at 793–94.

[185] *Id.* at 784.

[186] *See id.* at 795–801.

[187] *See Riley*, 487 U.S. at 795–96. The Court refused to separate the commercial component of the speech from the "persuasive" part. *Id.* Also, the Court noted that precedents revealed no distinction of constitutional significance between compelled speech and compelled silence. *Id.* at 796.

[188] *See id.* at 798.

[189] *Id.* at 799.

[190] *Id.* at 800. The Court noted that the state could publish financial disclosure statements itself, or more vigorously enforce existing antifraud statutes. *Id.*

[191] *Id.* at 803.

[192] *See Riley*, 487 U.S. at 801–02.

[193] *See id.* at 802.

[194] *See id.* In a concurring opinion, Justice Scalia agreed with the majority despite questioning dictum indicating that requiring a fundraiser merely to disclose professional status would withstand First Amendment scrutiny. *See id.* at 803 (Scalia, J., concurring). Justice Stevens concurred with most of the majority's opinion but dissented from the Court's conclusion that the licensing requirement was unconstitutional. *Id.* at 804 (Stevens, J., concurring).

[195] *See id.* at 808 (Rehnquist, C.J., dissenting). In 1986, subsequent to the *Schaumburg* and *Munson* decisions, Justice Rehnquist was elevated to the position of Chief Justice of the United States Supreme Court.

First, he argued that the reasonable fee provision was merely an economic regulation with only a minimal burden on speech.[196] Chief Justice Rehnquist further argued that the fee provision would even withstand strict scrutiny because of the government's strong interest in preventing fraud and the fact that the regulation was not a blanket prohibition.[197] Second, the Chief Justice addressed the disclosure requirement and determined that requiring the disclosure of true facts in a commercial transaction did not infringe on free speech.[198] Finally, he approved the licensing requirement on the grounds that it only incidentally affected the *charities'* speech.[199] Chief Justice Rehnquist concluded that the entire regulation deserved a lower degree of scrutiny and should stand.[200]

In *Riley,* the Supreme Court elaborated on the *Schaumburg* and *Munson* holdings, explicitly extending First Amendment protection to professional fundraisers' activities.[201] In its reasoning, the Court emphasized the regulation's burden on the speech of small and unpopular advocacy groups.[202] The Court concluded that the regulation's three provisions, the reasonable fee scheme, the disclosure requirement and the licensing requirement, all failed to withstand First Amendment scrutiny.[203]

The *Schaumburg* trilogy establishes that charitable solicitation constitutes protected speech under the First Amendment.[204] The three cases note that solicitation cannot be separated from a group's essential message.[205] Charitable solicitation aids in disseminating the message as well as ensuring its continuing survival.[206] In addition, the Supreme Court has indicated that those who personally benefit from the solicitation, such as professional fundraisers, nevertheless retain First Amendment protection.[207]

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[196] *See id.* at 807 (Rehnquist, C.J., dissenting).

[197] *Riley,* 487 U.S. at 808, 809 (Rehnquist, C.J., dissenting).

[198] *Id.* at 811 (Rehnquist, C.J., dissenting).

[199] *Id.* at 812 (Rehnquist, C.J., dissenting).

[200] *See id.* at 814 (Rehnquist, C.J., dissenting).

[201] *See id.* at 787–95, 801–02.

[202] *Riley,* 487 U.S. at 793, 799.

[203] *See id.* at 803.

[204] *See id.* at 787–95; Secretary of State of Md. v. Joseph H. Munson Co., 467 U.S. 947, 959 (1984); Village of Schaumburg v. Citizens for a Better Env't, 494 U.S. 620, 632 (1980).

[205] *E.g. Riley,* 487 U.S. at 796; *Munson,* 467 U.S. at 959–60; *Schaumburg,* 444 U.S. at 632.

[206] *See Riley,* 487 U.S. at 796; *Munson,* 467 U.S. at 959–60; *Schaumburg,* 444 U.S. at 632.

[207] *Riley,* 487 U.S. at 801–02.

B. International Society for Krishna Consciousness v. Lee

Then, in 1992, in *International Society for Krishna Consciousness, Inc. v. Lee* ("*ISKCON I*"), the Supreme Court upheld a New York Port Authority regulation banning in-person solicitation of funds in airport terminals.[208] In a companion decision, *Lee v. International Society for Krishna Consciousness* ("*ISKCON II*"), the Court struck down the same regulation as applied to the distribution of literature.[209] The regulation prevented the Krishna adherents from performing *sankirtan,* a ritual involving in-person solicitation of funds, in New York metropolitan airports.[210] Under the Public Forum doctrine, the *ISKCON I* Court reasoned that the airport was a nonpublic forum, therefore the regulation only had to be reasonable.[211] The Court concluded that the Port Authority's interests in limiting solicitation were reasonable and the regulation could stand.[212] The *ISKCON II* Court, however, determined that leafletting did not present the same "dangers" as solicitation.[213] Thus, the Court struck down the prohibition on distributing literature in the terminal.[214] Writing separately, in *International Society of Krishna Consciousness v. Lee* ("*ISKCON III*"), Justices O'Connor, Kennedy and Souter focused their forum analyses more on the objective characteristics of the terminals than had the *ISKCON I* Court.[215]

The *ISKCON I* Court determined that the airport terminals were nonpublic fora because neither tradition nor purpose indicated oth-

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[208] 112 S. Ct. 2701, 2709 (1992). The Port Authority regulation stated in pertinent part:

> 1. The following conduct is prohibited within the interior areas of buildings or structures at an air terminal if conducted by a person to or with passers-by in a continuous or repetitive manner:
>
> (a) The sale or distribution of any merchandise, including but not limited to jewelry, foodstuffs, candles, flowers, badges and clothing.
>
> (b) The sale or distribution of flyers, brochures, pamphlets, books or any other printed or written material.
>
> (c) Solicitation or receipt of funds.

Id. at 2704.

[209] 112 S. Ct. 2709, 2710 (1992).

[210] *ISKCON I,* 112 S. Ct. at 2704.

[211] *Id.* at 2705–06.

[212] *See id.* at 2706, 2709.

[213] *ISKCON II,* 112 S. Ct. at 2710 (citing reasoning in *ISKCON III,* 112 S. Ct. 2711, 2713–14 (1992) (O'Connor, J., concurring)).

[214] *Id.* at 2710.

[215] *See* 112 S. Ct. at 2712, 2716 (O'Connor, J., concurring); *ISKCON III,* 112 S. Ct. at 2716 (Kennedy, J., concurring); *ISKCON III,* 112 S. Ct. at 2724 (Souter, J., concurring in part, dissenting in part).

erwise.[216] First, the Court reasoned that the relatively recent historical emergence of airports prevented them from qualifying as traditional public fora.[217] Second, the Court decided that the terminals were not designated public fora because the Port Authority considered their purpose the facilitation of passenger air travel, not the promotion of expression.[218] Moreover, the Court found no indication in the manner of operation of the airports that the terminals had been dedicated to open expression.[219] After ruling out traditional and designated public fora, the Court concluded that the airport terminals were nonpublic fora and the regulation should be held to a reasonableness standard.[220]

Under this reasonableness standard, the Court articulated the Port Authority's three legitimate interests in banning in-person solicitation.[221] First, the Court stressed that solicitation had a disruptive effect on business.[222] Second, the Court observed that in-person solicitation impeded the flow of traffic.[223] Third, according to the Court, face-to-face solicitation presented risks of duress, an appropriate target for regulation.[224] The Court then noted that the alternative of performing *sankirtan* on the sidewalk outside the terminal mitigated adverse effects on speech.[225] The *ISKCON I* Court concluded that these interests justified the regulation as reasonable and thus constitutional.[226]

In *ISKCON II,* the Court invalidated the companion ban on distribution of literature in Port Authority terminals.[227] As justification, the *ISKCON II* Court cited the reasoning in Justices O'Connor's, Kennedy's and Souter's separate *ISKCON III* opinions that followed.[228] In a dissenting opinion, Chief Justice Rehnquist disagreed with the Court's invalidation of the prohibition on literature distribution.[229] The

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[216] *ISKCON I,* 112 S. Ct. at 2706, 2708.

[217] *Id.* at 2706. In addition, solicitation in airports did not appear until recently, too late even to be traditional solely for airports. *Id.* The Court dismissed the argument that the terminals were heir to the expressive activity traditionally conducted at "transportation nodes," such as train stations. *Id.* at 2707. The Court noted that bus and train stations were often under private ownership and, moreover, that airports may have critical differences with more conventional transportation nodes. *Id.*

[218] *Id.* at 2707.

[219] *Id.*

[220] *See id.* at 2708.

[221] *See ISKCON I,* 112 S. Ct. at 2708.

[222] *Id.*

[223] *Id.*

[224] *Id.*

[225] *Id.* at 2708–09.

[226] *See ISKCON I,* 112 S. Ct. at 2708–09.

[227] *ISKCON II,* 112 S. Ct. 2709, 2710 (1992).

[228] *Id.*

[229] *Id.* at 2710 (Rehnquist, C.J., dissenting).

Chief Justice emphasized that leafletting presented identical congestion risks as solicitation, in addition to unique problems, such as the creation of litter.[230] The Chief Justice concluded that without a more significant distinction between the risks presented by the two activities, the Court's decision allowed excludable conduct in through the back door.[231]

In an opinion in *ISKCON III,* Justice O'Connor concurred in both the *ISKCON I* and *ISKCON II* decisions.[232] She agreed that the terminals were nonpublic fora and therefore, the regulation should be held to a reasonableness standard.[233] Justice O'Connor, however, emphasized that reasonableness must be determined in light of all surrounding circumstances.[234] She argued that the airport terminals constituted a large multipurpose complex rather than an environment with the sole purpose of air travel.[235] Nevertheless, Justice O'Connor concluded that in-person solicitation was incompatible with the terminals' functioning in a way that leafletting was not and thus, concurred with the Court's decisions.[236]

In *ISKCON III,* Justice Kennedy also agreed with the Court's results in *ISKCON I* and *II,* despite concluding that the terminals were public fora.[237] He argued that basing forum status on the government's express characterization, as the majority did, eviscerated the First Amendment by allowing the government to set the standard of review.[238] Instead, Justice Kennedy advocated focusing on a property's actual objective qualities, and articulated three factors to examine.[239] In his opinion, the Court should consider a property's shared physical similarities with traditional public fora, whether the government has permitted broad public access to the property, and whether expressive activity would interfere in a significant way with the uses of the property.[240]

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[230] *Id.* (Rehnquist, C.J., dissenting).

[231] *See id.* (Rehnquist, C.J., dissenting).

[232] 112 S. Ct. at 2711 (O'Connor, J., concurring).

[233] *Id.* at 2711–12 (O'Connor, J., concurring).

[234] *Id.* at 2712 (O'Connor, J., concurring).

[235] *Id.* at 2712–13 (O'Connor, J., concurring). Justice O'Connor noted that the terminals functioned as "a shopping mall as well as an airport." *Id.* at 2713.

[236] *See id.* at 2713–15 (O'Connor, J., concurring).

[237] *ISKCON III,* 112 S. Ct. at 2715 (Kennedy, J., concurring).

[238] *See id.* at 2716 (Kennedy, J., concurring). Justice Kennedy also admonished the Court for taking refuge in "history;" he contended that the reality must be faced that new "public fora" will develop as society changes. *Id.* at 2717.

[239] *Id.* at 2716, 2718 (Kennedy, J., concurring).

[240] *Id.* at 2718 (Kennedy, J., concurring). Justice Kennedy also suggested taking into account the availability of reasonable time, place and manner restrictions. *Id.* at 2718.

Applying this standard to the facts before him, Justice Kennedy determined that the terminals were public fora.[241] Nevertheless, he reasoned that the solicitation ban survived the strict scrutiny test.[242] Justice Kennedy emphasized the prevention of fraud and duress, often linked to in-person solicitation, and the existence of satisfactory alternatives.[243] On the other hand, he concluded that the distribution ban could not withstand the scrutiny of a public forum.[244] Justice Kennedy reasoned that leafletting presented less risk of fraud and that the regulation left open fewer alternatives.[245]

Concurring in part and dissenting in part, Justice Souter agreed with striking down the distribution ban, but argued that the solicitation ban also failed First Amendment scrutiny.[246] He supported Justice Kennedy's conception of the Public Forum doctrine, asserting that the classification of government property should rest on the compatibility of its uses and physical characteristics with expressive activity.[247] Justice Souter agreed that the terminals were public fora, and the regulation should be subjected to strict scrutiny.[248] Unlike Justice Kennedy, however, he concluded that solicitation for immediate payment was compatible with the airport terminals and the ban should be invalidated.[249]

In *ISKCON,* the Supreme Court used the Public Forum doctrine to determine the appropriate degree of scrutiny to review the Port Authority's regulation of expressive activity.[250] The majority opinion

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[241] *Id.* at 2719 (Kennedy, J., concurring). First, he emphasized the physical similarities between the airport corridors and the quintessential public fora, public streets. *Id.* Next, he noted that the terminals were open to the public without restriction. *Id.* Finally, Justice Kennedy found that expressive activity was compatible with the function of the airport. *Id.*

[242] *ISKCON III,* 112 S. Ct. at 2720 (Kennedy, J., concurring).

[243] *See id.* at 2721, 2722–23 (Kennedy, J., concurring). Justice Kennedy interpreted the regulation to prohibit only solicitation for immediate payment, leaving open such alternatives as handing out preaddressed envelopes. *Id.* at 2723.

[244] *Id.* at 2723 (Kennedy, J., concurring).

[245] *Id.* (Kennedy, J., concurring).

[246] *Id.* at 2724–25 (Souter, J., concurring in part, dissenting in part).

[247] *ISKCON III,* 112 S. Ct. at 2724 (Souter, J., concurring in part, dissenting in part). Justice Souter described the forum analysis categories as "archetypes," representing broad characteristics of fora. *See id.* Moreover, he warned of the twin dangers of allowing history to close a category and of treating the categories as overly static. *Id.*

[248] *Id.* at 2725 (Souter, J., concurring in part, dissenting in part).

[249] *See id.* at 2725, 2726 (Souter, J., concurring in part, dissenting in part). Justice Souter argued against the solicitation ban for primarily two reasons. *See id.* at 2725. He first concluded that no strong government interest justified the prohibition. *See id.* at 2725–26. Justice Souter reasoned that pedestrians' relative freedom to simply walk away undermined the asserted interest in preventing fraud and duress. *Id.* He also dismissed the alleged interest in combatting congestion by noting the corridors' similarity to city streets. *Id.* at 2725 n.1. Second, Justice Souter indicated the lack of reasonable alternatives, and dismissed Justice Kennedy's suggestion of distributing preaddressed envelopes as unrealistic. *Id.* at 2727.

[250] *See ISKCON I,* 112 S. Ct. at 2705.

reasoned that the airports were nonpublic fora because neither tradition nor the Port Authority's characterization of the terminals' purposes indicated otherwise.[251] Therefore, the Court concluded that the solicitation ban was constitutional and the distribution ban was not.[252] The separate opinions in *ISKCON III* however, suggested that forum analysis should focus more on the objective physical characteristics of the airport, and their compatibility with solicitation and leafletting.[253]

In sum, the *ISKCON* decision accepts the basic holding of the *Schaumburg* trilogy, that charitable solicitation is so intertwined with dissemination of a group's message that it deserves First Amendment protection.[254] The *ISKCON* Court, however, determined the degree of scrutiny with which to review the Port Authority regulation via a Public Forum doctrine analysis.[255] The Court effectively tied its balancing of competing interests to a characterization of the nature of the forum.[256]

III. Treatment of Begging by the Courts

Unlike charitable solicitation, begging, until recently, has received scant attention from the courts.[257] In fact, when a begging case appeared before a court, the court often overlooked the First Amendment element entirely.[258] Those precedents that raised beggars' First Amendment rights reveal an inconsistent approach to begging regulations.[259]

In 1976, in *Ulmer v. Municipal Court*, the California Court of Appeals upheld a statute that prohibited accosting another individual for begging purposes.[260] After noting the regulation's purpose as pre-

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[251] *Id.* at 2705–08.

[252] *Id.* at 2709; *ISKCON II*, 112 S. Ct. at 2710.

[253] *See ISKCON III*, 112 S. Ct. at 2712 (O'Connor, J., concurring); *Id.* at 2716 (Kennedy, J., concurring); *Id.* at 2724 (Souter, J., concurring in part, dissenting in part).

[254] *ISKCON I*, 112 S. Ct. 2701, 2705 (1992).

[255] *Id.* at 2705–06.

[256] *See id.* at 2705.

[257] Rose, *supra* note 13, at 193. One commentator gives four reasons for the "dearth" of precedents: 1) low priority of law enforcement, 2) beggars often lack wherewithal to challenge regulations, 3) long historical roots of anti-begging laws make them more accepted, 4) courts never even address the First Amendment issue. *Id.* at 193–95.

[258] *See, e.g.*, State v. Hundley, 142 S.E. 330, 330–32 (N.D. 1928) (court upheld anti-begging law despite focusing analysis entirely on organized charities); Decker v. Fillis, 306 F. Supp. 613, 614–17 (D. Utah 1969) (law criminalizing loitering/begging invalidated for vagueness and overbreadth without raising the First Amendment).

[259] *See* Rose, *supra* note 13, at 193.

[260] 127 Cal. Rptr. 445, 447 (1st Dist. 1976). The California Penal Code criminalizes "(c) . . . accost[ing] other persons in any public place or in any place open to the public for the purpose of begging or soliciting alms." Cal. Penal Code § 647 (West Supp. 1993). The petitioner contended that he had been soliciting for "the Son of Man Temple for scientific research on the

venting the "annoyance" of begging, the court found no necessary nexus between begging and the communication of ideas.[261] Consequently, the court concluded that begging was not protected speech.[262] The court dismissed a vagueness argument, noting the clear import of the words, "[w]alking up to and approaching another for the purpose of soliciting."[263] The court concluded that the ordinance fell outside the protective sweep of the First Amendment and was constitutional.[264]

Conversely, in 1984, in *C.C.B. v. State of Florida,* the First District Court of Appeals of Florida ruled that a Jacksonville municipal ordinance prohibiting begging was unconstitutionally overbroad and violative of the First Amendment.[265] First, the court articulated the city's interests in safeguarding against public annoyance and facilitating traffic flow.[266] The court reasoned, however, that, balanced against the beggar's rights, these interests did not justify totally depriving the appellant from seeking sustenance through panhandling.[267] The court concluded that the ordinance encroached upon the appellant's rights to solicit alms and, therefore, violated the First Amendment.[268]

Then, in 1990, in *Young v. New York City Transit Authority,* the United States Court of Appeals for the Second Circuit held that a begging prohibition did not violate freedom of speech.[269] Two homeless individuals brought a class action suit challenging a Transit Authority ban on begging in the subway system.[270] The court reasoned that the regulation advanced substantial Transit Authority interests without unduly infringing on speech rights.[271] In dicta, the court questioned

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disease of sickle-cell anemia," though this was not established on the record. *Ulmer,* 127 Cal. Rptr. at 447.

[261] *Ulmer,* 127 Cal. Rptr. at 447.

[262] *See id.*

[263] *Id.* at 447–48. The court reasoned that the regulation did not include anyone "who merely sits or stands by the wayside." *Id.*

[264] *Id.* at 447.

[265] 458 So.2d 47, 48 (Fla. Dist. Ct. App. 1984). Jacksonville City Ordinance 330.105 made it unlawful "to beg or solicit alms in the streets or public places of the city or exhibit oneself for the purpose of begging or obtaining alms." *Id.*

[266] *Id.* at 48.

[267] *See id.* at 50. The court distinguished this case from *Ulmer,* where the statute only dealt with "accosting." *Id.* at 49.

[268] *See id.* at 48, 50.

[269] 903 F.2d 146, 148 (2d Cir.), *cert. denied,* 498 U.S. 984 (1990).

[270] *Id.* at 148. The plaintiffs challenged the regulation under the First Amendment to the United States Constitution and challenged a state anti-begging law, N.Y. PENAL LAW § 240.35(1), under the New York State Constitution. *Id.* at 148, 151. That state law was also challenged in *Loper v. New York City Police Dep't,* 802 F. Supp. 1029, 1032 (S.D.N.Y. 1992). See *infra* notes 328–374 and accompanying text for a discussion of *Loper.*

[271] *See id.* at 157–61.

whether begging constituted expressive conduct and determined that the subway constituted a nonpublic forum.[272] The court upheld the regulation because it was narrowly tailored to achieve a significant governmental interest, and therefore survived constitutional scrutiny under the track two analysis articulated in *O'Brien*.[273]

To help maintain a safe and effective public transportation system, the Transit Authority had a longstanding prohibition on begging.[274] In 1989, the Transit Authority amended the regulation to increase access for organized charities, subject to some location restrictions.[275] Simultaneously, the Transit Authority instituted "Operation Enforcement," an attempt to escalate enforcement of the panhandling prohibition.[276]

In analyzing the panhandling ban, the court first expressed doubts that begging deserved First Amendment protection.[277] The court speculated that, under the *Spence* standard, beggars probably intended no "particularized" message.[278] Even assuming a potential message, the court determined that witnesses were unlikely to be able to discern the message.[279] Moreover, the court suggested that the inherent aggressiveness of begging in the subway might overshadow any expressive element.[280] Finally, the court noted that the only message common in begging, the desire for money, did not coincide with the First Amendment's underlying values.[281]

The court also distinguished begging from charitable solicitation.[282] The court first noted that the *Schaumburg* trilogy dealt only with the nexus between organized charities' solicitation and various speech interests.[283] Second, the court emphasized that the Transit Authority was able to distinguish the two when it amended the regulation to

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[272] *Id.* at 153–57, 161–62.

[273] *Id.* at 157–61, 164. In addition, the court upheld N.Y. PENAL LAW § 240.35(1) under the New York State Constitution's Due Process clause. *See id.* at 164.

[274] *Young*, 903 F.2d at 148. N.Y. COMP. CODES R. & REGS., tit. 21, § 1050.6(b) (1989) states: "no person, unless duly authorized . . . shall upon any facility or conveyance . . . solicit alms, subscription or contribution for any purpose."

[275] *Young*, 903 F.2d at 148.

[276] *Id.* at 149. "Operation Enforcement" resulted from a study indicating that begging engendered public intimidation and concern. *See id.*

[277] *Id.* at 153.

[278] *Id.* The court contrasted begging with clear-cut acts of symbolic conduct. *See id.* (citing cases).

[279] *Id.* at 153–54.

[280] *Young*, 903 F.2d at 154.

[281] *See id.* The court also separated incidental conversations with subway passengers from begging, the conduct being regulated. *See id.*

[282] *Id.* at 156.

[283] *Id.* at 155.

permit access by organized charities.[284] Finally, the court emphasized the commonsense difference that organized charities benefitted the community while begging was a "menace to the common good."[285] Ultimately, however, the court grounded its decision on an analysis of the regulation, not on whether begging was protected under the First Amendment.[286]

Assuming that begging fell within the purview of the First Amendment, the court then determined that the regulation withstood scrutiny under the *O'Brien* standard.[287] First, the court noted that the Transit Authority had a substantial interest in providing the general populace with reasonably safe public transportation.[288] In the context of the subway, begging threatened that interest because the court viewed it as tantamount to assault.[289] Second, the court determined that the regulation satisfied the content-neutrality prong because the ban attempted to regulate begging's effect on safety and efficiency, not any communicative element.[290] Finally, the court determined that the regulation was sufficiently tailored despite being a total ban.[291] Noting that regulations were not required always to be the least restrictive, the court deferred to the Transit Authority's judgment that controlling the negative effects of begging necessitated a total ban.[292] In addition, the court emphasized that the rest of the city remained as an alternative forum, thus mitigating the regulation's effect.[293]

Although the court did not analyze the regulation under the Public Forum doctrine, in dicta, the court determined that the Transit Authority did not intend to designate the subway a limited public forum.[294] The court emphasized that Operation Enforcement actually indicated a contrary intent.[295] Furthermore, the court held that the subways could be opened to organized charities without necessarily opening the forum for all conduct.[296] The court concluded that the

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[284] *Id.* at 155–56. The court emphasized that, while evidence abounded that begging engendered intimidation in passengers, no evidence indicated the same consequences for charitable solicitation. *Id.* at 156.

[285] *Young*, 903 F.2d at 156.

[286] *Id.* at 154, 161.

[287] *Id.* at 157, 161.

[288] *Id.* at 158.

[289] *Id.*

[290] *Young*, 903 F.2d at 158.

[291] *See id.* at 159, 160.

[292] *Id.* at 160.

[293] *Id.*

[294] *Id.* at 161–62.

[295] *Young*, 903 F.2d at 161.

[296] *Id.* at 161–62.

subway qualified as a nonpublic forum and held the regulation to the same level of scrutiny as applied under the *O'Brien* standard.[297]

Judge Meskill, concurring in part and dissenting in part, disagreed with the majority's conclusion that the statute did not violate the First Amendment.[298] Judge Meskill perceived no constitutionally meaningful distinction between charitable solicitation and begging, which also furthered the speech interests articulated by the *Schaumburg* trilogy.[299] He argued that begging should be protected equally by the First Amendment.[300]

Next, Judge Meskill determined that the subway was a limited public forum.[301] He reasoned that by amending the regulation to permit organized charities, the Transit Authority effectively designated the subways as public fora.[302] Judge Meskill concluded that the regulation was subject to the stricter scrutiny of a public forum.[303]

Finally, Judge Meskill argued that, under strict scrutiny, the Transit Authority's interests did not justify the begging prohibition.[304] He emphasized the lack of any distinction between purely passive begging, "which would hardly daunt the average New Yorker," and more aggressively intrusive conduct.[305] Conceding the significance of having a safe and efficient subway system, Judge Meskill suggested that, while the Transit Authority might proscribe aggressive behavior or confine soliciting to certain areas, it could not prohibit begging entirely.[306] Judge Meskill concluded that the regulation failed to withstand the level of scrutiny accorded speech restrictions in public fora.[307]

In sum, the *Young* court held that a ban on begging in the New York subways did not infringe on beggars' freedom of speech.[308] The court reasoned that the Transit Authority's interests in providing efficient public transportation justified the regulation.[309] In addition, the

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[297] *See id.*

[298] *Id.* at 164 (Meskill, J., concurring in part, dissenting in part). Judge Meskill concurred with the state law issue, however. *Id.*

[299] *Id.* at 164 (Meskill, J., concurring in part, dissenting in part).

[300] *See Young*, 903 F.2d at 165 (Meskill, J., concurring in part, dissenting in part).

[301] *Id.* at 166 (Meskill, J., concurring in part, dissenting in part).

[302] *Id.* (Meskill, J., concurring in part, dissenting in part).

[303] *See id.* at 167 (Meskill, J., concurring in part, dissenting in part).

[304] *Id.* at 167–68 (Meskill, J., concurring in part, dissenting in part).

[305] *Young*, 903 F.2d at 168 (Meskill, J., concurring in part, dissenting in part). Judge Meskill pointed out that there was also no evidence that passengers did *not* feel harassed when approached by solicitors from organized charities. *Id.* at 167 n.1, 168.

[306] *Id.* at 168 (Meskill, J., concurring in part, dissenting in part).

[307] *Id.* at 167–68 (Meskill, J., concurring in part, dissenting in part).

[308] *Id.* at 164.

[309] *Id.* at 158.

court suggested that begging did not constitute protectable speech and that the subways were not public fora such that the regulation should be given greater scrutiny.[310] Therefore, the *Young* court concluded that the regulation should stand.[311]

Conversely, in 1991, in *Blair v. Shanahan,* the United States District Court for the Northern District of California held a state prohibition of begging unconstitutional.[312] A former panhandler sought recompense for damages suffered from police enforcement of the ban.[313] The court diverged from the *Young* decision and drew a parallel between the speech interests involved in begging and those present in charitable solicitation.[314] The court concluded that the statute violated the First Amendment.[315]

The *Blair* court found no significant First Amendment distinction between begging and solicitation by organized charities.[316] The court reasoned that begging promoted the same speech values because, more than a mere commercial exchange, beggars disseminate information on their situation and poverty in general.[317] The court stressed that constitutional protection continues even though beggars represent only themselves and intend to keep the receipts.[318]

In so concluding, the court declined to follow the *Young* decision.[319] The court noted that factual differences between the subway and the street might reconcile the two decisions, but refused to take this path.[320] Moreover, the court described as "disturbing," the *Young* court's characterization of begging as "a menace to the common good."[321]

Reasoning that the prohibition affected a public forum, the street, the court then strictly scrutinized the state's interests in prohibiting begging.[322] First, the court dismissed as uncompelling the idea that the statute prevented public annoyance.[323] Second, the court determined

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[310] *Young,* 903 F.2d at 153, 162.

[311] *Id.* at 164.

[312] 775 F. Supp. 1315, 1329 (N.D. Cal. 1991).

[313] *Id.* at 1317.

[314] *See id.* at 1322–23.

[315] *See id.* at 1325.

[316] *Id.* at 1322.

[317] *Blair,* 775 F. Supp. at 1322–23.

[318] *Id.* at 1323. The court analogized the beggar to a professional fundraiser whose primary goal is to effectuate monetary donations. *See id.* at 1323–24.

[319] *Id.* at 1323.

[320] *See id.* at 1322 & n.5.

[321] *Id.* at 1323 n.9.

[322] *See Blair,* 775 F. Supp. at 1324.

[323] *Id. But see Ulmer,* 127 Cal. Rptr. at 447–48 (finding purpose behind statute supported enforcement).

that preventing intrusion on the public at large also failed to be compelling.[324] Finally, the court conceded that while preventing "coercive" or "intimidating" activity was compelling, the statute at issue was not sufficiently narrowly drawn to serve that interest.[325] The court emphasized that existing laws already protected the public from such threatening conduct.[326] Thus, the court struck down the statute as violative of the First Amendment.[327]

Following in the wake of *Blair,* in October 1992, in *Loper v. New York City Police Department,* the United States District Court for the Southern District of New York struck down a New York City ordinance criminalizing begging.[328] Two homeless individuals challenged the statute in a class action suit, claiming violations of the First, Eighth and Fourteenth Amendments.[329] Under the First Amendment analysis, the court first noted that begging was protected speech, and then determined that the beggars' rights outweighed competing interests.[330] The court concluded that the regulation failed to withstand First Amendment scrutiny.[331]

The New York City Police Department used the criminal begging law to justify organized campaigns to reduce begging.[332] The police argued that allowing the persistence of minor forms of disorder, such as begging or broken windows, fosters more serious crime by undermining the public sense of order.[333] Under this "Broken Windows" theory, the police attempted to combat crime by reasserting an orderly society.[334] On the other hand, the homeless plaintiffs depended on begging as their sole means of support.[335] Although never arrested or summonsed, the plaintiffs had been occasionally ordered by the police to "move along," under threat of the regulation.[336]

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[324] *Blair,* 775 F. Supp. at 1324.

[325] *Id.*

[326] *Id.*

[327] *See id.* at 1325.

[328] 802 F. Supp. 1029, 1048 (S.D.N.Y. 1992). N.Y. PENAL LAW § 240.35(1) stated in pertinent part: "A person is guilty of loitering when he: 1. Loiters, remains or wanders about in a public place for the purpose of begging. . . ." See *supra* note 273 for the *Young* court's disposition of this statute under the New York State Constitution.

[329] *Loper,* 802 F. Supp. at 1033. The court did not deal with the Eighth and Fourteenth Amendment claims because it decided on First Amendment grounds. *Id.* at 1047–48.

[330] *See id.* at 1036–37, 1047.

[331] *Id.* at 1047.

[332] *Id.* at 1034.

[333] *See id.*

[334] *See Loper,* 802 F. Supp. at 1034; see also *infra* notes 378–388 for a discussion of the Broken Windows theory.

[335] *Id.* at 1033.

[336] *Id.*

The court began by analogizing begging to *sankirtan,* the Krishna ritual of in-person solicitation held to be protected speech in *ISKCON.*[337] Dismissing the differences between begging and solicitation by organized charities as "largely semantic," the court reasoned that the two activities conveyed identical messages.[338] The court noted that attempting to disentangle the expressive element from conduct would be futile in this instance.[339] The court concluded that begging fell within the scope of the First Amendment.[340]

Next, the court examined whether the statute could survive constitutional scrutiny.[341] The court first determined that the statute was content-based because it targeted the beggars' message.[342] The court emphasized the disparate treatment accorded solicitors for organized charities and beggars "standing side-by-side" despite identical messages.[343] According to the court, the Broken Windows rationale only highlighted the fact that the regulation targeted begging's societal message.[344] The court concluded that the regulation was not content-neutral and deserved strict scrutiny.[345]

Under a strict scrutiny analysis, the *Loper* court faulted the total ban, for effectively closing all alternatives.[346] The court emphasized that other New York laws already addressed problem conduct.[347] The court concluded that the regulation was not narrowly tailored to advance a city interest.[348]

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[337] *Id.* at 1037. The court even noted that *sankirtan* can be "more aggressive and intrusive" than begging. *Id.*

[338] *Id.* at 1037–38 ("[i]t is the message that is the same, and that message is entitled to First Amendment protection.") (citing First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 777 (1978) (source of speech does not define inherent worth in terms of capacity to inform)).

[339] *Loper,* 802 F. Supp. at 1038.

[340] *See id.*

[341] *See id.* Synthesizing the *O'Brien* test and the standard for reasonable regulation of time, place or manner of expression, the court articulated three requirements for constitutional regulations. *Id.* at 1039. First, a regulation must be content-neutral. *Id.* Second, it must be supported by substantial governmental interest. *Id.* Third, the regulation must allow alternative means of communication. *Id.* The court addressed the first and third requirements before addressing the second. *See id.* at 1039–41.

[342] *See id.* at 1040.

[343] *Id.* Organized charities are subject to a New York licensing scheme. *Id.* The court also pointed out that, of all the visual and aural intrusions on individual tranquility along Times Square, only the beggar is singled out for regulation. *Id.*

[344] *Loper,* 802 F. Supp. at 1040.

[345] *See id.*

[346] *Id.*

[347] *Id.* at 1040–41.

[348] *See id.*

Next, the court balanced the government's interests underpinning the statute against the beggars' freedom of speech interests.[349] The court defined the government's interest as protecting and promoting three factors: the beggars' interests, the specific audience's interests and the general public's interests.[350]

The *Loper* court first determined the beggars' interests in this case to be the widest possible dissemination of two related messages.[351] First, the court noted that the beggars wanted to indicate their specific dire economic plight and request donations.[352] Second, and more generally, the court observed that the beggars expressed the underside of current socio-economic conditions.[353]

The court viewed the audience's interests as having information readily available to it, being informed about social conditions, not being defrauded, and having one's personal privacy respected.[354] Although it considered begging readily compatible with the first two interests, the court struggled with the degree to which speech must bow to privacy concerns.[355] Although conceding the importance of personal privacy, the court noted that exposure to differing messages was in the audience's best interests even if "in unwelcome forms."[356] The court reasoned that outside the home, individuals sacrifice their privacy rights to the greater societal interest in permitting the expression.[357] The court then emphasized the degree of control that pedestrians possess in determining whether they become an "audience" to the beggar's plea.[358] The court concluded that, although close, the beggars' interests ultimately outweighed those of the specific audience.[359]

Finally, the court explored the general interests of the public in upholding the public order and preventing fraud.[360] The court divided

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[349] *Loper*, 802 F. Supp. at 1047.

[350] *Id.* at 1042.

[351] *See id.*

[352] *Id.*

[353] *Id.*

[354] *Loper*, 802 F. Supp. at 1042.

[355] *See id.* at 1042–43.

[356] *Loper*, 802 F. Supp. at 1042–43.

[357] *See id.* at 1047.

[358] *Id.* at 1045. "He can turn away, shake his head before the expression is uttered, avert his eyes and refuse to acknowledge the speaker, or he can listen to the message and then decide how to respond to the speaker's personal appeal." *Id.*

[359] *Id.*

[360] *See id.* at 1045–47. See *infra* notes 368–371 and accompanying text for a discussion of prevention of fraud.

society's interest in the public order into two aspects, the prohibition of disruptive conduct and the Broken Windows rationale.[361] If intended to combat disruptive behavior, such as aggressive panhandling or interference with traffic, the court concluded that the statute was overbroad.[362] According to the *Loper* court, existing laws already addressed these problems and laws narrowly targeting undesirable activity would have been a more effective solution than the blanket ban.[363]

Furthermore, the court declined to endorse the Broken Windows justification for the panhandling ban.[364] The court noted that, even accepting the theory, beggars themselves do not constitute a threat and have committed only "the offense of being needy."[365] The court reasoned that this justification merely removes "the messenger of bad news" from sight.[366] The *Loper* court rejected the Broken Windows rationale, asserting that speech should not lose First Amendment protection simply because society finds it disturbing.[367]

The court also dismissed the public's interest in prevention of fraud as a justification for the ban.[368] The court first reasoned that the fact that organized charities provide some relief does not abrogate the beggars' right to take matters into their own hands.[369] Second, the vague possibility that the donated alms will not be used for the announced purposes could not support a blanket ban on panhandling.[370] The court concluded that the city's interests in banning begging failed to overcome beggars' free speech rights.[371]

In sum, after concluding that begging deserved First Amendment protection, the *Loper* court reasoned that the regulation directly targeted begging's message, and that the total ban eliminated alternative

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[361] *Loper*, 802 F. Supp. at 1045.

[362] *Id.*

[363] *Id.* at 1045, 1046.

[364] *See id.* at 1046.

[365] *Id.*

[366] *Loper*, 802 F. Supp. at 1046.

[367] *See id.* The court also dismissed the argument that the statute was constitutional because the police do not enforce it on the peaceful beggar; this would mean that overly broad discretion was delegated to the decision maker. *Id.*

[368] *Id.* at 1046–47. The court noted that this argument has often failed in the context of charitable solicitation. *Id.* at 1046.

[369] *See id.* at 1047 (noting that available services do not meet the great need presented); *but see* Williams, *supra* note 2 ("but [Detroit Salvation Army] Colonel Clarence Harvey says there's enough food and shelter available right now that the homeless don't need to beg.").

[370] *See Loper*, 802 F. Supp. at 1047. The general fear seems to be that the money will be spent on "more self-destructive ends, such as the purchase of tobacco, alcohol or drugs." *Id.* at 1046.

[371] *Id.* at 1047.

[372] *Id.* at 1037–38, 1040.

forums.[372] Moreover, the court determined that the city's asserted interests were not compelling enough to override beggars' rights.[373] Therefore, the court held that the prohibition of begging on New York City streets did not withstand First Amendment scrutiny.[374]

Thus, courts have treated beggars' First Amendment rights inconsistently.[375] The *Ulmer* and *Young* courts determined that societal interests in preventing begging outweighed any free speech interests of the beggar.[376] Conversely, the *C.C.B.*, *Blair* and *Loper* courts held that the First Amendment prohibited obstructing beggars' expressing their message of life in the underclass.[377]

VI. Application of the Public Forum Doctrine to Anti-Begging Laws

A. *Sociological Views on Begging*

Some commentators advocate anti-begging laws as a means for reasserting control over our decaying urban environment and halting the dissolution of our social fabric.[378] The Broken Windows theory contends that low-level disorder, if left unchecked, leads to more serious crime and the breakdown of the social order.[379] The presence of unfixed broken windows, graffiti or panhandling in a neighborhood creates the impression that the authorities have lost control.[380] The community grows increasingly atomized as people modify their behavior to fit their perceptions.[381] Many will simply leave or at least avoid "unsafe" areas.[382] The theory deems such neighborhoods ripe for criminal invasion.[383] Drug dealers, prostitutes and other criminals will then enter the scene, believing themselves more secure from police interference.[384] One author describing this phenomenon stated that

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[373] *Id.* at 1047.

[374] *Id.* at 1048.

[375] *See, e.g.*, Young v. New York City Transit Auth., 903 F.2d 146, 147 (2d Cir.), *cert. denied*, 498 U.S. 984 (1990); Loper v. New York City Police Dep't, 802 F. Supp. 1029, 1048 (S.D.N.Y. 1992); Blair v. Shanahan, 775 F. Supp. 1315, 1329 (N.D. Cal. 1991); C.C.B. v. Florida, 458 So.2d 47, 48 (Fla. Dist. Ct. App. 1984); Ulmer v. Municipal Court, 127 Cal. Rptr. 445, 447 (Cal. Ct. App. 1976).

[376] *See Young*, 903 F.2d at 147; *Ulmer*, 127 Cal. Rptr. at 447.

[377] *See Loper*, 802 F. Supp. at 1048; *Blair*, 775 F. Supp. at 1329; *C.C.B.*, 458 So.2d at 48.

[378] *See Rightsmongering*, *supra* note 6, at 23; Wilson & Kelling, *supra* note 6, at 35.

[379] *Fighting*, *supra* note 6, at 18; *Rightsmongering*, *supra* note 6, at 23; *see also* Wilson & Kelling, *supra* note 6, at 31–32.

[380] *Fighting*, *supra* note 6, at 18; *Rightsmongering*, *supra* note 6, at 23.

[381] Wilson & Kelling, *supra* note 6, at 32.

[382] *Id.*

[383] *Id.*

[384] *Id.*

"[w]hen the police were withdrawn from the neighborhoods and the social workers pulled out of the projects, skid row behavior and a sense of menace extended outward to include larger and larger portions of the city."[385]

The social order rests upon a myriad of small, mundane interchanges, scenes and images; when these show signs of disrepair, the structure of our society risks collapse.[386] These commentators argue that by enforcing laws against begging, cities can reimpose order on the sidewalks and in the neighborhoods.[387] By constructing such a background, these cities are setting the stage for the reversal of urban deterioration.[388]

Other commentators view begging and its relation to the social fabric radically differently.[389] These commentators view the vaunted social structure built upon a myriad of background details as a fragile illusion, "phantom normalcy," erected as psychological insulation against the harshness of reality.[390] In return for hiding the "pain of being poor," beggars receive society's tacit "phantom acceptance"—or at least not its explicit rejection.[391] The listeners can remain unshaken in their feelings of physical security as well as their naivete over economic reality.[392]

Begging provides a means for the disenfranchised to break through the "phantom" wall.[393] This engagement value of begging allows beggars to bridge the psychological divide and establish, if only momentarily, a social bond with an individual in the mainstream.[394] At that precise moment, the listener cannot avoid confronting the reality of poverty in our midst.[395] Theorists contend that these small connec-

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[385] Fred Siegel, *Reclaiming Our Public Spaces*, THE CITY JOURNAL, Spring 1992, at 35, 37.

[386] Siegel, *supra* note 385, at 35.

> [S]idewalk contacts are the small change from which a city's wealth of public life may grow. . . . The tolerance, the room for great differences among neighbors, are possible and normal only when the streets of great cities have built-in equipment allowing strangers to dwell in peace together on civilized but essentially dignified and reserved terms.

Siegel, *supra* note 385, at 35 *quoting* JANE JACOBS, THE DEATH AND LIFE OF GREAT AMERICAN CITIES (1961).

[387] *See Rightsmongering*, *supra* note 6, at 23.

[388] *See* James Q. Wilson & George L. Kelling, *Making Neighborhoods Safe*, THE ATLANTIC MONTHLY, Feb. 1989, at 46 (citing examples of instances in which theory has apparently worked).

[389] *See* Hershkoff & Cohen, *supra* note 41, at 910.

[390] *See id.* at 912.

[391] *Id.*

[392] *Id.*

[393] *Id.* at 912–913.

[394] Hershkoff & Cohen, *supra* note 41, at 913.

[395] *Id.* at 912.

tions between individuals will form the "small change" from which a society can develop, based not in phantom but human realities.[396] Not only does such engagement allow the beggar to assert his or her humanity and "escape momentarily, [his or] her marginalization," it also fosters empathy in the listener and appeals to the listener's sense of social justice.[397] At a minimum, such an engagement reminds those who would prefer to remain shrouded in the naivete of "phantom normalcy . . . of the human costs of poverty."[398] Thus, under this view, begging performs a social function closely linked to the First Amendment itself by exposing the true nature of society, even if a bit unseemly. The uncomfortable nature of begging, while making it controversial, is therefore seen as precisely that which makes it deserving of First Amendment protection.

B. *Begging Constitutes Protected Expression*

Despite its prominent place in the deterioration of cities, begging deserves First Amendment protection as expressive activity. An examination of begging, Supreme Court precedents dealing with charitable solicitation, and the values underpinning the First Amendment reveals that begging falls within the First Amendment's intended scope of expressive freedom. Yet, begging does, sometimes, conflict with the public order or inconvenience more mundane concerns, such as commuting. Focusing too much on the definition of speech risks detracting from the pursuit of a society committed to expressive freedom, as well as overlooking the gravity of the community's interests. Evaluating begging restrictions via a Public Forum analysis enables the courts to strike a balance between beggars' expressive rights and communitarian interests. By using a conception of the doctrine such as Justice Kennedy's in *ISKCON III,* one that focuses on the physical nature and uses of fora, the courts can best maintain diverse voices while not overlooking general societal interests.[399]

1. Begging Conveys a Message

An examination of begging reveals that it conveys a powerful message about the economic underside of our society and, thus should be protected by the First Amendment. By forcing the listener to con-

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[396] *See id.* at 915.

[397] *Id.* at 914.

[398] *See id.*

[399] *See ISKCON III,* 112 S. Ct. 2711, 2716 (1992) (Kennedy, J., concurring).

front the reality of poverty, begging does express an unmistakable message. In dicta, the *Young* court wrongly applied the *Spence* standard, which defines speech as acts intended to convey a particularized message easily discernible by its audience, to determine that begging did not constitute speech. The message ascertained by the *Young* court, "that beggars . . . want money," necessarily implies two points. First, the beggar is poor, which highlights the existence of extreme poverty and its nature. Second, the beggar believes that he or she can elicit alms from passers-by for survival, implying social obligations owed by members of society to one another. Concededly, the message of begging is difficult to distill into a short phrase common to all beggars. At the expense of clear articulation, however, begging conveys its message in a manner calculated to carry a great degree of empathic force. The First Amendment aims to promote ideas, not simply words, and does not discriminate against the "inexpressible emotions" often captured in art or conduct.[400] Thus, viewed as an expression of poverty and social responsibility, begging expresses a coherent idea in a powerful manner.

In addition, the beggar's audience can comprehend the message, the second requirement of the *Spence* standard. The rationales asserted by the Transit Authority in *Young* and the police in *Loper,* show that begging is targeted because the audience perceives its message.[401] The Broken Windows thesis advocates eliminating begging because it exposes cracks in the public order, demonstrating that society is not in full control. This theory warns that allowing this reality to become widely known will accelerate societal deterioration, exemplified by urban decay. Therefore, the theory presumes that the general public perceives the import of begging's message and responds accordingly. This conclusion is reinforced by indications that the presence of beggars engenders fear and uneasiness in members of the public, such as the Transit Authority study emphasized in *Young.*[402] The reaction of passers-by can only be the result of their understanding the message, complete with its large emotional aspect.

2. Begging is Equivalent to Charitable Solicitation

Furthermore, no meaningful distinction can be drawn between begging and solicitation by organized charities, which the Supreme

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[400] See *supra* notes 89–109 and accompanying text for a discussion of First Amendment values.

[401] Young v. New York City Transit Auth., 903 F.2d 146, 149 (2d Cir. 1990); Loper v. New York City Police Dep't, 802 F. Supp. 1029, 1034 (S.D.N.Y. 1992).

[402] *See supra* note 276.

Court held protectable in the *Schaumburg* trilogy. Absent connotations from their respective labels, both activities involve in-person solicitation of immediate payment for financial support. No less than charitable solicitation, the act of begging is intertwined with the substantial speech interests articulated in *Schaumburg*. Begging communicates information regarding the speaker's plight and spreads views on how our society treats its disenfranchised.[403] Begging also advocates social responsibility by communicating that society should support and help out the downtrodden and less fortunate.[404] Similarly, the ability of beggars to continue to speak depends no less on the donation of funds than does the ability of organized groups such as the Krishna society. The *Schaumburg* trilogy also demonstrates that begging cannot be distinguished on the grounds that the beggars retain the money for personal use. The *Riley* Court explicitly noted that the speech of professional fundraisers is protected despite the fact that they are being compensated.[405]

3. Begging Advances the First Amendment's Values

Extending protection to begging as speech also advances the values underlying the First Amendment. Each of the theories articulated by commentators highlights a benefit to society from maximizing the opportunity to express ideas. Protecting begging expands the opportunity to a largely disenfranchised class of citizens through nontraditional modes of expression.

In addition, begging advances the Marketplace of Ideas theory by challenging preconceptions of poverty, especially by shattering carefully constructed illusions of "order." Begging also challenges views on communal responsibility by implicitly advocating a duty to help the poor and providing an alternative to traditional charities. Whether one agrees with the beggar's message is irrelevant, for the Marketplace theory contends that truth will only emerge from open and uninhibited debate.

Moreover, begging furthers the Democratic Process theory in two primary ways. First, allowing begging to exist in open sight allows citizens to realize the full magnitude of socio-economic conditions. This theory contends that enlightened public policy can only result when the citizenry enjoys a full understanding of the issues. If begging

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[403] Hershkoff & Cohen, *supra* note 41, at 905.

[404] *Id.*

[405] *See supra* note 192 and accompanying text.

could be swept up and hidden away, then citizens might fall prey to an illusion of normalcy, and not truly comprehend that there was a serious public issue at all. Second, begging may be the only means of access, albeit indirect, to public policy formation left for the poor on the fringes of society.

Finally, begging also furthers the Self-Realization value of freedom of speech. So long as it does not cross the line into aggressive "panhassling," begging provides an outlet for beggars to express their opinions and disseminate their values. Even broader than merely a point of access to public policy, begging links the indigent to the mainstream. These momentary escapes from marginalization provide the beggar's only opportunity for expressing his or her "inner spirit."[406]

Thus, an investigation of begging's message, the Supreme Court's holdings on charitable solicitation, and the values underlying freedom of speech, demonstrates that begging fits within the intended scope of the First Amendment. Although often accompanied by explanations, opinions or words of various sorts, the totality of begging deserves protection, not simply incidental conversations as argued by Judge Meskill in his *Young* dissent.[407] Organized charities convey their message, regardless of whether they give a full explanation of the cause to every potential donor. Likewise, beggars convey their message through panhandling, and artificial distinctions between those commenting on President Clinton's tax policies and those simply extending a paper cup should not be used to delimit First Amendment protection.

C. *The Public Forum Doctrine*

Beggars' activities nevertheless conflict with other interests of the community. For example, beggars in the subways do hinder the most efficient operation of mass transportation and affect congestion. Begging also contravenes the maintenance of a general sense of order and safety sought by government authorities. Although the First Amendment has never been costless, the Supreme Court has recognized that freedom of speech must be balanced against competing interests. Therefore, the courts' challenge is to develop a standard of review for begging regulations that will enable them to strike the appropriate balance.

A heavy focus on what qualifies as speech risks detracting from the task of devising appropriate balances. While defining protectable

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[406] Hershkoff & Cohen, *supra* note 41, at 903.

[407] *Young*, 903 F.2d at 166 (Meskill, J., concurring in part, dissenting in part).

speech serves a necessary threshold function, the preferred position of expressive freedom suggests a broad scope of protected expression. The First Amendment's underpinning theories all emphasize the benefits from maximizing the pool of potential speakers and ideas. An approach that merely stops with a determination of "speech," and accords absolute protection, is inadequate. First, such an approach forces the courts to make final decisions on which voices will be heard and creates a substantial risk of narrowing the range of speech to exclude the less mainstream voices. Second, such an approach ignores the infinite variety of ideas and methods of transmission. Some expressive acts may simply impose too high a cost on the rest of society, while the same conduct or message in a different form, may be perfectly compatible when placed in different surroundings. The courts should make an initial determination that a message is probably conveyed, within broad parameters, and then focus on accommodating the multiplicity of voices and interests.

Begging exemplifies a form of expression that wreaks havoc with First Amendment analysis. By mixing conduct and speech into an inseparable mass of expression, begging operates interactively with society and therefore inevitably comes into conflict with competing forces, such as traffic. In addition, begging's association in many people's minds with the uglier side of life engenders strong reactions against both the message and the messenger. Any analytical approach to begging restrictions must possess two important qualities. First, the doctrine must be flexible enough to reconcile the inevitable conflicts with other societal goals. Second, the doctrine must be able to withstand the tide of popular repulsion, to protect begging when necessary.

The Public Forum doctrine provides a ready framework to deal with forms of expression like begging. First, it aims at developing a sort of New Roberts Rules of Order, for accommodating as much speech as possible without frustrating the forum's primary purpose.[408] Second, using Justice Kennedy's view of the doctrine, which places heavier emphasis on objective criteria, would insulate the analysis somewhat from the effect of popular reaction that can easily influence the government's rules and asserted interests.[409] The courts should focus on the three factors articulated by Justice Kennedy in his *ISKCON* concurrence when evaluating begging restrictions: the property's shared physical similarities with traditional public fora, whether the government has permitted broad public access to the property and whether

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[408] Kalven, *supra* note 41, at 13.

[409] *See ISKCON III*, 112 S. Ct. 2711, 2716 (1992) (Kennedy, J., concurring).

expressive activity would interfere in a significant way with the uses of the property.[410]

The *Loper* and *Blair* courts correctly struck down anti-begging ordinances because they operated in areas that were clearly public fora. City streets have been described as quintessential public fora, that "time out of mind" have been used for the purpose of expression.[411] History alone, however, should not be dispositive. The Supreme Court has indicated that, in spite of tradition, sidewalks are not always public fora.[412] Thus, certain areas may present examples of fora where beggars' speech rights can justifiably be limited; for instance, a narrow choke point or within thirty feet of an automatic teller machine. The *Young* court, however, disregarded the possibility that new fora develop to replace old gathering places for citizens. If free speech coexisted with mass transportation at train and bus terminals in earlier times, then the two can likely coexist in modern subway stations.

V. Conclusion

Restrictions on beggars' free speech rights can best be reviewed under the Public Forum doctrine. Begging should be considered an exercise of free speech because it fits within the intended scope of the First Amendment and is analogous to charitable solicitation. Moreover, protecting begging advances the First Amendment's underlying values. The nature of begging, however, creates an unavoidable risk of conflict with other elements of society. Yet, the First Amendment's guarantee of free speech has never been costless, and begging should be protected from regulation as much as possible. The Public Forum doctrine serves this purpose by explicitly varying the degree of scrutiny for restrictions with the surrounding context, and by making its determination of forum status on the basis of objective criteria. Therefore, the Public Forum doctrine provides the analytical approach best suited to dealing with ambiguous forms of expression such as begging.

John T. Haggerty

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[410] *Id.* at 2718 (Kennedy, J., concurring).

[411] Hague v. Committee for Indus. Org., 307 U.S. 496, 515 (1939).

[412] *See* United States v. Kokinda, 110 S. Ct. 3115, 3120 (1990) (sidewalk running only from parking lot to U.S. Post Office).