# INVASION OF THE PUBLIC FORUM DOCTRINE

AARON H. CAPLAN*

> **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

* Associate Professor of Law, Loyola Law School Los Angeles. This article is adapted from remarks delivered on October 16, 2009 in Salem, Oregon at the symposium "The Future of the First Amendment," sponsored by American Constitution Society and the Willamette University College of Law. Thanks to Caroline Mala Corbin and Catherine Crump for helpful comments and to Ari Dybnis for research assistance.

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

courts frequently assert that *all* government property must be some kind of forum. The Ninth Circuit, for example, has said, "Government property is divided into three categories: public fora, designated public fora, and nonpublic fora."[7] In the same vein, the Eleventh Circuit has said that "all government-owned property not traditionally or explicitly designated as a public forum" is a nonpublic forum.[8] In addition to explicit statements like these, there are numerous court opinions implying the same principle: all government property is a type of forum, with the only question being what type of forum it is.[9]

If the forum metaphor was a useful tool for resolving free speech disputes, there would be little reason to complain about its spread. Sadly, even in its native habitat of government-owned real property, the public forum doctrine has its share of noxious qualities (including logical inconsistencies and a tendency to uphold speech restrictions upon relatively little justification). When the doctrine is exported to more remote factual settings, its difficulties remain while its virtues diminish even further. And its spread tends to crowd out other methods of analysis that may be more fruitful.

This paper criticizes the judicial reflex to view an ever-expanding array of free speech questions by means of the forum metaphor. Part I quickly describes the origins and structure of the public forum doctrine as we know it. Along the way, I will recount some of the standard objections to the doctrine, and also consider what makes it work when it does work.

Part II considers some of the problems that arise from the doctrine's rampant spread. The most common result is injury to the legal reasoning process. When used in inapt situations, the doctrine does

F.3d 370 (6th Cir. 2006); Planned Parenthood of S. C. v. Rose, 361 F.3d 786 (4th Cir. 2004); Sons of Confederate Veterans v. Comm'r of the Va. Dep't of Motor Vehicles, 288 F.3d 610 (4th Cir. 2002).

6. Ark. Educ. Television Comm'n v. Forbes, 523 U.S. 666 (1998).

7. PMG Int'l Div. L.L.C. v. Rumsfeld, 303 F.3d 1163, 1169 (9th Cir. 2002). As someone raised in the United States in the twentieth century and not in Rome in the first, I will in this article use the more readily recognized plural "forums" rather than the showy, Latinate "fora." 6 OXFORD ENGLISH DICTIONARY 106 (2d ed. 1989) (approving of this usage from 1647: "The City of Rome had four great forums[.]").

8. Atlanta Journal-Constitution v. City of Atlanta Dep't of Aviation, 322 F.3d 1298, 1306 n.9 (11th Cir. 2003).

9. *E.g.*, Lederman v. United States, 291 F.3d 36, 41 (D.D.C. 2002); Fleming v. Jefferson County Sch. Dist. R-1, 298 F.3d 918, 929 (10th Cir. 2002) (citing Hawkins v. City of Denver, 170 F.3d 1281, 1286 (10th Cir. 1999)); Christ's Bride Ministries, Inc. v. Se. Pa. Transp. Auth., 148 F.3d 242, 247 (3d Cir. 1998).

little to help lawyers and judges reach correct results, but instead introduces a branching series of dead ends, redundancies, and inefficiencies. Continued use of the public forum doctrine in these settings may hinder the development of better-fitting legal rules. A larger problem arises when the doctrine goes beyond inelegance to create genuinely unjust results. A standard objection to the public forum doctrine is that speech is abridged when a court applies the (relatively less speech-protective) rules for the nonpublic forum instead of the (relatively more speech-protective) rules for the public forum. I tend to agree with those criticisms, but focus here on a different issue: the rarer but equally troublesome situations where the use of the forum analogy itself causes undesirable results.

Finally, in keeping with the theme of this symposium—the future of the First Amendment—Part III concludes with some predictions.

## I. THE PUBLIC FORUM DOCTRINE'S NATIVE SOIL

### *A. Private Speakers on Government-Owned Property*

The U.S. Supreme Court first visited what would today be called a public forum question in 1897. In *Davis v. Massachusetts*,[10] a preacher appealed his conviction for orating in the Boston Common without a permit from the mayor. Future Justice Oliver Wendell Holmes (then sitting on the Supreme Judicial Court of Massachusetts) had ruled against the defendant on the theory that the government could control what happened on its own property: "For the legislature absolutely or conditionally to forbid public speaking in a highway or public park," he wrote, "is no more an infringement of the rights of a member of the public than for the owner of a private house to forbid it in his house."[11] The U.S. Supreme Court agreed, quoting Holmes' language with approval, and further concluding that the federal constitution "does not have the effect of creating a particular and personal right in the citizen to use public property."[12] Whatever limitations the First Amendment might place on the government in its sovereign capacity as regulator of private conduct did not apply to the government in its capacity as an

10. 167 U.S. 43 (1897).

11. Commonwealth v. Davis, 162 Mass. 510, 511 (1895).

12. *Davis*, 167 U.S. at 47–48.

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

13. 307 U.S. 496 (1939).

14. *Id.* at 515–16.

15. *E.g.*, Pickering v. Bd. of Educ., 391 U.S. 563 (1968) (speech); Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532 (1985) (due process).

16. *See, e.g.*, Arkansas Educ. Television Comm'n v. Forbes, 523 U.S. 666 (1998); ISKCON v. Lee, 505 U.S. 672 (1992); U.S. v. Grace, 461 U.S. 171 (1983).

government interests, narrow tailoring, and ample alternative channels for communication.[17] As it happens, this test also applies to laws regulating speech on private property.[18] Robert Post explains that the shift from *Davis* to *Hague* did not establish parks and sidewalks as special places where private citizens have *more* right to speak than they do elsewhere (such as in their own homes or in any private place where they were lawfully present). Instead, the change merely meant that they should have *no less* right to speak in parks and on sidewalks than they do elsewhere.[19]

Although it was repudiated for cases arising in traditional public forums, the *Davis* concept did not die with *Hague*. In a series of cases beginning in the late 1960s, the Supreme Court announced that for certain facilities, such as prisons or military bases, "[t]he State, no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated."[20] When these facilities are made available to private speakers for private expression, they are deemed "nonpublic forums." In a nonpublic forum, the government may regulate speech in any way that is viewpoint neutral (a less demanding standard than the content neutrality that applies to public forums) and reasonable in light of the purpose of the forum.[21] Examples of speech restrictions upheld under this standard include: a rule allowing only the recognized teacher's union, and not a rival union, to place its materials in a school's inter-office mailboxes;[22] a rule allowing only charities that provide "direct health and welfare services to individuals," and not charities to undertake impact litigation, to participate in a workplace giving program;[23] a rule limiting the public comment period at a city council meeting to local residents;[24] a rule disallowing the rental of public library conference

17. Ward v. Rock Against Racism, 491 U.S. 781 (1989).

18. Robert C. Post, *Between Governance and Management: The History and Theory of the Public Forum*, 34 UCLA L. REV. 1713, 1760–61 (1987).

19. *Id.* at 1720–24.

20. Adderley v. Florida, 385 U.S. 39, 47 (1969) (prison). *Accord* Greer v. Spock, 424 U.S. 828, 836 (1976) (military base); Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 47 (1983) (inter-office mail system); Members of City Council of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789, 804 (1984) (utility poles); Cornelius v. NAACP Legal Defense and Educ. Fund, Inc., 473 U.S. 788, 800 (1986) (office charity drive).

21. *Cornelius*, 473 U.S. at 806; Good News Club v. Milford Central Sch., 533 U.S. 98, 106–07 (2001).

22. *Perry Educ. Ass'n*, 460 U.S. at 40.

23. *Cornelius*, 473 U.S. at 793.

24. Rowe v. City of Cocoa, 358 F.3d 800, 802 (11th Cir. 2004) (per curiam).

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. ILL. L. REV. 949 (1991). At least one Supreme Court opinion suggested this approach, but it has not become enshrined in the doctrine. Grayned v. City of Rockford, 408 U.S. 104, 116 (1972) ("The crucial question is whether the manner of expression is basically incompatible with the normal activity of a particular place at a particular time.").

33. 523 U.S. 666 (1998).

34. *Id.* at 694.

35. *Id.* at 677–78.

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 forum," relatively little has been applied to the equally confusing term "nonpublic forum." Does it mean a forum that is nonpublic? Or a place that is not a public forum? And if it is not a public forum, is it a forum at all? Standard discussions of the public forum doctrine have not considered these questions. With so much entertaining haggling to be had over whether a location is a "designated" or a "limited" public forum, court decisions are generally oblivious to the possibility that a piece of government-owned property might not be a forum at all. Because of this, there is surprisingly little effort to define "forum."

The unspoken definition of a forum seems to be "a platform for expression by persons other than the owner of the platform." However, even with this very impressionistic step toward a definition, it becomes clear that many places—most places, in fact—are not forums. The mere fact that someone might conceivably use a location for expression does not make it a forum in this sense. For example, it is possible for me to carve my initials on the walls of the Grand Canyon, paint my face on the side of a nuclear warhead, leaflet in the Oval Office, or picket in the hallways of the Pentagon. Although I engage in expression in each circumstance, I am not doing so within a forum. To take another example: the walls of the Smithsonian Museum of Art are physically capable of displaying the finger paintings I made in first grade, but I have no right to force the Smithsonian to display my paintings next to its chosen works. In my view, this is not because the rejection of my paintings is a viewpoint-neutral and reasonable rule for a nonpublic forum. It is because the walls of the Smithsonian are not a forum at all.

The Supreme Court has been curiously resistant to expressly stating that a location is not a forum, even when that seems to be the Court's holding. *Arkansas Educational Television Commission v. Forbes*[42] involved a public television station's decision to exclude an independent candidate for Congress from a televised candidate debate. The Court decided that the hour dedicated to the debate was a nonpublic forum in which exclusion of minor candidates was reasonable and viewpoint neutral.[43] The majority carefully distinguished the

42. 523 U.S. 666 (1998).

43. *Id.* at 680.

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 broadcasting as a general matter does not lend itself to scrutiny under the forum doctrine,"[47] thus never quite saying that the broadcast day is not a forum.[48] Such is the invasive power of the forum metaphor.[49]

44. *Id.* at 673–74.

45. *Id.* at 677.

46. *Id.* at 674.

47. *Id.* at 675.

48. Similar unwillingness to say unequivocally that a location is "not a forum" appears in *United States v. Am. Library Ass'n, Inc*., 539 U.S. 194, 205 (2003), a case examining the legality of a federal statute providing funds to local public libraries on condition that they install internet filtering software. A plurality said that "public forum principles . . . are out of place in the context of this case." *Id.* at 205. In the very next sentence, however, it complicated the matter by saying that "Internet access in public libraries is neither a 'traditional' nor a 'designated' public forum," *id.*, which leaves open the possibility that the reason "public forum principles" (i.e., the principles controlling regulation of speech in public forums) do not apply is because the internet access is judged by the standards for nonpublic forums. As in *Forbes*, the Court in *ALA* curiously avoided saying outright that the forum metaphor and all its related doctrines do not apply.

49. A few brave lower courts have used the term "nonforum" to describe locations to which the public forum doctrine does not apply, but the usage has not caught on. *E.g.*, Knolls Action Project v. Knolls Atomic Power Laboratory, 771 F.2d 46, 49–50 (2d Cir. 1985); Tele-Communications of Key W., Inc. v. United States, 757 F.2d 1330, 1337 (D.C. Cir. 1985); Gannett Satellite Info. Network, Inc. v. Metropolitan Transp. Auth., 745 F.2d 767, 773 (2d Cir. 1984); United States Sw. Africa/Namibia Trade & Cultural Council v. U.S., 708 F.2d 760, 764 (D.C. Cir. 1983).

Alan Brownstein argues that we should use the term "nonforum" to refer to "a new free speech category" where "the conventional protection provided to private speakers under the Free Speech Clause does not exist." Alan Brownstein, *The Nonforum as a First Amendment Category: Bringing Order Out of the Chaos of Free Speech Cases Involving School-Sponsored Activities*, 42 U.C. DAVIS L. REV. 717, 786 (2009). While I agree with many of Brownstein's observations about the shortcomings of existing forum analysis, I am wary of his use of the term "nonforum" as a label for a purported category of government property. Its primary failing is that it reinforces the dominant metaphor, implying once again that all speech questions should be resolved by asking to what extent the setting in which speech occurs resembles an

### *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").

acter as an outdoor physical space implies several things. The forum could be approached from many directions, and was not gated or guarded like a home or a garrison. The forum's literal openness (absence of walls and roof) means that occurrences in a forum are visible to all, not concealed. The National Mall shares this easy access and transparency.

*2. Assembly*

It is not often remarked upon, but the expression that occurs in traditional public forums involves assembly: the gathering together of speakers and listeners in close proximity for contemporaneous communication. The Oxford English Dictionary puts assembly into its definition of the ancient forum: "In ancient Rome the place of assembly for judicial and other public business."[53] Technology, however, enables communication without assembly. Written language, for example, allows a writer to communicate with physically and temporally distant readers. But not all writing (or even most writing) can be said to occur within a forum.

*3. Government Control or Ownership*

For the federal Constitution to apply at all, there must be governmental action (or its equivalent).[54] This is particularly important to remember when applying the current standard for the nonpublic forum. As described above, government has great power to regulate speech in a nonpublic forum because of the governmental interest in managing its property. If the targeted speech does not occur on the government's property, there is no similar justification for reducing the available level of speech protection.[55]

53. *Id.* *See also* Hague v. Comm. for Indus. Org., 307 U.S. 496, 515 (1939) (streets and parks "have been used for purposes of assembly").

54. While the state actor in a public forum case is usually the government, private property owners who are sufficiently intertwined with the government may be deemed state actors who therefore operate public forums. *See* Lee v. Katz, 276 F.3d 550 (9th Cir. 2002); First Unitarian Church of Salt Lake City v. Salt Lake City Corp., 308 F.3d 1114, 1131 (10th Cir. 2002); Venetian Casino Resort v. Local Joint Executive Bd. of Las Vegas, 257 F.3d 937, 941–42 (9th Cir. 2001).

55. For example, *City of Seattle v. Huff*, 767 P.2d 572 (Wash. 1989), concluded that private speech over the telephone actually occurred in a nonpublic forum, thus allowing the state to criminalize speech that occurred there. The unjustified recourse to the (non)public forum doctrine is particularly baffling in this case, because as the court acknowledged, "[t]he parties did not address the public/nonpublic forum distinction" (with good reason). *See* Caplan, *supra*

*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 does"[56] other than to motivate attorneys to launch "a barrage of unhelpful First Amendment jargon."[57]

The plaintiffs in *U.S. Postal Service v. Council of Greenburgh Civic Associations*[58] challenged a statute forbidding anyone other than the post office from depositing mailable matter in residential mailboxes.[59] This dispute over mailboxes seems like a poor candidate for the forum metaphor. To begin with, mailboxes are not real property owned by the government. A residential mailbox is a privately owned chattel (or at most, a privately owned fixture). Private ownership is what allows people to buy or build their own mailboxes to suit their aesthetic preferences. To be sure, the mailbox is subject to various forms of governmental regulation, but so is the rest of the home. Many other differences exist between a residential mailbox and a archetypal traditional public forum. They cannot be used for assembly or contemporaneous communication. Mail deposited there is not readily open to passersby, and indeed its privacy is protected by law.

56. Illinois Dunesland Preservation Society, 584 F.3d at 724.

57. Id. at 723. *See also* Henderson v. Lujan, 964 F.2d 1179, 1186 (D.C. Cir. 1992) (Williams, J., concurring) (describing how public forum doctrine adds little value, but assures longer briefs from parties who are forced to argue multiple levels of alternatives).

58. 453 U.S. 114 (1981).

59. *Id.* at 115–16.

And depending on the size of the box and the volume of mail, the presence of some expression diminishes the ability of the mailbox to host more expression. Despite these mismatches, the Supreme Court in *Greenburgh* devoted many pages of its opinion to public forum principles.

The result of their labors showed how little predictive power the doctrine has in inapt settings. A five-justice majority declared that the mailbox was not a public forum, and that the statute was therefore valid. [60] Justice Brennan's concurrence thought the mailbox was a public forum, but that the statute was nonetheless valid.[61] Justice Marshall's dissent said the mailbox was a public forum and that the statute was invalid,[62] while Justice Stevens's dissent argued that the mailbox was not a public forum but that the statute was nonetheless invalid. [63] Justice White's concurrence, sensibly enough, pronounced the public forum doctrine a waste of breath on these facts, since resolution of that question seemed to have no bearing on the resolution of the case.[64]

*Greenburgh* is not the only Supreme Court case where Justices who agree on the result differ on whether the property is a public forum. Four Justices found unconstitutional a ban on airport leafleting, believing that the terminal at JFK airport was a public forum, and one Justice believed that a leafleting ban was unreasonable even in a non-public forum.[65] In addition, four Justices thought post office walkways were not a public forum, and upheld a ban on solicitations outside post offices; they were joined by one Justice who found the ban acceptable regardless of forum status.[66] All of this suggests that the labeling effort is beside the point.

Unnecessary reliance on the public forum doctrine can draw courts through circuitous routes to results reached more understandably without it. For example, *Sammartano v. First Judicial District Court*[67] involved the right to wear a jacket emblazoned with motorcycle gang emblem at a county courthouse. If this fact pattern sounds

60. 453 U.S. at 134.
61. *Id.* at 134–36 (Brennan, J., concurring).
62. *Id.* at 148–52 (Marshall, J., dissenting).
63. *Id.* at 152 (Stevens, J., dissenting).
64. *Id.* at 142 (White, J., concurring).
65. Lee v. Int'l Soc'y for Krishna Consciousness, Inc., 505 U.S. 830, 831 (1992).
66. United States v. Kokinda, 497 U.S. 720, 730, 738 (1990).
67. 303 F.3d 959 (9th Cir. 2002).

familiar, it should: the famous case of *Cohen v. California*[68] upheld the constitutional right to wear a jacket bearing an offensive message ("Fuck the Draft") in a courthouse. Despite this, the Ninth Circuit panel deciding *Sammartano* felt that it could not resolve the case by simple reliance on *Cohen* because "*Cohen* pre-dates the Supreme Court's articulation of its forum-based approach to First Amendment questions."[69] The panel therefore devoted many pages to debating what sort of forum was involved, believing the effort to be required because the case involved "a First Amendment claim relating to speech on government property."[70] The detour through the intricacies of public forum doctrine resulted in a ruling basically identical to *Cohen*: the rule against motorcycle gear was unconstitutional because it suppressed speech without good reason.[71]

The detour in *Legal Services Corporation v. Velazquez*[72] was even more laborious. The plaintiffs challenged a federal statute that funded legal aid attorneys for welfare recipients only on the condition that they would not pursue litigation to overturn any existing laws. A panel of the court of appeals found the restriction invalid without once mentioning the word "forum."[73] It focused instead on suppression of viewpoints as an independent First Amendment evil, and also on the doctrine of unconstitutional conditions. The Supreme Court affirmed, but in an opinion marked by a meandering discussion of public forum principles. "[L]imited forum [sic] cases . . . may not be controlling in a strict sense," said the majority, "yet they do provide some instruction."[74] The instruction drawn from those cases was rather opaque; namely, that the government should not seek "to use an existing medium of expression [which the Court equates with a forum] and to control it . . . in ways which distort its usual function-

68. 403 U.S. 15 (1971).

69. *Sammartano*, 303 F.3d at 969.

70. *Id.* at 965.

71. *Id.* at 975.

72. 531 U.S. 533 (2001).

73. Velazquez v. Legal Services Corp., 164 F.3d 757 (2d Cir. 1999). Oddly, the dissent in the court of appeals criticized the majority for relying on public forum principles, even though it did not. The dissent asked, "What forum?" "According to the majority opinion . . . the public forum is the courtroom (an idea that may come as a surprise to trial judges)." *Id.* at 777 (Jacobs, J., dissenting). Judge Jacobs's critique of the forum analogy is a fair criticism of the later-decided Supreme Court opinion, but out of place when directed at the court of appeals majority.

74. 531 U.S. at 544.

ing."[75] The actual holding of the opinion had little to do with this labored gloss on the public forum analogy. Instead, the result rested on the venerable principle that the First Amendment does not allow the government to directly or indirectly suppress speech that criticizes the government.

> We must be vigilant when Congress imposes rules and conditions which in effect insulate its own laws from legitimate judicial challenge. Where private speech is involved, even Congress' antecedent funding decision cannot be aimed at the suppression of ideas thought inimical to the Government's own interest.[76]

The Court's repugnance for self-dealing and unconstitutional conditions[77] resolved the case, not the unpersuasive recourse to forum cases.

In the cases described above, the public forum doctrine injected inefficiency and confusion into the formal reasoning of judicial opinions, but it did not stop courts from reaching the sensible conclusions. But sometimes—especially when qualified immunity is invoked—the complications of the doctrine result in serious error on the merits. Courts that are convinced the public forum doctrine is mandatory may reach unjust results simply through the attempt to avoid the doctrine's headaches.

The plaintiffs in *Weise v. Casper*[78] went to see a speech by then-President George W. Bush at a Denver museum that was open to the public, although the public or nonpublic forum status of the event had not been definitively resolved. To express their opposition to the Iraq War, they displayed on their car a bumper sticker reading "No More Blood For Oil." The plaintiffs alleged that the Secret Service forcibly removed them from the event because of their bumper sticker, as part of a White House policy of excluding those who disagreed with the President from all of his official public appearances. The officers moved to dismiss on grounds of qualified immunity, arguing that it was not clearly established at the time of their alleged actions that it

75. 531 U.S. at 543.

76. 531 U.S. at 548–49.

77. 531 U.S. at 547 ("Congress cannot recast a condition on funding as a mere definition of its program in every case, lest the First Amendment be reduced to a simple semantic exercise.").

78. 593 F.3d 1163 (10th Cir. 2010).

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 that the majority was unwilling to decide it.[79]

Why did the panel think this straightforward case of political censorship posed a difficult constitutional question? In no small part, the answer is the public forum doctrine. The trial court believed that the qualified immunity defense hinged on the existence of law clearly establishing plaintiff's rights in "a situation in which the President [is] speaking in a limited private forum [sic] or limited nonpublic forum [sic]."[80] The court of appeals majority agreed that the forum status of the location of the President's speech made a difference. The majority distinguished away all of the cases finding free speech violations when peaceful political dissenters were removed from Presidential appearances, on the basis that they involved Presidential speeches in public forums, rather than in a forum of uncertain status.[81] The dissent felt able to decide the case quite easily without any reference to the public forum doctrine. For the dissent, "[t]he question, then, is whether the Constitution permitted Defendants to take this action [removing the plaintiffs from the event] for this reason [official disagreement with plaintiffs' speech]. The answer, informed by decades of free speech jurisprudence, must be a resounding 'no'."[82]

By injecting itself where it does not belong, the public forum doctrine makes easy cases hard (or at least laborious), just like using a hammer to turn a screw.

### *B. Forums Without Assembly: Unattended Displays on Government Property*

The city park is a prototypical traditional public forum for oral speech or leafleting to an assembled audience—think of speaker's

79. *Id.* at 1167 (explaining that the court has authority to decide in this procedural posture whether the plaintiff's rights were violated on the alleged facts, but will not do so to avoid the risk of an incorrect answer).

80. *Id.* (quoting trial court order, *Weise v. Casper*, 2008 WL 4838682 at *8 (D. Colo. Nov. 6, 2008)). The trial court's invention of the previously unknown terms "limited private forum" and "limited nonpublic forum" reveals the confused state of the terminology.

81. *Weise*, 593 F.3d at 1168 n.1, 1170 (case requires resolution of "the nature of the forum").

82. *Id.* at 1174 (Holloway, J., dissenting).

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 expansions of the public forum doctrine has been to other types of communication in parks, including displays of unattended signs or sculptures. By and large, the spread of public forum doctrine to this factual setting has not led to intolerable results, but it reveals in interesting ways how the doctrine does not travel well.

Unattended displays lack many of the attributes that make a traditional public forum a forum. First, they do not involve assembly. The speaker's delivery of the message is separated in time from the audience's receipt of it. Second, there can be confusion as to the governmental status of the display. A preacher reciting the Ten Commandments in a city park is self-evidently not the government. By contrast, most viewers would imagine that a stand-alone granite monument of the Ten Commandments in a city park is owned, maintained, or at least endorsed by the city.[83] Third, the presence of a permanent display diminishes the forum's ability to host other speech. The presence of the display reduces the space available for other displays or speakers. For displays that are difficult to move because they are massive or otherwise affixed to the property, it is not easy for a different display to appear in the same spot at a different time in the same way that a different speaker can take over the soap box after the preacher finishes.

The Supreme Court has grappled on several occasions with this problem without recognizing that a major part of the difficulty is its reflexive resort to the public forum metaphor. In the leading case of *Ohio Capitol Square Review and Advisory Board v. Pinette*,[84] a state regulation declared the grounds of the state capitol to be a public forum for "free discussion of public questions, or for activities of a broad public purpose."[85] Although this language contemplates assembly, the Supreme Court determined that the grounds were also a forum for the purpose of private parties erecting unattended displays.[86] The grounds previously hosted a privately sponsored meno-

83. In many settings, determining whether the government is the true speaker is not a trivial matter. Caroline Mala Corbin, *Mixed Speech: When Speech Is Both Private and Governmental*, 83 N.Y.U. L. REV. 605 (2008).

84. 515 U.S. 753, 758 (1995).

85. OHIO ADMIN.CODE 128-4-02(A) (1994) (cited in Capital Square Review & Advisory Bd. v. Pinette, 515 U.S. 753, 757–58).

86. *Pinette*, 515 U.S. at 757–58.

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]

Public forum logic contributed to similar tensions in *Pleasant Grove City v. Summum*,[91] where a minority religious group demanded that the city install a monument of its Seven Aphorisms in a park where the city had previously erected other donated monuments, including a monument engraved with the Ten Commandments. The Supreme Court concluded that the display of city-chosen monuments in a park constituted government expression, and not the creation of a public forum. In so doing, *Summum* is one of the few decisions to expressly reject the public forum framework when it did not apply. The majority's reasoning is similar to what I advocate here. It rejected the analogy between "the installation of permanent monuments in a public park to the delivery of speeches and the holding of marches and demonstrations" in that same park[92] (lack of assembly). It noted that "permanent monuments displayed on public property typically represent government speech"[93] (lack of clear

87. *Id.* at 758.

88. Cornelius v. NAACP Legal Def. & Fund, Inc., 473 U.S. 788, 802 (1986).

89. *Pinette*, 515 U.S. at 762.

90. *See Pinette*, 515 U.S. at 776 (O'Connor, J., concurring in part and concurring in the judgment); *see also id.* at 793 (Souter, J., concurring in part and concurring in the judgment); *see also id.* at 818 (Ginsburg, J., dissenting).

91. 129 S.Ct. 1125, 1129–30 (2009).

92. Pleasant Grove City v. Summum, 129 S.Ct. 1125, 1137 (2009).

93. *Id.* at 1132. *See also id.* at 1133 ("[P]ersons who observe donated monuments routinely—and reasonably—interpret them as conveying some message on the property owner's

demarcation between public and private). And it noted that permanent monuments "monopolize the use of the land on which they stand and interfere permanently with other uses of public space"[94] (diminution of the forum).

*Summum* is, in my view, a step in the right direction. However, it would likely not apply in a situation where the government had somehow issued an invitation for private speakers to contribute permanent monuments, as the Court believed had occurred in *Pinette*. This often takes the form of "Adopt-a-Brick" programs, where a public facility (like a park, library, museum, or concert hall) rewards donors by allowing them to engrave a message of their choice on a brick or plaque. Unless clear limits are established in advance in a manner ensuring that the resulting display represents the government's speech,[95] a *Pinette* problem could easily arise.

One such dispute occurred in 2002 on the plaza outside a newly constructed branch of the King County Library in Redmond, Washington. As a fundraiser, the Library allowed supporters to engrave a message of their choice on a tile in exchange for a small donation. The first wave of donors selected messages of the sort the Library was probably expecting: the donor's names, "in memory of" a decedent, or a message like "Reading Is Fun" or "In Honor of Dr. Seuss." Other donors chose to display messages that were important to them for religious reasons. These included "God Can Change Life," "Christ Died For Our Sins," "Read About Jesus," and "Read Your Bible: Prevent Truth Decay." Atheists objected that a public library ought not endorse religion.[96] Their complaint was not without basis, because where the speech sticks to the forum, there is understandable confusion as to source.

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behalf.").

94. *Id.* at 1137.

95. For example, schools will sometimes decorate their hallways with artwork created by students according to fixed content guidelines; these are deemed to be school-sponsored works subject to the school's editorial control, rather than public forums for student art. Fleming v. Jefferson County Sch. Dist. R-1, 298 F.3d 918, 934 (10th Cir. 2002); Gernetzke v. Kenosha Unified Sch. Dist. No. 1, 274 F.3d 464, 467 (8th Cir. 2001).

96. See Aaron H. Caplan, *Stretching the Equal Access Act Beyond Equal Access*, 27 SEATTLE U. L. REV. 273, 357–58 (2004) (citing *Clash Over Religious Expression Derails Tile Sales*, KING COUNTY JOURNAL (EASTSIDE EDITION) (Oct 19, 2002)). No litigation accompanied the Redmond Library episode, but other such disputes have generated litigation. *See e.g.*, Jon Savelle, *Park Playground's Brick Pavers Lead to Suit Against State*, SEATTLE TIMES (Sept. 25, 2003); Kirsten Sorenson, *Parents Sue the PV District: Rejecting "God" on School Tiles Sparks Furor*, ARIZONA REPUBLIC (March 13, 2003).

Under *Pinette*, the Adopt-a-Brick program would likely be deemed a public forum, as the library invited private speakers to present messages on public property. But also under *Pinette*, a disclaimer would be needed to avoid an Establishment Clause violation. The library decided to mount a plaque reading as follows:

> About the Tiles: The inscribed tiles you see on the walkway were purchased by individual library supporters, who chose the messages. The views expressed on the tiles are those of the sponsors, not the King County Library System. To sponsor additional tiles, contact the Library staff or the Friends of the Redmond Library.

This resolved the Establishment Clause problem, but it did not resolve all ramifications of a designated public forum consisting of permanent engraved text. Taking to heart Justice Brandeis's adage that the remedy to speech one dislikes is more speech,[97] atheists bought some tiles of their own, reading "First Amendment: Keep Church & State Separate,'' "With Soap, Baptism Is A Good Thing," and "Jehovah, Allah, Zeus, Thor & Brahma. They're All Myths." The library ultimately discontinued the project because of the swelling controversy after a donor purchased a forceful tile that read: "God Kills Babies. Read 1 Samuel 15:3. And God Is Love?'' The library learned from the incident that the evanescence of a traditional public forum has some advantages over a format that fixes private expression in stone.

Even if this matter had arisen after *Summum*, the bricks at the library would inhabit an uncertain status. The variety and personalized nature of many messages might lead the reasonable observer to conclude that the Library was not the speaker. But it is also true, as the majority said in *Summum*, that "[i]t certainly is not common for property owners to open up their property for the installation of permanent monuments that convey a message with which they do not wish to be associated."[98] The presence of engraved bricks also altered the forum. When a brick is engraved with the words "Religion is the Opiate of the Masses," the opportunity for future expression in the same medium is both smaller and different. One less space is available for expression, and future speakers must either compete

97. Whitney v. California, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring).

98. *Summum*, 129 S.Ct. at 1133.

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 through.

### *C. Money as Forum*

Casual statements from courts that "all government property" is some sort of forum might not be intended to include intangible property. But the metaphor has been expanded to the intangible realm, particularly where the intangible property involved is a bank account. In two cases involving the student activity funds of public universities, the Supreme Court evaluated spending decisions in relation to the public forum doctrine.

The first occasion was *Rosenberger v. University of Virginia,*[100] where the majority stated that a student activity fund "is a forum more in a metaphysical than in a spatial or geographic sense, but the same principles are applicable."[101] The analogy was asserted, not explained. And as far as I can tell, a bank account does not resemble a forum metaphysically any more than it does physically. A pile of money (or in its current form, a ledger entry representing a pile of money) shares none of the attributes that make traditional public forums especially hospitable for speech. To begin with, it is not outdoor real property. Public forum cases routinely deal with questions

99. *See* Pacific Gas & Elec.Co. v. Pub. Utilities Comm'n of Cal., 475 U.S. 1, 15 (1986) (utility that is forced by law to include newsletter of public interest group in its billing envelopes "may be forced either to appear to agree with [the newsletter] or to respond").

100. 515 U.S. 819 (1995).

101. *Id.* at 830.

of access to government property, but access to a bank account means something quite different from access to a park or sidewalk. Because it is intangible, one cannot assemble in a bank account. When the government spends its money on speech, it may become difficult to tell whether the message is that of the speaker or of the government.[102] A lengthy and contentious strain of classic Establishment Clause jurisprudence arises entirely because government spending may imply a governmental message of endorsement.[103] Finally, for the bank account to have any expressive value, it must in some way be spent—which means that it will, of necessity, diminish. A city park or sidewalk used as a traditional public forum is subject to some wear and tear and is not an infinite resource, but it is not permanently diminished or altered each time it is used it for speech.[104]

Although *Rosenberger* announced an analogy between a student activity fund and a public forum, it did not pursue the analogy to its logical conclusion by determining whether the fund was a public or nonpublic forum or applying the appropriate test. The ultimate holding of *Rosenberger* was that the student activity fund was obligated to pay for religious speech on the same basis as any other speech (and that doing so would not violate the Establishment Clause). The only principle borrowed from the public forum doctrine was that of viewpoint neutrality, which is a principle that need not be limited to public forum cases. As a result, on its facts *Rosenberger*'s reference to money as a public forum was an inapt rhetorical flourish, but one that could be muddled through.

The analogy raised bigger conceptual problems in *University of Wisconsin v. Southworth*.[105] Students were charged an activity fee that paid for, among other things, a student council that proposed a budget and used a referendum process to determine which student groups would be funded.[106] Plaintiffs objected to paying the fee because some of it was distributed to groups whose views they did not share, particularly student gay rights groups.[107] The case could have

102. *Compare* Rust v. Sullivan, 500 U.S. 173 (1991) (doctors paid by government were equivalent of government speakers), *with* Legal Services Corp. v. Velazquez, 531 U.S. 533, 534 (2001) (lawyers paid by government were private speakers).

103. *See, e.g.*, Zelman v. Simmons-Harris, 536 U.S. 639 (2002); Mitchell v. Helms, 530 U.S. 793 (2000).

104. *See generally* Caplan, *supra* note 26, at 364–66.

105. 529 U.S. 217, 235 (2000).

106. University of Wisconsin v. Southworth, 529 U.S. 217, 222–24 (2000).

107. *Id.* at 224.

been decided as any other tax protestor case, on the grounds that one's tribute to the government may often be spent on things that one disagrees with. (Just ask Henry David Thoreau, imprisoned for refusal to pay taxes that would fund a war he considered unjust.) In fact, even before *Southworth*, a line of compelled speech cases assessed the propriety of levying mandatory fees to pay for speech by the government or third parties.[108] None of these cases relied on public forum concepts.

Despite this, the majority opinion in *Southworth* stated, "Our public forum cases are instructive here by close analogy. This is true even though the student activities fund is not a public forum in the traditional sense of the term."[109] The Court's perceived need to anchor its decision to the forum metaphor led to the following dubious syllogism: the student activity fund is like a public forum; the government does not violate anyone's free speech rights by spending tax money to operate a public forum; therefore, the student activity fund will not violate anyone's free speech rights *to the extent it operates like a public forum*. The student government budgeting process, which included a referendum provision, did not strike the majority as similar to a public forum.

> To the extent the referendum substitutes majority determinations for viewpoint neutrality it would undermine the constitutional protection the program requires. The whole theory of viewpoint neutrality is that minority views are treated with the same respect as are majority views. Access to a public forum, for instance, does not depend upon majoritarian consent.[110]

In short, *Southworth* holds that use of a democratic political process to create a budget violates the First Amendment. Taken at its word, *Southworth* means that the only constitutionally legitimate budgeting mechanisms are strictly viewpoint-neutral, such as pro rata distributions to all applicants, a lottery, first-come first-served, or some other rationing system. The expansion of the public forum doctrine to government spending means that legislators writing a budget must be treated like a police chief rousting speakers from a sidewalk

108. *See* Abood v. Detroit Bd. of Educ., 431 U.S. 209 (1977); Keller v. State Bar of Cal., 496 U.S. 1 (1990); Glickman v. Wileman Bros. & Elliott, Inc., 521 U.S. 457 (1997).

109. 529 U.S. 217, 229–30 (2000).

110. *Id.* at 235.

or city park.

It is hard to imagine that the Justices really believe this. Perhaps it is only the budgets of *student* governments that are forums in a metaphysical sense. But without some limiting principle that has not yet become evident, treating money as a type of forum is yet another area where the invasion of the public forum doctrine has lead to mischief.[111]

## III. THE FUTURE OF THE PUBLIC FORUM DOCTRINE

In keeping with the theme of the symposium—the future of the First Amendment—it seems only fitting for me to close with a prediction about the future of the public forum doctrine. Donning my futurist's goggles, I hereby predict that the future will resemble the present. (I didn't say it would be daring prediction.)

One could imagine a future where *Summum* heralds an era where public forum analogies are viewed with greater skepticism. Drawing on Justice Breyer's concurrence, courts would approach "categories such as 'government speech,' 'public forums,' 'limited public forums,' and 'nonpublic forums' with an eye towards their purposes—lest we turn free speech doctrine into a jurisprudence of labels."[112] The decades of conditioning that have convinced many lawyers and judges that free speech thrives best in places categorized as public forums will wear away. Meaningful free speech protection will continue to be found, as it has been found before, from sources other than the public forum doctrine. While that future is possible, there are many reasons to believe it will not arrive any time soon.

First, notwithstanding *Summum*, the US Supreme Court contin-

111. On the Supreme Court, Justice Kennedy (the author of *Rosenberger*, *Southworth*, and *Velazquez*) favors inapt public forum analogies, while Chief Justice Rehnquist was most likely to signal resistance to them. For example, *Locke v. Davey*, 540 U.S. 712 (2004), involved a state program to subsidize college tuition for students, so long as they were not pursuing theology degrees that the state was barred from funding under its state version of the establishment clause. Upholding the exemption against free speech and free exercise attack, Justice Rehnquist wrote that the program "is not a forum for speech" and that as a result "[o]ur cases dealing with speech forums are simply inapplicable." *Id.* at 720 n.3. In reaching this conclusion, Justice Rehnquist distinguished *Rosenberger* by saying that program encouraged a diversity of views from private speakers. Why this is not also true of a college scholarship program was not well explained, but it was a sufficient distinction to satisfy Justice Kennedy, who joined Chief Justice Rehnquist's opinion. *See also* United States v. Am. Library Ass'n, 539 U.S. 194, 205 (2003) (Rehnquist, C.J.) (plurality opinion suggesting that public forum doctrine ought not be used).

112. *Summum*, 129 S.Ct. at 1140 (Breyer, J., concurring).

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 status of "recognized student organization" at a public law school. Recognized organizations were eligible for many benefits that are not easily analogized to access to a forum, including receipt of subsidies and the ability to use the university's name and logo as a means to announce the official affiliation between the university and the group.[114] Meanwhile, many important benefits that are easily analogized to access a forum-use of campus rooms for meeting space and campus bulletin boards for communication-were available to the group whether or not it was officially recognized,[115] which should have rendered questions about forum access moot. Despite this, the majority, two concurrences, and a dissent each stated without any discussion that the status of being officially recognized by the law school was legally identical to access to a forum.[116] None of the opinions questioned the aptness of the metaphor.

Second, the public forum doctrine has thus far been impervious to criticism. The doctrine's shortcomings have been described many times before with more eloquence than I have mustered here, both in dissenting opinions[117] and scholarly writing[118] reaching back decades.

113. 130 S. Ct. 2971 (2010).

114. *Id.* at 2797.

115. *Id.* at 2981.

116. Most of the justices reached this end through the intermediate stop of converting the status of official recognition to a "program," which was then analogized to a forum. The majority said that the law school, "through *its RSO program*, established a limited public forum." *Id.* At 2984 n. 12 (emphasis added). Justice Stevens' concurrence said that "*an RSO program* is a limited forum." *Id* at 2997 (emphasis added). Justice Alito's dissent said explicitly that "the forum consists of *the RSO program*." *Id.* at 3009 (emphasis added). Justice Kennedy's concurrence nowhere specifies exactly what he thought the "forum" was, although his opinion used the word "forum" eight times.

117. *See* Cornelius v. NAACP Legal Def. & Fund, Inc., 473 U.S. 788, 813–33 (Blackmun, J., dissenting); Bd. of Regents of Univ. of Wis. v. Southworth, 529 U.S. 217, 235–43 (Souter, J., concurring); Rosenberger v. Rector and Visitors of Univ. of Va., 515 U.S. 819, 892–99 (Souter, J., dissenting).

118. *See* David A. Stoll, *Public Forum Doctrine Crashes at Kennedy Airport, Injuring Nine:* Int'l Soc'y for Krishna Consciousness, Inc. v. Lee, 59 BROOK. L. REV. 1271 (1993); Robert C. Post, *Between Governance and Management: The History and Theory of the Public Forum*, 34 UCLA L. REV. 1713 (1987); C. Thomas Dienes, *The Trashing of the Public Forum: Problems in First Amendment Analysis*, 55 GEO. WASH. L. REV. 109 (1986). Daniel A. Farber & John A. Nowak, *The Misleading Nature of Public Forum Analysis: Content and Context in First Amendment Adjudication*, 70 VA. L. REV. 1219 (1984). An extensive catalogue of scholarly commentary on the public forum doctrine may be found in David A. Thomas, *Whither*

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 the public forum doctrine, reaching just results even if it would be possible to resolve the case more coherently on other grounds.

Fifth, in the hardest cases, the leading substitute for the public forum doctrine is the notoriously murky unconstitutional conditions doctrine. While *Rosenberger* asked whether the University failed to treat its student activity fund like a forum, a better question would have been whether the University violated the plaintiffs' free speech rights by conditioning their receipt of funds on a limitation of their speech. In *Legal Services Corporation v. Velazquez*[121] (where the government agreed to fund legal aid attorneys for the poor so long as they would not seek to invalidate any statutes), the right question was not whether the government "distorted" the "usual functioning" of a forum,[122] but whether it offered money with unconstitutional strings attached. The unconstitutional conditions doctrine is unformed and undeniably difficult,[123] making the public forum doctrine, with its surface appearance of coherent structure, seem preferable.

Finally, I do not perceive any consistently affected constituency that would be motivated to undertake the concerted litigation campaign that would be necessary for change. Reflexive use of the public forum doctrine may lead to messy results, but I am not convinced that the errors disadvantage anyone in particular. Some aspects of the doctrine make life unnecessarily hard for government, and other aspects for speakers, and there will be times where the existing doctrine is favorable to each. And of course neither government nor speakers are monolithic groups with identical interests. Historically, the constituency to express the most dissatisfaction with the doctrine has

121. 531 U.S. 533 (2001).

122. *Id.* at 543.

123. Caplan, *supra* note 26, at 367–68.

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.