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## First Amendment Fora Revisited: How Many Categories Are There?

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# First Amendment Fora Revisited: How Many Categories Are There?

Marc Rohr

## **Abstract**

In 2009, I published an article which focused on the remarkable lack of clarity surrounding the term “limited public forum” in the law of freedom of speech

**KEYWORDS:** public, disarray, amendment

## FIRST AMENDMENT FORA REVISITED: HOW MANY CATEGORIES *ARE* THERE?

BY MARC ROHR\*

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### I. INTRODUCTION

In 2009, I published an article which focused on the remarkable lack of clarity surrounding the term “limited public forum” in the law of freedom of speech.<sup>1</sup> I asserted then:

More than twenty-five years after the United States Supreme Court, in *Perry Education Ass’n v. Perry Local Educators’ Ass’n*, purported to define and elucidate the components of its “public forum” doctrine, the meaning—and legal significance—of the “limited public forum” concept remains startlingly unclear. Confessions of uncertainty by courts as to the meaning of this term—and its relationship to its doctrinal siblings, the “designated” public forum and the “non-public forum”—are, in fact, surprisingly common in reported judicial decisions.<sup>2</sup>

“The uncertainty surrounding this body of First Amendment doctrine,” I concluded, cries out for resolution.<sup>3</sup>

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1. Marc Rohr, *The Ongoing Mystery of the Limited Public Forum*, 33 NOVA L. REV. 299, 301 (2009).

2. *Id.* at 300 (footnote omitted); *see also* *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 45–48 (1983).

3. Rohr, *supra* note 1, at 355.

But the clarity for which I hoped has not been provided by the Supreme Court. Instead, the Court has, since I begged it for clarification in 2009, amplified the confusion associated with its forum categories, to the point that it is no longer even certain how many such categories there are.<sup>4</sup>

The modest goal of this Article is simply to try to answer that question.<sup>5</sup>

## II. THE ESSENCE OF THE “PUBLIC FORUM” DOCTRINE, PRIOR TO 2009

For the sake of the uninitiated, it should be said, without further delay, that all of this pertains to the issue of access, for expressive purposes, to governmentally-controlled properties or channels of communication that have not traditionally been deemed available to the citizenry for such purposes.<sup>6</sup> *Perry Education Ass’n v. Perry Local Educators’ Ass’n*,<sup>7</sup> in 1983, represented the Supreme Court’s first attempt to impose order on the case law addressing questions of this kind, which arise continually.<sup>8</sup> I summarized *Perry*’s well-known taxonomy in my earlier article, as follows:

Justice White set forth, in this [majority] opinion, the tripartite breakdown of governmental “fora” . . . that continues to be quoted regularly. The first category, he stated, consists of “places which by long tradition or by government fiat have been devoted to assembly and debate,” embracing—at least—“streets and parks.” “In these quintessential public forums, he went on to say, restrictions on expression would be evaluated pursuant to the tests usually employed to gauge the constitutionality of content-based or content-neutral regulations of speech.<sup>9</sup> A second

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4. At least one colleague agrees: “[T]here is not even agreement as to how many levels of forum exist within the public forum doctrine. . . . It is a bad sign if the doctrine is so confused that reasonable observers cannot even agree on how many categories of forum exist.” Aaron H. Caplan, *Invasion of the Public Forum Doctrine*, 46 WILLAMETTE L. REV. 647, 654 (2010).

5. See *infra* Parts II–VII.

6. Rohr, *supra* note 1, at 300–01.

7. 460 U.S. 37 (1983).

8. See *id.* at 43–44, 43 n.6, 46.

9. As Justice White explained, at this point:

For the State to enforce a content-based exclusion it must show that its regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end. The State may also enforce regulations of the time, place, and manner of expression, which are content-neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication.

*Perry Educ. Ass’n*, 460 U.S. at 45 (citation omitted). I will refer to these tests as “the higher levels of scrutiny.”

category, he continued, “consists of public property which the State has opened for use by the public as a place for expressive activity . . . . This second category is important because, [as] Justice White instructed us, the First Amendment “forbids a State to enforce certain exclusions from a forum generally open to the public even if it was not required to create the forum in the first place.” At this point a key point was made in a footnote: “A public forum may be created for a limited purpose such as use by certain groups . . . or for the discussion of certain subjects.” A significant caveat was added: “Although a State is not required to indefinitely retain the open character of the facility, as long as it does so it is bound by the same standards as apply in a traditional public forum”—thus introducing the term “traditional public forum” to describe the first category in this taxonomy.<sup>10</sup>

Finally, he addressed the third category, described simply as “[p]ublic property which is not by tradition or designation a forum for public communication.” In such locations, . . . “the State may reserve the forum for its intended purposes, communicative or otherwise, as long as the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker’s view.” Oddly, it was not until later in his opinion that Justice White gave this third type of governmental property a name, and he did so only in passing: . . . “Implicit in the concept of the non-public forum,” he wrote, “is the right to make distinctions in access on the basis of subject matter and speaker identity.”<sup>11</sup>

At that point in my earlier article, still discussing Justice White’s opinion in *Perry*, I began my critique:

But with respect to the concept of the “limited” public forum, the opinion was distinctly unhelpful. First, as with the term “non-public forum,” Justice White used the term “limited public forum” only in passing, never defining it . . . ; readers of the opinion were thus left to infer that the “limited public forum” was the aforementioned forum “created for a limited purpose such as use by certain groups . . . or for the discussion of certain subjects.”

Second, and most inexcusably, the legal significance of the label was never made explicit in Justice White’s opinion. He stated that the designated public forum would be treated as if it were a traditional public forum, but said nothing, in general terms, as to how the constitutionality of an exclusion of a particular

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10. Rohr, *supra* note 1, at 304.

11. *Id.* at 306; *see also Perry Educ. Ass’n*, 460 U.S. at 45, 46 n.7, 49.

speaker from a designated public forum limited for “use by certain groups” would be assessed.<sup>12</sup>

I argued then—based on what I deemed to be clues lurking in the remainder of Justice White’s *Perry* opinion,<sup>13</sup> along with the Court’s earlier ruling in *Widmar v. Vincent*<sup>14</sup>—that this was the proper understanding of the legal significance of the limited public forum concept:

In a limited public forum, we must first identify the speakers to whom the forum has been opened—the favored class of speakers, if you will—and then ask whether the speaker who seeks access to the forum—the challenger—is an “entit[y] of similar character” to those to whom the forum has been opened. In other words, we must ask whether the challenger falls within the favored class of speakers. If the answer is “yes,” then that challenger enjoys a “right of access” to the forum. To put it another way, a limited public forum would be “open” to speakers who fall into the same class as those to whom the forum has already been opened. . . . So it would appear, from the totality of the *Perry* decision, that a limited public forum will be treated as either a traditional public forum or a non-public forum, depending on whether the challenger does or does not fall within the favored class of speakers.<sup>15</sup>

To my knowledge, this was the only understanding of the limited public forum concept that gave it real meaning, as a category distinct from all the others.<sup>16</sup> And I was not alone in drawing this inference from *Perry* and *Widmar*; along with dictum in 1992’s *International Society for Krishna Consciousness, Inc. v. Lee*<sup>17</sup> decision,<sup>18</sup> several federal appellate courts embraced the same approach.<sup>19</sup>

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12. Rohr, *supra* note 1, at 306; *see also Perry Educ. Ass’n*, 460 U.S. at 46 n.7, 47–48.

13. Rohr, *supra* note 1, at 306–08; *see also Perry Educ. Ass’n*, 460 U.S. at 46 n.7, 47–48.

14. 454 U.S. 263 (1981).

15. Rohr, *supra* note 1, at 307–08 (alteration in original) (footnotes omitted); *see also Perry Educ. Ass’n*, 460 U.S. at 46 n.7, 47–48; *Widmar*, 454 U.S. at 269–70.

16. Rohr, *supra* note 1, at 306–09.

17. 505 U.S. 672 (1992).

18. *Id.* at 678–79.

19. *See* Rohr, *supra* note 1, at 332–34. Remarkably, this theory has continued to be put forth by one of those courts of appeals, albeit inconsistently and in dictum. *See* *Children First Found., Inc. v. Fiala*, 790 F.3d 328, 340 (2d Cir.), *reh’g granted*, 611 F. App’x 741 (2d Cir. 2015); *Zalaski v. City of Bridgeport Police Dep’t*, 613 F.3d 336, 342 (2d Cir. 2010) (*per curiam*). *But see* *Bronx Household of Faith v. Bd. of Educ.*, 650 F.3d 30, 36 (2d Cir. 2011); *Ochshorn ex rel. R.O. v. Ithaca City Sch. Dist.*, 645 F.3d 533, 540 (2d Cir. 2011). I say “remarkably” because this understanding was pretty clearly repudiated by the Supreme

But the actual holding of *Perry*,<sup>20</sup> along with the Court's other public forum cases decided between 1985 and 1998,<sup>21</sup> provided little or no support for that theory.<sup>22</sup> Then, in 2001, in *Good News Club v. Milford Central School*,<sup>23</sup> the Court, speaking through Justice Thomas, administered the coup de grace:

When the State establishes a limited public forum, the State is not required to and does not allow persons to engage in every type of speech. The State may be justified "in reserving [its forum] for certain groups or for the discussion of certain topics." The State's power to restrict speech, however, is not without limits. The restriction must not discriminate against speech on the basis of viewpoint, and the restriction must be "reasonable in light of the purpose served by the forum."<sup>24</sup>

Intentionally or not, Justice Thomas thereby equated, for purposes of First Amendment analysis, the category of the limited public forum with that of the non-public forum—with no explanation, or even any explicit acknowledgment, whatsoever, that he was doing so.<sup>25</sup> But, of course, lower courts took the hint.<sup>26</sup> Writing in 2009, I concluded:

The federal courts of appeals remain strikingly divided with respect to their understanding of what it means to pin the

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Court in 2001. *Bloedorn v. Grube*, 631 F.3d 1218, 1232 (11th Cir. 2011); *infra* text accompanying notes 18–19.

20. *See Perry Educ. Ass'n*, 460 U.S. at 55; Rohr, *supra* note 1, at 309–12.

21. *See Ark. Educ. Television Comm'n v. Forbes*, 523 U.S. 666, 669 (1998); *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995); *United States v. Kokinda*, 497 U.S. 720, 724 (1990); *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 796 (1985). Justice Kennedy's majority opinion in *Forbes*, however, did arguably lend some support to the limited public forum theory which I have advocated, but too ambiguously to cite, with any confidence, as supportive thereof. *See* Rohr, *supra* note 1, at 320–25.

22. *See Perry Educ. Ass'n*, 460 U.S. at 55.

23. 533 U.S. 98 (2001).

24. *Id.* at 106–07 (alteration in original) (citations omitted).

25. Rohr, *supra* note 1 at 320; *see also Good News Club*, 533 U.S. at 102, 106, 120, 131. That important doctrinal development had been strongly implied, six years earlier, by Justice Kennedy's majority opinion in *Rosenberger v. Rector & Visitors of University of Virginia*, 515 U.S. 819, 829–30 (1995). I criticized the *Rosenberger* pronouncement as well. Rohr, *supra* note 1, at 325; *see also Rosenberger*, 515 U.S. at 829–30. With regard to both decisions, I pointed out that, because each of them found impermissible viewpoint discrimination, no categorizing of the relevant forum was even necessary. Rohr, *supra* note 1, at 325; *see also Good News Club*, 533 U.S. at 106–07; *Rosenberger*, 515 U.S. at 829–30.

26. *See* Rohr, *supra* note 1 at 332.

label “limited public forum” upon a governmentally controlled property or channel of communication. At the risk of oversimplification, these courts can essentially be placed into one of two groups: Those who, like your humble author, are guided by the implications of *Perry* and *Forbes*, and those who have been influenced primarily by the misleading statements made in the *Rosenberger v. Rector & Visitors of University of Virginia* and *Good News Club* decisions.<sup>27</sup>

### III. SUBSEQUENT SUPREME COURT PRONOUNCEMENTS

As unhelpful as the Court was, in cases prior to 2009, in elucidating its public forum doctrine, it did, at least, faithfully list the three dominant categories of First Amendment fora: traditional, designated, and “non.”<sup>28</sup> That changed in 2009, in Justice Alito’s majority opinion in *Pleasant Grove City v. Summum*.<sup>29</sup> Because the Court found the Ten Commandments monument at issue therein to be, in the context of the case, a species of government speech,<sup>30</sup> Justice Alito’s discussion of public forum principles was entirely dictum; nonetheless, any statement made in a Supreme Court majority opinion obviously carries weight. So what did he say that has influenced the presentation of public forum concepts in lower courts? He listed the categories of traditional and designated public fora, and then added this: “The Court has also held that a government entity may create a forum that is limited to use by certain groups or dedicated solely to the discussion of certain subjects. In such a forum, a government entity may impose restrictions on speech that are reasonable and viewpoint neutral.”<sup>31</sup>

For the first time, the non-public forum received no mention.<sup>32</sup> While Alito did not use the term “limited public forum,” had he effectively replaced the non-public forum category with the limited public forum category? The Court had already—in dictum in *Good News Club*—equated those two categories for analytical purposes, but were we now supposed to conflate them completely—despite the fact that some “non-public” fora are

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27. *Id.*; see also *Good News Club*, 533 U.S. at 120; *Ark. Educ. Television Comm’n v. Forbes*, 523 U.S. 666, 683 (1998); *Rosenberger*, 515 U.S. at 846; *Perry Educ. Ass’n*, 460 U.S. at 55.

28. *Forbes*, 523 U.S. at 677; *Int’l Soc’y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 678 (1992); *United States v. Kokinda*, 497 U.S. 720, 726 (1990); *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 802 (1985).

29. 555 U.S. 460 (2009).

30. *Id.* at 472–73.

31. *Id.* at 469–70 (citation omitted) (citing *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 106–07 (2001)).

32. See *id.* at 464, 469; *Good News Club v. Milford Cent. Sch.*, 533 U.S. at 106–07.

closed to *all* private expressive activity<sup>33</sup>—and abandon the “non-public forum” label? No explanation was provided.

All that Alito said about First Amendment fora in *Sumnum* was repeated the following year, in Justice Ginsburg’s majority opinion in *Christian Legal Society v. Martinez*,<sup>34</sup> and this time it was not dictum.<sup>35</sup>

But, in 2015, in *Walker v. Texas Division, Sons of Confederate Veterans, Inc.*,<sup>36</sup> the non-public forum reappeared!<sup>37</sup> The Court held that the words or symbols on a specialty license plate were government speech.<sup>38</sup> For the majority, Justice Breyer rejected the argument that a specialty plate was some kind of “forum for private speech.”<sup>39</sup> In doing so, he bypassed the usual practice of setting out the forum categories, instead simply rejecting, in turn, the applicability of each category of forum—traditional, designated, limited, and non-public.<sup>40</sup>

Had order, such as it was, thereby been restored? Perhaps, but one’s confidence is further weakened by the fact that, the following year, Justice Thomas, joined by Justice Alito in dissenting from a denial of certiorari, made reference to “a limited public forum, also called a nonpublic forum.”<sup>41</sup>

So a legitimate question remains: How many forum categories are there?

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33. *E.g., Int’l Soc’y for Krishna Consciousness, Inc.*, 505 U.S. at 672; *Adderley v. Florida*, 385 U.S. 39, 47, 52 (1966) (*Adderley* pre-dated the *Perry* terminology, but provides a clear example of a government property that had been opened to no one for expressive purposes).

34. 561 U.S. 661 (2010).

35. *See id.* at 679 n.11.

36. 135 S. Ct. 2239 (2015).

37. *See id.* at 2252.

38. *Id.* at 2246–47.

39. *Id.* at 2250.

40. *Id.* at 2250–51. Writing for four Justices in dissent, Justice Alito said:

What Texas has done by selling space on its license plates is to create what we have called a limited public forum. It has allowed state property . . . to be used by private speakers according to rules that the State prescribes. Under the First Amendment, however, those rules cannot discriminate on the basis of viewpoint. But that is exactly what Texas did here.

*Walker*, 135 S. Ct. at 2262 (Alito, J., dissenting) (citations omitted).

41. *Am. Freedom Def. Initiative v. King Cty.*, 136 S. Ct. 1022, 1022 (2016) (Thomas, J., dissenting). Thomas observed that “[d]istinguishing between designated and limited public forums has proved difficult,” and that the guidance provided by the Supreme Court on this point “has bedeviled federal courts.” *Id.*

## IV. THEORETICAL DISARRAY IN THE COURTS OF APPEALS

Since 2010, federal appellate courts have remarkably, but understandably, exhibited considerable confusion regarding the *number* of public forum categories.<sup>42</sup> In some circuits, panels continued to adhere to the pre-*Summum* list of three categories—traditional, designated, and non-public<sup>43</sup>—as though the Supreme Court had said nothing that mattered in *Summum* or *Christian Legal Society*.<sup>44</sup> Opinions from other circuits, variously and inconsistently, set forth either those three categories;<sup>45</sup> all four categories;<sup>46</sup> the three categories identified in *Summum* and *Christian Legal Society*;<sup>47</sup> or those three categories, specifically said to be public fora, along with a separately-identified—apparently *sui generis*—type of government property, the “non-public forum.”<sup>48</sup>

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42. *See id.*

43. *Hodge v. Talkin*, 799 F.3d 1145, 1157–58 (D.C. Cir. 2015) *cert. denied*, 136 S.Ct. 2009 (2016) (decided post-*Walker*, but not citing it); *Sons of Confederate Veterans, Va. Div. v. City of Lexington*, 722 F.3d 224, 229–30 (4th Cir. 2013); *Am. Freedom Def. Initiative v. Suburban Mobility Auth. for Reg’l Transp.*, 698 F.3d 885, 890 (6th Cir. 2012); *Satawa v. Macomb Cty. Rd. Comm’n*, 689 F.3d 506, 517–18 (6th Cir. 2012); *McGlone v. Bell*, 681 F.3d 718, 732 (6th Cir. 2012);, *cert. denied*, 136 S. Ct. 2009 (2016); *Oberwetter v. Hilliard*, 639 F.3d 545, 551 (D.C. Cir. 2011); *see also Am. Freedom Def. Initiative v. Mass. Bay Transp. Auth.*, 781 F.3d 571, 578 (1st Cir. 2015); *Minn. Majority v. Mansky*, 708 F.3d 1051, 1057 (8th Cir. 2013) (each asking whether a transportation authority’s advertising program was a designated or non-public forum). Opinions in which the term “non-public forum” is used, without any list of categories, include *International Society for Krishna Consciousness of California, Inc. v. City of Los Angeles*, 764 F.3d 1044 (9th Cir. 2014); *United States v. Szabo*, 760 F.3d 997 (9th Cir. 2014); and *K.A. ex rel. Ayers v. Pocono Mountain School District*, 710 F.3d 99 (3d Cir. 2013).

44. *See Christian Legal Soc’y Chapter of the Univ. of Cal. Hastings Coll. of the Law v. Martinez*, 561 U.S. 661, 669 (2010); *Pleasant Grove City v. Summum*, 555 U.S. 460, 481 (2009).

45. *Keeton v. Anderson-Wiley*, 664 F.3d 865, 871 (11th Cir. 2011); *Pittsburgh League of Young Voters Educ. Fund v. Port Auth. of Allegheny Cty.*, 653 F.3d 290, 295 (3d Cir. 2011) (citing *Martinez*, 561 U.S. at 679 n.11).

46. *Wright v. Incline Vill. Gen. Improvement Dist.*, 665 F.3d 1128, 1134 (9th Cir. 2011) (citing *Martinez*, 561 U.S. at 679 n.11; *Ark. Educ. Television Comm’n v. Forbes*, 523 U.S. 666, 677 (1998)).

47. *Galena v. Leone*, 638 F.3d 186, 197 (3d Cir. 2011); *Bloedorn v. Grube*, 631 F.3d 1218, 1230 (11th Cir. 2011); *see also Newton v. LePage*, 700 F.3d 595, 602 (1st Cir. 2012) (rejecting the applicability of those three categories, with no mention of the non-public forum).

48. *Kaahumanu v. Hawaii*, 682 F.3d 789, 799 (9th Cir. 2012); *Miller v. City of Cincinnati*, 622 F.3d 524, 535 n.1 (6th Cir. 2010). In *Kaahumanu*, the court actually said this: “The Supreme Court has divided public forums into three categories: ‘[T]raditional public forums,’ ‘designated public forums,’ and ‘limited public forums.’ The rest of government property is either a non-public forum or no forum at all.” *Kaahumanu*, 682 F.3d at 799 (citing *Martinez*, 561 U.S. at 679 n.11); *see also Forbes*, 523 U.S. at 678.

The Second Circuit has consistently identified four categories.<sup>49</sup> The Tenth Circuit has also done so, but, somewhat oddly, has listed the original three major *Perry* categories first, adding that the Supreme Court “has *since* identified a separate category—the ‘limited public forum’—although the Court’s use of this term has been inconsistent,”<sup>50</sup> despite the fact that the limited public forum made its first appearance in *Perry*.<sup>51</sup> Even more oddly, the same court went on to observe that “‘the boundary between a designated public forum for a limited purpose . . . and a limited public forum . . . is far from clear.’”<sup>52</sup> The Seventh Circuit has also treated the limited public forum as less than a full-fledged member of the family of forum categories, listing the three established categories and then adding: “Some decisions recognize a fourth category, variously called a ‘limited designated public forum’ . . . a ‘limited public forum,’ or a ‘limited forum.’”<sup>53</sup>

A different Seventh Circuit panel had earlier equated the limited and non-public categories, asserting that “[a] limited public forum—sometimes called a ‘non-public forum’—is a place the government has opened only for specific purposes or subjects. . . .”<sup>54</sup> Other circuits have also equated the two concepts.<sup>55</sup> In the Third,<sup>56</sup> Eighth,<sup>57</sup> and Ninth<sup>58</sup> Circuits, there are,

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49. *Children First Found., Inc. v. Fiala*, 790 F.3d 328, 339 (2d Cir.), *reh’g granted*, 611 F. App’x 741 (2d Cir. 2015); *Ochshorn ex rel. R.O. v. Ithaca City Sch. Dist.*, 645 F.3d 533, 539 (2d Cir. 2011); *Zalaski v. City of Bridgeport Police Dep’t*, 613 F.3d 336, 341–42 (2d Cir. 2010) (per curiam); *see also* *Bronx Household of Faith v. Bd. of Educ.*, 650 F.3d 30, 36 (2d Cir. 2011) (finding a public school to be a limited public forum, with no reference to any other categories).

50. *Doe v. City of Albuquerque*, 667 F.3d 1111, 1128 (10th Cir. 2012) (emphasis added); *see also* *Verlo v. Martinez*, 820 F.3d 1113, 1129 n.6 (10th Cir. 2016).

51. *See Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 47 (1983); *Miller v. City of Cincinnati*, 622 F.3d 524, 535 n.1 (6th Cir. 2010) (citing the *Summum* decision as having “resolve[d] the confusion over terminology . . . after the Supreme Court first articulated the concept of a ‘limited public forum’ in *Good News Club*”).

52. *Doe*, 667 F.3d at 1129 (quoting *Summum v. Callaghan*, 130 F.3d 906, 916 n.14 (10th Cir. 1997)).

53. *Women’s Health Link, Inc. v. Fort Wayne Pub. Transp. Corp.*, 826 F.3d 947, 951 (7th Cir. 2016). Judge Posner provided no citations supporting the use of the first or third of those terms, which this author has never encountered anywhere else. *See id.*

54. *Milestone v. City of Monroe*, 665 F.3d 774, 783 n.3 (7th Cir. 2011). But in his later *Women’s Health Link* opinion, Judge Posner defined “designated public forum” as “a facility that the government has created to be, or has subsequently opened for use as, a site for expressive activity. Usually, . . . ‘designated forums’ are available for specified forms of private expressive activity or at specified times . . . . Such limitations are permitted.” *Women’s Health Link, Inc.*, 826 F.3d at 951.

55. *See NAACP v. City of Phila.*, 834 F.3d 435, 441 (3d Cir. 2016); *Powell v. Noble*, 798 F.3d 690, 699 (8th Cir. 2015); *Seattle Mideast Awareness Campaign v. King Cty.*, 781 F.3d 489, 496 n.2 (9th Cir. 2015); *Victory Through Jesus Sports Ministry Found. v. Lee’s Summit R-7 Sch. Dist.*, 640 F.3d 329, 334 (8th Cir. 2011).

accordingly, only three forum categories, because the “limited” and “non-public” fora are viewed—albeit a bit tentatively—as one and the same.<sup>59</sup> The Third Circuit’s pronouncement on the point is worth quoting:

There appears to be some inconsistency in federal courts’ opinions, even those of the Supreme Court, as to whether a limited public forum is a separate category or a subset of a designated public forum with a third category of forums being “non-public forums.” Recently, the Court has used the term “limited public forum” interchangeably with “non-public forum,” thus suggesting that these categories of forums are the same. Because the continued existence *vel non* of a “non-public forum” category has no bearing in this case, we need not dwell on the possible distinction between limited public forums and nonpublic forums.<sup>60</sup>

Similarly the Ninth Circuit, guided by *Christian Legal Society*, set forth the traditional, designated, and limited categories, observing, with respect to limited public fora, that “in past cases they’ve sometimes been labeled ‘non-public’ forums.”<sup>61</sup>

But less than a month later, a Ninth Circuit panel stated that, in light of the Supreme Court’s decision in *Walker*, “the proper term likely is ‘non-

56. See *City of Phila.*, 834 F.3d at 441. “The final category is sometimes called a limited public forum and other times labeled a non-public forum.” *Id.* The court went on to “assume, without deciding, that the [district] [c]ourt was correct” in “conclud[ing] that the advertising space [at issue was] a limited public/non-public forum.” *Id.* at 442 (citation omitted).

57. See *Powell*, 798 F.3d at 699; *Victory Through Jesus Sports Ministry Found.*, 640 F.3d at 334. “A limited public forum, like a non-public forum, may be ‘limited to use by certain groups or dedicated solely to the discussion of certain subjects,’ and the public entity ‘may impose restrictions on speech that are reasonable and viewpoint-neutral.’” *Victory Through Jesus Sports Ministry Found.*, 640 F.3d at 334–35 (quoting *Christian Legal Soc’y Chapter of the Univ. of Cal., Hastings Coll. of the Law v. Martinez*, 561 U.S. 661, 679 n.11 (2010)).

58. See *Seattle Mideast Awareness Campaign*, 781 F.3d at 496 n.2.

59. See *City of Phila.*, 834 F.3d at 441; *Powell*, 798 F.3d at 699; *Seattle Mideast Awareness Campaign*, 781 F.3d at 496 n.2; *Victory Through Jesus Sports Ministry Found.*, 640 F.3d at 334.

60. *Galena v. Leone*, 638 F.3d 186, 197 n.8 (3d Cir. 2011) (citations omitted). The court added, “[w]e have stated that ‘we have generally applied to limited public fora the constitutional requirements applicable to designated public fora.’ In light of *Pleasant Grove*, this statement may no longer be good law.” *Id.* at 198 n.9 (citations omitted); see also *Pleasant Grove City v. Summum*, 555 U.S. 460, 461, 469–70 (2009).

61. *Seattle Mideast Awareness Campaign*, 781 F.3d at 496 n.2. The Court added that “[t]he label doesn’t matter, because the same level of First Amendment scrutiny applies to all forums that aren’t traditional or designated public forums.” *Id.*

public forum.”<sup>62</sup> Indeed, one might reasonably expect that, given Justice Breyer’s recognition of four categories of forum in *Walker*,<sup>63</sup> all prior semantic confusion will be dispelled.<sup>64</sup> But a few months later, yet another Ninth Circuit panel reverted, without explanation, to a list of three categories that included the limited public forum—but not the non-public forum.<sup>65</sup> Given the fact that some courts appeared to be uninfluenced by the language used by the Court in *Sumnum* and *Christian Legal Society*,<sup>66</sup> along with the propensity of courts to keep quoting from their own precedents, *Walker* will probably *not* signal the end of judicial inconsistency in the listing of forum categories.

## V. MAKING SENSE OF THE CATEGORIES

In a very recent Seventh Circuit opinion, Judge Posner made this surprising and somewhat cryptic comment: “[I]t is rather difficult to see what work ‘forum analysis’ in general does.”<sup>67</sup> Is he right?<sup>68</sup> I would suggest, more modestly, that it is difficult to see what is accomplished by having three or four forum categories, particularly if, as it now appears, two of them are deemed to be essentially synonymous.<sup>69</sup>

Let us first consider, then, whether it makes any sense to evaluate a speech restriction in a limited public forum just as we would evaluate such a restriction in a non-public forum. Start by recognizing that, stray judicial pronouncements to the contrary notwithstanding<sup>70</sup>, the boundaries of the two

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62. *Am. Freedom Def. Initiative v. King Cty.*, 796 F.3d 1165, 1169 n.1 (9th Cir. 2015), *cert. denied*, 136 S. Ct. 1022 (2016).

63. *Walker v. Tex. Div., Sons of Confederate Veterans, Inc.*, 135 S. Ct. 2239, 2248–51 (2015).

64. *See id.*

65. *See Reza v. Pearce*, 806 F.3d 497, 502 (9th Cir.), *reh’g denied*, 2015 U.S. App. LEXIS 20118 (9th Cir. 2015).

66. *See supra* text accompanying note 43.

67. *Women’s Health Link, Inc. v. Fort Wayne Pub. Transp. Corp.*, 826 F.3d 947, 951 (7th Cir. 2016).

68. I took the position, earlier, that the doctrine made presumptive sense. Rohr, *supra* note 1, at 349–50.

69. In my earlier article, I boldly asked, “how any reasonable jurist could believe that, in a scheme apparently comprising four categories, two of them—one labeled ‘limited’ and one labeled ‘non’—are to be treated as exactly the same.” Rohr, *supra* note 1, at 334.

70. *See supra* text accompanying notes 54–61. Consider also judicial definitions of “non-public forum” that tend to conflate the two categories, such as this: “The third category—the “nonpublic forum”—consists of government-owned facilities . . . that could be and sometimes are used for private expressive activities but are not primarily intended for such use.” *Women’s Health Link, Inc. v. Fort Wayne Pub. Transp. Corp.*, 826 F.3d 947, 951 (7th Cir. 2016). But Judge Posner clearly meant to distinguish this third category from a

categories are not precisely coterminous—which is why it made sense to identify them originally as two different categories.<sup>71</sup> Courts—including the Supreme Court—have often applied the “non-public” label to government properties that were, in fact, opened to some speakers for expressive activity,<sup>72</sup> but a non-public forum might also be a venue that had never been so opened.<sup>73</sup>

Still, might it make sense to treat them similarly? It might. Justice Kennedy’s majority opinion in *Arkansas Educational Television Commission v. Forbes*<sup>74</sup> paves the way toward this conclusion. While that opinion perpetuated existing doctrinal confusion in some respects,<sup>75</sup> it provided some helpful guidelines as well. Kennedy never used the term “limited public forum” in this opinion, instead describing a non-public forum—by way of distinguishing it from a designated public forum—*as if it were* a limited forum.<sup>76</sup> His key statement, made after discussing some earlier precedents, was this:

These cases illustrate the distinction between “general access,” which indicates the property is a designated public forum, and “selective access,” which indicates the property is a non-public forum. . . . [T]he government does not create a designated public forum when it does no more than reserve eligibility for access to the forum to a particular class of speakers, whose members must then, as individuals, “obtain permission” to use it.<sup>77</sup>

The “non-public forum” label was thus correlated with “selective access,” despite the facts that: (a) the non-public category was originally described as encompassing venues that were not intended as First Amendment fora at all,<sup>78</sup> and (b) selective access would seem to be an intrinsic feature of a limited forum.<sup>79</sup> Now that the Supreme Court has

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fourth, the “limited public forum.”

71. See *United States v. Kokinda*, 497 U.S. 720, 730 (1990); *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 46 (1983).

72. See *Kokinda*, 497 U.S. at 730; *Perry*, 460 U.S. at 46.

73. See *Int’l Soc’y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 680 (1992); *Adderley v. Florida*, 385 U.S. 39, 41–42 (1966).

74. 523 U.S. 666 (1998).

75. See *Rohr*, *supra* note 1, at 320–25.

76. See *id.* at 693 n.18; *Rohr*, *supra* note 1, at 327.

77. *Forbes*, 523 U.S. at 679 (citations omitted).

78. *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 46 (1983). Justice White, in *Perry Education Association*, introduced the third category—soon known as the non-public forum—as “[p]ublic property which is not by tradition or designation a forum for public communication.” *Id.*

79. See *id.* at 46 n.7, 48.

repeatedly stated that both labels lead to the same judicial analysis,<sup>80</sup> whether the forum is closed to all (for expressive purposes) or open to some (on a selective basis with permission still required) the merger appears complete.

Given that the existence of a designated public forum has always been all about the government's intent to make it so,<sup>81</sup> this arguably makes sense; neither "no access for any speakers," nor "access for some speakers with permission required" is consistent with an intent to *open* the forum to speakers.<sup>82</sup> Justice Kennedy went on, in *Forbes*, to supply a policy reason for making "general" versus "selective" access the governing distinction.<sup>83</sup> By taking this approach, he wrote, "we encourage the government to open its property to some expressive activity in cases where, if faced with an all-or-nothing choice, it might not open the property at all."<sup>84</sup>

The "mystery of the limited public forum," of which I complained several years ago, is thus solved, albeit without the help of a clear explanation by the Supreme Court: Rather than being a sub-set of the designated public forum, as first appeared,<sup>85</sup> the limited public forum turns out to be a non-identical twin of the non-public forum.<sup>86</sup> But why continue to use two different labels?

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80. See *supra* text accompanying notes 31 and 34. The two-part test—reasonableness and the absence of viewpoint discrimination—linked, in *Sumnum* and *Martinez*, to the limited public forum is of course the same test that applied to non-public fora from the outset. *Christian Legal Soc'y Chapter of the Univ. of Cal., Hastings Coll. of the Law v. Martinez*, 561 U.S. 661, 679, 679 n.11 (2010); *Pleasant Grove City v. Sumnum*, 555 U.S. 460, 469–70 (2009).

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

82. See *Cornelius*, 473 U.S. at 802; *Perry Educ. Ass'n*, 460 U.S. at 52–53. This understanding is consistent with, and helps explain, this otherwise odd statement made by Justice O'Connor in her plurality opinion in *Kokinda*, referring to a post office sidewalk to which some speakers had been granted access: "Even conceding that the forum here has been dedicated to some First Amendment uses, and thus is not a purely nonpublic forum, under *Perry*, regulation . . . would still require application of the reasonableness test." *Kokinda*, 497 U.S. at 730.

83. *Forbes*, 523 U.S. at 680.

84. *Id.*

85. See *Cornelius*, 473 U.S. at 802; *Perry Educ. Ass'n* 460 U.S. at 46 n.7; Rohr, *supra* note 1, at 306. What appears to be Justice White's definition of a limited public forum, presented for the first time in *Perry Educ. Ass'n*, was set forth in a footnote that sprang from his discussion of the category that soon came to be known as "the public forum created by government designation," thereby suggesting that "limited" was a subset of "designated." *Cornelius*, 473 U.S. at 802; *Perry Educ. Ass'n*, 460 U.S. at 46 n.7. See also this statement, in Chief Justice Rehnquist's majority opinion in *International Society for Krishna Consciousness, Inc. v. Lee*: "The second category of public property is the designated public forum, whether of a limited or unlimited character. . . ." *Int'l Soc'y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 678 (1992).

86. Rohr, *supra* note 1, at 300.

## VI. THE RIGHT TERMINOLOGY

If the two categories were to be consolidated as one, what should that category be called? One could simply do what several courts have recently done—namely, to use one of the two terms and quickly add that it is sometimes called the other,<sup>87</sup> but that is an unsatisfying solution because, again, the two terms are really not synonymous.<sup>88</sup> Is there a better phrase that accurately includes: (a) government properties that are not open to any speakers and (b) those that are open only to some? Quite frankly, I cannot think of one.

But the phrase “non-public forum,” while awkward and misleading from the very beginning,<sup>89</sup> *might* be serviceable—preferably with *two* hyphens—*i.e.*, “non-public-forum”—if understood as denoting that a government property, having been consistently off limits to all private expression, is not a “forum” at all.<sup>90</sup> And that *might* be expanded to include “selective-access” fora that, legally, do not trigger the higher levels of judicial scrutiny that apply in “traditional” public fora. The “limited public forum” label could thus be eliminated. Limited and non-public fora would therefore be lumped together, and defined simply by what they are not.

Meanwhile, at the other end of the spectrum, are there really two categories of general-access fora? Specifically, does the designated public forum—consistently acknowledged by the Supreme Court, and on every court’s list of categories—truly exist? One can argue that, logically, it does not, because it is defined as a government property that has been intentionally opened for general access by private speakers;<sup>91</sup> as long as that

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87. *Milestone v. City of Monroe*, 665 F.3d 774, 783 n.3 (7th Cir. 2011); *see also NAACP v. City of Phila.*, 834 F.3d 435, 441 (3d Cir. 2016); *Powell v. Noble*, 798 F.3d 690, 699 (8th Cir. 2015); *Victory Through Jesus Sports Ministry Found. v. Lee’s Summit R-7 Sch. Dist.*, 640 F.3d 329, 334 (8th Cir. 2011).

88. *See supra* text accompanying notes 71–73.

89. *See Rohr, supra* note 1, at 302. As I observed in my earlier article: “Because we are dealing, by definition, with public—and not private—property, the term [‘non-public forum’] is something of a misnomer. It would be more accurate to speak, in such a case, of a ‘public non-forum’ . . . .” *Id.* at 302 n.10.

90. *See Powell*, 798 F.3d at 699; *Milestone*, 665 F.3d at 783 n.3. Concededly, I cannot confidently cite any judicial decision as clearly supporting this understanding. Note, too, that Justice Kennedy, in his majority opinion in the *Forbes* case, cryptically introduced the third forum category thusly: “Other government properties are either non-public fora or not fora at all.” *Ark. Educ. Television Comm’n v. Forbes*, 523 U.S. 666, 677 (1998). That statement was quoted, still without any explanation, in *Kaahumanu v. Hawaii*, 682 F.3d 789, 800 (9th Cir. 2012). I point this out simply to show that the concept of “not [a] forum at all” has been taken seriously—but (a) apparently conceived of as something other than a non-public forum, yet (b) never explained.

91. *See Forbes*, 523 U.S. at 679.

description fits the property, speech restrictions are subject to strict or intermediate judicial scrutiny.<sup>92</sup> But the government actor in charge of the property is not obligated to maintain its general-access policy, and as soon as it denies a speaker access to the property, has it not switched to a policy of selective access, thereby throwing the venue into the non-public forum category?<sup>93</sup> The designated forum would therefore seem capable of existing, but only as a utopian place in which, by definition, no occasion for litigation would ever arise; conflict immediately ends the property's "designated" status. The category could therefore be eliminated.

But, notwithstanding this logic, courts—other than the Supreme Court—*have* held government properties to be designated public fora.<sup>94</sup> The unspoken explanation of such a holding, which would seem necessary to render it consistent with prevailing forum theory, is that the government's primary intention is to allow general access to speakers, the exclusion of the challenger thereby being viewed as somehow aberrational.<sup>95</sup>

Could the "traditional" and "designated" categories be usefully combined into one? In fact, that consolidation was suggested by Justice White's initial identification of (what quickly came to be known as) the traditional public forum, back in 1983 in *Perry*; that "first" category was described as comprising "places which by long tradition or by government fiat have been devoted to assembly and debate . . . ."<sup>96</sup> The coupling of tradition and government fiat, however, did not last long; "traditional" public fora have been defined largely by historical practice,<sup>97</sup> without regard for the

92. See *supra* note 9.

93. See *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 825 (1985) (Blackmun, J., dissenting). My argument corresponds to that put forth by Justice Blackmun, joined by Justice Brennan, in his dissenting opinion—which was highly critical of the Court's emerging public forum rules—in *Cornelius*. *Id.* Notably, Blackmun, throughout this opinion, referred to the "limited public forum" rather than the "designated public forum," clearly viewing a "limited" forum as presumptively open to speakers. See *id.*

94. *Sons of Confederate Veterans, Va. Div. v. City of Lexington*, 722 F.3d 224, 230 (4th Cir. 2013); *Doe*, 667 F.3d at 1128–30; *Bloedorn v. Grube*, 631 F.3d 1218, 1234 (11th Cir. 2011); *Bowman v. White*, 444 F.3d 967, 979 (8th Cir. 2006); *Justice for All v. Faulkner*, 410 F.3d 760, 769 (5th Cir. 2005); *Giebel v. Sylvester*, 244 F.3d 1182, 1188 (9th Cir. 2001).

95. In the words of Professor Post, criticizing *Cornelius* in 1987: "There is only one way out of this vicious circle, and it is not very satisfactory. It would require the Court to distinguish between the intent to include the class of speakers or subjects of which the plaintiff is the representative, and the intent to exclude the plaintiff." Robert C. Post, *Between Governance and Management: The History and Theory of the Public Forum*, 34 UCLA L. REV. 1713, 1757 (1987).

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

97. See *Int'l Soc'y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 678–79 (1992). "These precedents foreclose the conclusion that airport terminals are public

government's intent, while "government fiat" seems pretty clearly to correlate with the governmental intent needed to establish a "designated" forum. But the fact that the two concepts did make their debut in tandem supports the possibility of reuniting them, under the singular heading of the "open" public forum—the openness of which could be established either by historical practice or governmental intent. But the availability—at least in theory—of two separate paths to openness leads to the conclusion that the two separate labels—"traditional" and "designated"—might as well be retained.

## VII. CONCLUSION

So how many public forum categories do we really have? From a practical standpoint, there are really only two options: Either the forum is open—by virtue of either tradition or designation—in which case the higher levels of judicial scrutiny apply, or it is not, in which case the more deferential judicial analysis is employed.<sup>98</sup> But four labels remain in use, although the growing and prevailing view seems to be that two of those labels—"limited" and "non"—are now synonymous. It truly appeared, two or three decades ago, that the "limited" forum was a viable, non-redundant category of its own, but there has been scant support for that understanding in recent years. For the sake of clarity, that label should now be abandoned, preferably via a clear and explicit judicial pronouncement that will make speculative queries such as this little essay unnecessary.

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fora. . . . [T]he tradition of airport activity does not demonstrate that airports have historically been made available for speech activity." *Id.* at 680.

The standard pronouncement is that streets, sidewalks, and parks are traditional public fora, *e.g.*, *United States v. Kokinda*, 497 U.S. 720, 726–27 (1990), and the implication appears to be that those are the *only* properties worthy of inclusion in the category, but courts have at times stretched to pin the "traditional" label on other kinds of government property that are seen as sufficiently similar to streets, sidewalks, and parks. *E.g.*, *ACLU of Nev. v. City of Las Vegas*, 333 F.3d 1092, 1099, 1106 (9th Cir. 2003) (publicly-owned pedestrian mall); *Pouillon v. City of Owosso*, 206 F.3d 711, 715–17 (6th Cir. 2000) (city hall steps).

98. *Int'l Soc'y for Krishna Consciousness, Inc.*, 505 U.S. at 678–79 (1992); *Kokinda*, 497 U.S. at 726; *Perry Educ. Ass'n*, 460 U.S. at 45–46.