INVASION OF THE PUBLIC FORUM DOCTRINE

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> **weed**: n. a herbaceous plant not valued for use or beauty, growing wild and rank, and regarded as cumbering the ground or hindering the growth of superior vegetation.[1]

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The public forum doctrine reminds me of kudzu. Like that invasive, creeping vine that covers much of the American south, the doctrine has expanded luxuriantly after being transplanted beyond its native habitat, growing over objects to form a thick, fuzzy mass that obscures the features below. And like kudzu, it is now so familiar and so pervasive that it can be hard to imagine how the landscape might appear without it.

The metaphor of the forum was first used in constitutional free speech cases as a way of explaining why the government cannot engage in prior restraint or content discrimination with regard to speaking, picketing, or leafleting on city parks and sidewalks.[2] It has since outgrown these locations, taking root in such disparate locations as inter-office mailboxes,[3] government publications,[4] specialty license plates,[5] and television broadcasts.[6] The metaphor is so pervasive that

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1. 20 OXFORD ENGLISH DICTIONARY 77 (2d ed. 1989).

2. Police Dep't of Chicago v. Mosley, 408 U.S. 92 (1972); Hague v. Comm. for Indus. Org., 307 U.S. 496 (1939).

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

4. Cogswell v. City of Seattle, 347 F.3d 809 (9th Cir. 2003); Alaska Gay Coal. v. Sullivan, 578 P.2d 951 (Alaska 1978).

5. *See, e.g.*, Arizona Life Coal. v. Stanton, 515 F.3d 956 (9th Cir. 2008); Choose Life Ill. v. White, 547 F.3d 853 (7th Cir. 2008); Am. Civil Liberties Union of Tenn. v. Bredesen, 441

owner or manager of property.

This understanding was replaced in the 1930s by decisions enforcing constitutional limits on the government's ability to regulate private speech on government-owned property. *Hague v. CIO*[13] presented a challenge to a Jersey City ordinance that forbade all assemblies, leafleting, or picketing in any public place without a permit from the chief of police. This time, the Court rejected the idea that the government could manage speech on its property without regard to the free speech clause.

> Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating 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. The privilege of a citizen of the United States to use the streets and parks for communication of views on national questions may be regulated in the interest of all . . . but it must not, in the guise of regulation, be abridged or denied.[14]

In other words, the government is constrained by the Constitution even when it performs managerial functions. This principle has found expression in other areas, such as the constitutional obligation of the government as employer to respect its employees' due process and free speech rights in ways not required of private employers.[15]

Later cases describe locations like the city park in *Davis* or the city sidewalks in *Hague* as "traditional public forums."[16] The government may regulate speech in such locations chiefly by means of reasonable time, place, and manner restrictions. Such restrictions are valid only to the extent that they conform to a relatively speech-protective four part test, which requires content-neutrality, significant

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rooms for religious services;[25] and a rule forbidding candidates for city office to say anything about their opponents in a city-sponsored voters information pamphlet.[26]

B. Classifying Forums

The ease with which the government may exclude speech from a nonpublic forum is one of the chief criticisms leveled against the public forum doctrine as a whole.[27] However, for good or ill, the test for speech regulations within a nonpublic forum is at this point well established. With so much hinging on the label, litigation routinely arises over whether a court should deem a particular location a public forum (where only content-neutral time, place, and manner restrictions are allowed)[28] or a nonpublic forum (where a vast array of restrictions are allowed if they are viewpoint neutral and reasonable in light of the purpose of the forum).

The outcomes of the cases are inevitably fact-specific, but two main principles have emerged. First, traditional public forums (city parks, sidewalks, and streets when used for permitted parades) are governed by the public forum rules whether the government likes it or not. This is the continuing rule of *Hague*. Second, the characterization of all other government property depends on the government's intent. If the government "intentionally open[s] a nontraditional forum for public discourse,"[29]a court will treat the forum as a "desig-

25. Faith Ctr. Church Evangelical Ministries v. Glover, 480 F.3d 891, 908 (9th Cir. 2007).

26. Cogswell v City of Seattle, 347 F.3d 809 (9th Cir. 2003). *See generally* Aaron H. Caplan, *Stretching the Equal Access Act Beyond Equal Access*, 27 SEATTLE U. L. REV. 273, 349–50 (2004) (discussing Cogswell).

27. *Cornelius*, 473 U.S. at 826–27 (Blackmun, J., dissenting); Post, *supra* note 18, at 1762.

28. The public forum standard has sometimes been described as "strict scrutiny." Hopper v. City of Pasco, 241 F.3d 1067, 1074 (9th Cir. 2001); Int'l Soc'y for Krishna Consciousness v. Lee, 505 U.S. 672, 679 n.4 (1992). This misnomer adds additional confusion to the doctrine, since the standard for reasonable time, place, and manner restrictions is structured differently from the test known as "strict scrutiny" in equal protection or substantive due process cases (compelling government interests and narrow tailoring). On one occasion, a plurality of the Supreme Court found that a content-based but viewpoint-neutral limitation on speech in a traditional public forum survived equal protection-style "strict scrutiny," but it is unsettled whether this approach commands a majority. *See* Burson v. Freeman, 504 U.S. 191, 199–200 (1992) (plurality) (applying "strict scrutiny" to uphold a law forbidding political campaign speech within 100 feet of the entrance of a polling place); *id.* at 212 (Kennedy, J., concurring) (opposing the formulation).

29. *Cornelius*, 473 U.S. at 801.

nated" public forum where the government may impose only those reasonable time, place, and manner restrictions allowed in a traditional public forum. In the absence of a clearly expressed intent to dedicate government property for private expression, the space will be governed by the standard for nonpublic forums.[30]

This ability of the government to select its own constitutional standard is another chief criticism lodged against the public forum doctrine.[31] Why should the government be able to will away a speech-protective constitutional rule simply by intending that it not apply? As an alternative approach, many writers suggest treating government property as a public forum so long as the proposed private speech is not incompatible with the reasonable ordinary functioning of the property.[32] This approach takes governmental intent out of the equation, thereby avoiding the situation where a desire to suppress speech in a certain setting becomes its own justification.

Another frequently voiced criticism of the public forum doctrine is the inconsistent terminology used for forums other than the traditional public forum. One of the clearer formulations appeared in *Arkansas Educational Television Commission v. Forbes*.[33] That opinion used the term "designated public forum" for nontraditional locations that the government opens to all speakers (or a very large group of speakers) for speech on all subjects. This almost never happens, but when it does the designated public forum is subject to the time, place, and manner standard used for traditional public forums. By contrast, the term "limited public forum" is used when the government opens a place only to certain speakers or certain subjects.[34] The nonpublic forum standard applies in these locations.[35] But in other decisions—including decisions of the Supreme Court—the terms are not

30. *Id.*

31. *Id.* at 825 (Blackmun, J., dissenting). *See also* David S. Day, *The Public Forum Doctrine's "Government Intent Standard": What Happened to Justice Kennedy?*, 2000 MICH. ST. L. REV. 173, 174 (2000).

32. *See, e.g.*, Steven G. Gey, *Reopening the Public Forum—From Sidewalks to Cyberspace*, 58 OHIO ST. L.J. 1535 (1998); G. Sidney Buchanan, *The Case of the Vanishing Public Forum*, 1991 U.

used consistently.

The most confusion surrounds the phrase "limited public forum." When the Supreme Court first used the term, the context indicated that the Court viewed the limited public forum as a place subject to the public forum standard.[36] After approximately 1990, the Court used the phrase "limited public forum" to describe a place subject to the nonpublic forum standard.[37] The Court has never expressly acknowledged this shift, and the term has resulted in considerable confusion among lower courts[38] and commentators.[39]

As a result, there is not even agreement as to how many levels of forum exist within the public forum doctrine. Given the inconsistency in the case law, I believe the best description of Supreme Court decisions envisions two levels of forum: public and nonpublic. Other observers (understandably) perceive three or even four distinct levels instead, with "designated" and "limited" public forums constituting their own categories.[40] Indeed, some lower courts have acknowledged that there is support for describing the structure as a three-tier (or four-tier) system.[41] It is a bad sign if the doctrine is so confused that reasonable observers cannot even agree on how many categories of forum exist.

36. Perry Educ. Ass'n v. Perry Local Educators Ass'n, 460 U.S. 37, 48–49 (1983); Cornelius v. NAACP Legal Def. & Educ. Fund, 473 U.S. 788, 804 (majority), 817 (Blackmun, J., dissenting) (1985). These cases use the phrase "limited public forum" to apply to what *Forbes* later called a "designated public forum." It is this meaning of the phrase "limited public forum" that Robert Post used in 1987, when he spoke of "the birth and death of the limited public forum." Post, *supra* note 18, at 1745–58. The phrase has not died, even though it is now applied to a different legal concept.

37. Rosenberger v. Rector and Visitors of Univ. of Va., 515 U.S. 819, 829 (1995); Good News Club v. Milford Central Sch., 533 U.S. 98, 106–07 (2001).

38. Bowman v. White, 444 F.3d 967, 975 (8th Cir. 2006); Hopper v. City of Pasco, 241 F.3d 1067 (9th Cir. 2001).

39. Marc Rohr, *The Ongoing Mystery of the Limited Public Forum*, 33 NOVA L. REV. 299 (2009); Ronnie J. Fischer, Comment, *"What's in a Name?": An Attempt to Resolve the "Analytic Ambiguity" of the Designated and Limited Public Fora*, 107 DICK. L. REV. 639, 640–42 (2003).

40. *See, e.g.*, Rohr, *supra* note 39, at 331–35 (describing a three-level or four-level system). *Accord* Norman T. Deutsch, *Does Anybody Really Need A Limited Public Forum?*, 82 ST. JOHN'S L. REV. 107, 107–08 (2008).

41. Illinois Dunesland Preservation Society v. Illinois Department of Natural Resources, 584 F.3d 719, 723 (7th Cir. 2009) (describing the doctrine as having three—or perhaps four—levels).

C. Places That Are Not Forums

For all the attention given to the imprecise term "limited public

hour dedicated to candidate debate from the station's broadcast day as a whole, during which the management of the station is free to express its own viewpoint notwithstanding the rule against viewpoint discrimination.[44] Realistically, this means that the broadcast day as a whole is not a forum. Indeed, a different portion of the majority opinion contained one of the very rare express acknowledgements that government properties that are public forums might be "either nonpublic fora or not fora at all."[45] But the majority shied away from saying in so many words that the broadcast day is "not a forum at all." Instead, it said that the public forum doctrine should not be given "sweeping application in this context"[46] and that "public

D. Why a Traditional Public Forum Is a Forum

I mentioned above that a forum must be some sort of platform for the speech of persons other than the government, but what exactly does this mean? This paper begins the much-needed project of developing a workable definition of a forum. Examining the least controversial part of the public forum doctrine—its applicability to traditional public forums—may help us better understand why the doctrine fails in other settings.

The National Mall in Washington D.C. has been called "the quintessential public forum in the civic life of the nation."[50] It is regularly the site of rallies, demonstrations, speeches, leafleting, picketing, and expression of various sorts. Indeed, for many people the most indelible image of the National Mall is the 1963 March on Washington, when Dr. Martin Luther King delivered his "I Have A Dream" speech from the steps of the Lincoln Memorial. But what makes the Mall a forum for expression—whether the government likes it or not—rather than a location that could be reserved for non-expressive activities like jogging, kite-flying, or picnicking? Five attributes of the National Mall strike me as relevant to its status as a forum. With these attributes identified, we can then consider how well the forum metaphor works in settings lacking one or more of these attributes.

1. Open-Air Real Property

In its earliest usage, the word "forum" connoted an outdoor space. Its etymology is related to the Latin *fores* (an outside door); literally, a *forum* is that which is "out of doors."[51] It soon came to mean "the public place or marketplace of a city."[52] The forum's char-

archetypal forum. Moreover, the term "nonforum" implies that all speech not occurring in a forum shares essential characteristics and should therefore be judged under a single standard. This is not the case. For example, the standard Brownstein proposes for schools would not necessarily apply to graffiti on the walls of the Grand Canyon. If "nonforum" becomes a label for yet another category, the arms race for terminology will continue. What should we call government property that is not a public forum, not a nonpublic forum, and not one of Brownstein's school-like nonforums? A non-nonforum? An antiforum? The better approach would recognize that when there is nothing to be gained from the forum metaphor, it should not be used at all. Disputes that arise in those settings should be decided through better-fitting principles that would not need to explain themselves by reference to the forums they are not.

50. ISKCON of Potomac, Inc. v. Kennedy, 61 F.3d 949, 959 (D.C. Cir. 1995).

51. THE NEW AMERICAN DICTIONARY 668 (2001) (definition of "forum").

52. 6 OXFORD ENGLISH DICTIONARY 106 (2d ed. 1989) (definition of "forum").

4. Clear Designation of Source

Speakers in a traditional public forum are presumed to speak on behalf of themselves, not on behalf of the government. The mere act of appearing and speaking in a traditional public forum does not transmute the speaker into a governmental actor. Moreover, it is quite easy to tell that the private speakers are not governmental. Unless more information is available, the reasonable observer believes that the government is providing the forum, but not the expression occurring there.

5. Speech Does Not Alter or Diminish the Forum

On the day of the March on Washington, the National Mall was filled to the brim with speakers and listeners. After they left, the mall was fully capable of hosting unrelated expression, such as a Ku Klux Klan rally. Nothing about a speaker's expression on the Mall reduces or limits the Mall's capacity to host future speech on similar terms. Phrased another way, the speech does not stick to the forum. Once the speakers are gone, their speech goes with them. To be sure, there may be some wear and tear after a major rally, but this would be no different in kind than if a similar number of people had used the mall for purposes other than expression.

By identifying traits of a traditional public forum like the National Mall, I do not mean to suggest that strong speech protection should be limited to places sharing those attributes. The First Amendment protects speech in many different ways, most of them having nothing to do with ownership of the property where the speech occurs (e.g., prior restraint, vagueness, or overbreadth). For this reason, highly speech-protective standards may be entirely proper in settings lacking one or more attributes of a traditional public forum. For example, a government-run internet chat board would not be outdoor real property capable of hosting assembly, but it would clearly distinguish between the private speaker and the government host, and (subject to the electronic equivalent of wear and tear) would not be unavoidably diminished by using it to host speech. I do not question that speech in this setting should enjoy considerable protection. I do, however, question whether we benefit from analogizing that setting to

note 26, at 360–61 (discussing *Huff*).

a forum, and oppose any rule that would afford speech protection only to the extent a location resembles a forum. As we will see, the analogy often misbehaves.

II. INVASION OF THE PUBLIC FORUM DOCTRINE

At the risk of introducing yet another metaphor: if all you have is a hammer, every problem starts to look like a nail. This section examines three areas where the public forum has been used for ill-fitting functions, much like using a hammer to drive screws or staples. While not all of the examples result in tragedy, they do reveal that courts are not using the right tools for the job.

A. More Words for Less Insight

The most common result from unnecessary use of the public forum doctrine is the extra work it requires to reach results that were more readily explained through other, simpler means. The result caused Judge Posner to lament that "it is rather difficult to see what work 'forum analysis' in general doe4nalysx.00n8Span/P ^MC5D 1 BDC BT/TT1 1 Tf04j0 Tc 0 7 1

was unlawful to remove people from an event solely because of their political opinions. A majority of a Tenth Circuit panel agreed, dismissing the case on qualified immunity because in their view it posed a difficult unsettled question. Indeed, it was a question so difficult

corner in London's Hyde Park. It has been repeated many times that a city park is a traditional public forum. As a result, one of the first

rah during Chanukah, a display showing the progress of a United Way fundraising campaign, and booths and exhibits during an arts festival.[87] Even though earlier cases held that government does not designate a public forum by allowing "limited discourse" on government property,[88] the Supreme Court concluded that the Ohio capitol grounds were "a full-fledged public forum" for unattended signs or sculptures.[89] A dispute arose when the local branch of the Ku Klux Klan demanded to erect a cross in front of the capitol. In a flurry of concurring and dissenting opinions, a majority of the justices in *Pinette* concluded that because the grounds were a public forum for unattended displays, the state could not refuse the Klan's display. But because of the blurred boundary between forum and speaker that is inevitable in the case of unattended displays, the controlling opinions held that the state had an obligation under the Establishment Clause to clarify with an effective disclaimer that the cross was private expression not endorsed by the state.[90]

against past expression or accommodate themselves to the existing message when formulating their own.[99]

The diminution of the forum would become most noticeable when the last space for bricks is paved. No new speech would be allowed because the forum has been exhausted. At that point, would the government be obliged to remove bricks? It is not a trivial question because if the government is maintaining the original messages, it is arguably discriminating against others. Certain viewpoints are enshrined while others are rejected. Rationing by space and time may be acceptable as a content-neutral time, place, or manner limitation, but the awkwardness of the question reveals some tensions in how well the public forum metaphor works in a situation only slightly removed from its original habitat. The best that can be said about the public forum doctrine in such cases is that it does not prevent us from muddling throuwsCthersc1n be said about ttg1(t- the)]TJ-0.000TJ-0.0009 Tc 0.0269 Tw(ifcs1:0989?(

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ues to set an example of unthinking application of the forum metaphor. The 2010 decision in *Christian Legal Society v. Martinez*[113] considered whether the First Amendment entitled a student group to

The doctrine keeps spreading anyway. The doctrine has even breached the federalism barrier into state constitutions, where it is routinely invoked by state courts interpreting domestic free speech provisions despite their freedom to pursue independent methodologies.[119]

Third, viewed as a meme, the public forum doctrine has extraordinary powers of replication. At the Supreme Court level, it took less than twelve years from its first mention as an identified legal concept to being labeled "a fundamental principle of First Amendment doctrine."[120] Recent experience with my own students confirms how rapidly the metaphor seems to grasp the legal imagination. When I taught the public forum doctrine in the fall of 2009 in the midst of preparing this presentation, I carefully instructed my students on many of the lessons I hope to impart here. In particular, I emphasized that the public forum doctrine should only be used in cases involving access to government-owned property or government-owned communications media, and never to cases involving governmental regulation of speech on private property. But my cautions were to no avail. On the final exam, nearly half the class felt compelled to discuss the public forum doctrine when answering a question containing no public forum issue. Of these, many concluded that the government could outlaw political signs on people's front yards because, after all, people's front yards are not traditional public forums. These errors may

The Public Forum Doctrine: Has This Creature of the Courts Outlived its Usefulness?, 44 REAL PROP. TR. & EST. L.J. 637, 716–26 (2010).

119. *See, e.g.*, Operation Rescue-National v. Planned Parenthood of Houston and Se. Tex., Inc., 975 S.W.2d 546, 559 (Tex. 1998) (following federal methodology); Rogers v. New York City Transit Auth., 680 N.E.2d 142 (N.Y. 1997) (same); State v. Baldwin, 908 P.2d 483 (Ariz. Ct. App. 1995) (same). Some states track the federal methodology as a general matter, with only small changes. *See, e.g.*, City of Seattle v. Mighty Movers, Inc., 96 P.3d 979 (Wash. 2004). Only a few states have announced truly independent methods of interpretation, typically adopting an incompatibility approach. *See* Oregon v. Carr, 170 P.3d 563 (Or. Ct. App. 2007) (state constitution forbids "laws that prevent people from speaking in publicly owned locations where they are lawfully present and are not interfering with the intended use of the property"); Leydon v. Town of Greenwich, 777 A.2d 552, 573–574 (2001) (similar). California flirted with the incompatibility approach, *U.C. Nuclear Weapons Labs Conversion Project v. Lawrence Livermore Lab.*, 154 Cal. App. 3d 1157 (1984), but has recently disavowed it. *See* San Leandro Teachers Ass'n v. Governing Bd. of San Leandro Unified Sch. Dist., 209 P.3d 73, 88–89 (2009). A few states have yet to clearly rule on the matter. Walker v. Georgetown Housing Auth., 677 N.E.2d 1125, 1128 (Mass. 1997) (noting open question); *see also* Price v. State, 622 N.E.2d 954, 958 (Ind. 1993) (state analysis does not discuss public forum, but federal analysis does).

120. Post, *supra* note 114, at 1714 n.1 (quoting Minn. State Bd. for Cmty. Colleges v. Knight, 465 U.S. 271, 280 (1984)).

reflect the limits of my pedagogical abilities, but I think they also tell us that the doctrine has powers of seduction that act rapidly, even on limited exposure. Part of the appeal may be that the doctrine emphasizes equality more than some other speech rules, and everyone likes equality. Its appeal may also owe to its cookbook-style formatting, which promises a rigor and certitude that the doctrine does not actually provide.

Fourth, as with any truly successful parasite, the doctrine does not completely kill off its host. With only a few exceptions, it seems quite possible to muddle through the typical free speech case using 2iav32 0 Td 16(2ukdxpos1ng 1o5T m)u2u.13u0 -1.11.1302 TD[(the publi/Aach]TJju1259 Tw 0 l

been academics in search of greater elegance and coherence. With a docket full of cases and controversies to resolve, courts may understandably give elegance a pass.

So this is why the public forum doctrine reminds me of kudzu. It is usually a nuisance, sometimes a real impediment, but most of the time eliminating it would take more effort than it is worth. You can get used to it after a few decades, and even develop some nostalgia for it. Like the Southern states that have had to make their reluctant peace with kudzu, those of us who cultivate First Amendment gardens are likely to be tugging at public forum vines for a long time to come.