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Enforcing the Public Forum Doctrine on Private Property: First Unitarian Church of Salt Lake City v. Salt Lake City Corporation

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Enforcing the Public Forum Doctrine on Private Property: *First Unitarian Church of Salt Lake City v. Salt Lake City Corporation**

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“Next to the right of liberty, the right of property is the most important individual right guaranteed by the Constitution and the one which, united with that of personal liberty, has contributed more to the growth of civilization than any other institution established by the human race.”

William Taft¹

“If we don’t believe in freedom of expression for people we despise, we don’t believe in it at all.”

Noam Chomsky²

I. INTRODUCTION

Contemplating the speech rights guaranteed by the First Amendment, the United States Supreme Court developed the public forum analysis to assure that the public would always have a place to express themselves. Originally, the doctrine applied strictly to government property. Eventually, members of the public began to petition the courts for a guarantee of speech rights on private property that shared the same characteristics as government-owned public forums.

The Tenth Circuit recently handled a similar petition in *First Unitarian Church v. Salt Lake City Corp.*³ Under the current public forum doctrine, the Tenth Circuit correctly held that Salt Lake City’s easement across Main Street Plaza was a traditional public forum.⁴ However, the doctrine, as it currently exists, does not adequately balance private owners’ equally important property rights. Consequently, this Casenote addresses the inadequacies of the doctrine and sets forth an alternative factor analysis for courts to implement when faced with a situation similar to the one in this case. Under this modified approach, the Tenth Circuit would have ruled that the easement was a nonpublic forum.

This Casenote sets out the reasoning of both the district and appellate court holdings in this case. Part II explains the facts leading up to the lawsuit. Part III explains how the district court found that the easement was a nonpublic forum and that the easement’s restrictions on speech were valid. Part IV summarizes the Tenth Circuit Court of Appeals’ reversal of the district court’s ruling. Part V compares the Tenth Circuit’s

1. ROBERT ANDREWS, *THE CONCISE COLUMBIA DICTIONARY OF QUOTATIONS* 212 (1989).

2. *Id.* at 350.

3. 308 F.3d 1114 (10th Cir. 2002), *cert. denied*, 123 S. Ct. 2606 (2003).

4. *Id.* at 1131.

decision to the case law applicable to the public forum doctrine. Part VI discusses how the Tenth Circuit's ruling has affected the Church of Jesus Christ of Latter-day Saints, Salt Lake City, and the local community. The conclusion in Part VII lays out an alternate method for evaluating the public forum status of private property.

II. THE CONTROVERSY

This collision of free speech and property rights revolves around the sale of a portion of Main Street in downtown Salt Lake City, Utah, to the Church of Jesus Christ of Latter-day Saints (LDS Church or Church). Main Street runs north and south through Salt Lake City. The sale included the length of the street of one city block, approximately 660 feet in length,⁵ between North Temple and South Temple. The LDS Church already owned both city blocks on the east and west of this portion of Main Street.⁶

In 1995, the Salt Lake City Corporation (City) sold the subsurface rights for the ground underneath the above-described portion of Main Street to the LDS Church. The sale also included a right of first refusal for the LDS Church if the City later decided to sell the surface rights.⁷

Then, in 1999, the City sold the LDS Church the surface rights to the property.⁸ The sale was conditional upon the LDS Church's agreement to certain restrictions. As part of the special warranty deed, the City reserved a pedestrian passage easement, utility easements, access for emergency and police vehicles, and a view corridor that restricted the erection of buildings on the plaza. The deed also contained a reverter if the LDS Church failed to use the property as specified.⁹

Specifically, the dispute in this case arose from the easement that allowed for pedestrian access and passage across the property. The easement also specifically enumerated certain restricted activities, disallowing the creation or constitution of a public forum on the property.¹⁰

5. Heather May, *LDS Plaza Deal Done*, SALT LAKE TRIB., July 29, 2003, at A1.

6. 308 F.3d at 1117. A sale of public property, like a street, to a private party has precedent in Salt Lake City. Salt Lake City has sold "120 streets, alleys or sections of thoroughfares since 1970." Heather May, *ACLU May Sue if SLC Gives up Plaza Easement*, SALT LAKE TRIB., Dec. 24, 2002, at D1. However, until this sale, Salt Lake City had never sold a "centerpiece" of downtown before. *Id.*

7. *First Unitarian Church*, 308 F.3d at 1117.

8. *Id.* at 1118.

9. *Id.* at 1119.

10. The following is the actual wording of the restrictions on the easement:

In essence, as a condition of the sale, the LDS Church had to allow pedestrian access through the property, but it did not have to allow the pedestrians to do or say whatever they pleased. This right to restrict speech activities enraged many members of the community.¹¹

After the sale of the property, the LDS Church closed down the street, built an underground parking structure, and constructed a plaza where the street had previously run. The plaza consists of paved walking areas, planters, benches, waterfalls, and a large reflecting pool in the center.¹²

The plaintiffs, First Unitarian Church, Utahns for Fairness, Utah National Organization for Women, and Craig S. Axford, challenged the sale of the property and the LDS Church's right to restrict the use of the

2.2 Right to Prevent Uses Other Than Pedestrian Passage: *Nothing in the reservation or use of this easement shall be deemed to create or constitute a public forum*, limited or otherwise, on the Property. Nothing in this easement is intended to permit any of the following enumerated or similar activities on the Property: *loitering, assembling, partying, demonstrating, picketing, distributing literature, soliciting, begging, littering, consuming alcoholic beverages or using tobacco products, sunbathing, carrying firearms (except for police personnel), erecting signs or displays, using loudspeakers or other devices to project music, sound or spoken messages, engaging in any illegal, offensive, indecent, obscene, vulgar, lewd or disorderly speech, dress or conduct, or otherwise disturbing the peace*. Grantee shall have the right to deny access to the Property to persons who are disorderly or intoxicated or engaging in any of the activities identified above. The provisions of this section are intended to apply only to Grantor and other users of the easement and *are not intended to limit or restrict Grantee's use of the Property as owner thereof*, including, without limitation, the distribution of literature, the erection of signs and displays by Grantee, and the projection of music and spoken messages by Grantee.

Id. at 1118–19 (emphasis added).

11. To illustrate this point, Mayor “Rocky” Anderson of Salt Lake City said, “All of a sudden, the ill feeling that has been under the surface for years has boiled way over the top with this argument.” T.R. Reid, *Salt Lake Street Fight: Mormons and “Gentiles” Duel over Speech Rights*, WASH. POST, Dec. 23, 2002, at A1. As an example of the critics of the sale, one activist at a city council meeting exclaimed, “You gave away part of Main Street!” *Id.* That person also protested, “And you gave away our constitutional rights with it! No other city could possibly do that.” *Id.* H. David Burton, the Church's presiding bishop, wrote a letter to the community stating the following:

What was intended as an enhancement of the quiet splendor of the Salt Lake Temple has now become a platform for hecklers . . . and a haven for others distributing anti-Church literature, ‘buttonholing’ visitors or simply panhandling. Such behavior undermines the purpose of the plaza in direct contradiction of what the parties intended.

Id. A Salt Lake member of the LDS Church put the controversy in these terms: “It has become a metaphor for the tensions that exist in this city—for the Mormons who feel unappreciated, and for all the people who feel ignored and discriminated against because they're not Mormon.” *Id.* Whatever side of the debate, no one has been happy about the situation. The Tenth Circuit decision pleased free speech advocates, while at the same time angered the members of the LDS Church. *See also* Heather May, *Free Speech, Religion Collide on SLC Plaza*, SALT LAKE TRIB., Jan. 5, 2003, at A1.

12. *First Unitarian Church*, 308 F.3d at 1119.

property. The defendant was the City, and the LDS Church entered the case as an intervenor. The plaintiffs challenged the facial validity of the restrictions because they claimed that the property remained a public forum. Prior to the sale, Main Street had been an historical location for demonstrations and other expressive activities.¹³ It is centrally located in downtown Salt Lake City. Most importantly, the street ran right between two blocks of the LDS Church's property—a prime spot to speak out against the Church.

Accordingly, the plaintiffs alleged that the First Amendment had been violated. They also asserted that the restrictions violated the Establishment Clause. In addition, they stated a cause of action under the Fourteenth Amendment, claiming that the restrictions discriminated between the public and the LDS Church in violation of the Equal Protection Clause. The plaintiffs sought declaratory and injunctive relief that the deed's restrictions violated their rights.¹⁴

III. THE DISTRICT COURT'S RULING

A. *The Public Forum Claim*

On May 14, 2001, the U.S. District Court for the District of Utah held for the City after all parties had moved for summary judgment.¹⁵ As to the First Amendment claim, the district court followed the reasoning in *Hawkins v. City and County of Denver*,¹⁶ stating that the *Hawkins* case was “the controlling legal authority.”¹⁷ Accordingly, the district court

13. See May, *supra* note 11.

14. *First Unitarian Church*, 308 F.3d at 1119.

15. *First Unitarian Church v. Salt Lake City Corp.*, 146 F. Supp. 2d 1155, 1159 (D. Utah 2001), *rev'd*, 308 F.3d 1114 (10th Cir. 2002), *cert. denied*, 123 S. Ct. 2606 (2003). The court first had to address *sua sponte* whether the plaintiffs' claims were ripe. *Id.* at 1163. None of the plaintiffs had presented evidence that the restrictions had been enforced. Their only evidence pointed to their belief that they would be escorted off the plaza if they attempted any sort of demonstration or public dialogue. *Id.* at 1164–65. The court held that “because the bans create a ‘direct and immediate dilemma’ for Plaintiffs that could place an ‘inhibiting chill’ on their First Amendment right to free speech,” the plaintiffs' First Amendment claims were ripe. *Id.* at 1165 (citation omitted).

16. 170 F.3d 1281 (10th Cir. 1999). In *Hawkins*, Denver turned a formerly public street into a walkway, the Galleria, that allowed pedestrians to access the various structures that constitute the Denver Performing Arts Complex. The court upheld Denver's ban on all leafleting, demonstrations, and similar activities because the court found the Galleria to be a nonpublic forum and the policy to be viewpoint neutral. *Id.* at 1283–84, 1288–89.

17. *First Unitarian Church*, 146 F. Supp. 2d at 1166.

cited *Hawkins* for the principle that the “government may close a First Amendment public forum by *inter alia*, selling the property, changing its ‘physical character’ or ‘principal use.’”¹⁸

In this case, the district court emphasized the fact that the LDS Church purchased the property for its full market value,¹⁹ that the LDS Church built new sidewalks in a different form and in different places than the old city sidewalks,²⁰ and that the LDS Church created a religious “enclave,” separate and distinct from nearby areas.²¹ Additionally, the court found persuasive the fact that the new plaza no longer constituted a “part of the City’s automotive, bicycle or transportation grid.”²² Consequently, the court held that because the physical characteristics, use, and purpose of the property had changed, the plaza no longer constituted a public forum.²³

The court then addressed whether the easement itself constituted a public forum and concluded that it did not. It held that the intent of the sale and the changes to the property ended its status as a public forum.²⁴ The court went on to state, “Intent is necessary to establish a designated public forum.”²⁵ The deed stated that the easement expressly negated the creation of a public forum.²⁶ However, because the City still had a property interest in the land, the court held that the City’s easement was a nonpublic forum and that the restrictions only have to be rationally

18. *Id.* (quoting *Hawkins*, 170 F.3d at 1287–88).

19. *Id.* Actually, the LDS Church may have paid far more than fair market value for the land. For the subsurface rights it purchased in 1995, the Church gave the city a parcel of property worth \$2.6 million. For the sale of the surface rights in 1999, the Church paid \$8.1 million. The total price was \$10.77 million, placing the land’s value at \$124 per square foot. As a reminder, the land only had sidewalks and a paved street on its surface. To compare this sale to the value of the nearby Crossroads Mall, the county tax rolls assessed the value of the mall at \$69 per square foot for land that had been extensively developed into a mall. In addition to all that the Church has paid, it had to pay more to purchase the easement. Brady Snyder, *Price of Plaza Keeps Rising*, DESERET NEWS, Dec. 24, 2002, at A1; *see also infra* text accompanying notes 173–92.

20. *First Unitarian Church*, 146 F. Supp. 2d at 1167.

21. *Id.* at 1167–68. Some of the distinctive features of the new plaza include distinctive paving, special lighting, landscaping, a large reflective pool, graded elevations, and security bollards to prevent motor traffic from entering the plaza. *Id.* Moreover, the court was impressed by the numbers of pedestrians who use the plaza daily to access Temple Square to the west and the Church administrative buildings to the east. The plaintiffs did not challenge the numbers or the assertion that the “vast majority” of pedestrian use constituted traffic in and out of Church-owned buildings and property adjacent to the plaza. *Id.* at 1168–69.

22. *Id.* at 1169.

23. *Id.* at 1171.

24. *Id.*

25. *Id.*; *see also infra* notes 88–91 and accompanying text.

26. *First Unitarian Church*, 146 F. Supp. 2d at 1171; *see also supra* note 10 and accompanying text.

related to a legitimate government purpose in order to be valid.²⁷

The court determined that the restrictions were valid. The City had a limited interest in the property—to ensure pedestrian access—and this interest was legitimate. The restrictions on speech and other activities did not interfere with this interest.²⁸ In addition, the City had a political interest in pedestrian easements in general without burdening the property owners with people seeking to express their First Amendment rights.²⁹ Therefore, the restrictions were rationally related to these purposes. To conclude its First Amendment analysis, the court simply stated, “[T]here exists no First Amendment right to associate on private property belonging to another.”³⁰

B. The Establishment Clause Claim

The district court found no violation of the Establishment Clause. The plaintiffs claimed that the deed delegated to the LDS Church the traditional government function of interpreting and enforcing the restrictions on the easement.³¹ In response, the City and Church argued that the plaintiffs did not present any evidence of collusion between the City and the LDS Church and that the sale of the property met the *Lemon* test.³² By meeting the test, the sale did not violate the Establishment Clause and did not delegate any traditional government function to the LDS Church.³³

The court found that the LDS Church had not received any special authority to determine who could access the easement across the plaza.³⁴ According to the West Church Plaza security policy, the LDS Church would call the City police if a pedestrian violated the restrictions.³⁵ If the police did not respond, the deed stated that the LDS Church could use any lawful means that any other private property owner has to

27. *First Unitarian Church*, 146 F. Supp. 2d at 1172; see also Randall P. Bezanson & William G. Buss, *The Many Faces of Government Speech*, 86 IOWA L. REV. 1377, 1404–05 (2001).

28. *First Unitarian Church*, 146 F. Supp. 2d at 1171.

29. *Id.* at 1173.

30. *Id.*; see also *infra* note 144.

31. *First Unitarian Church*, 146 F. Supp. 2d at 1174.

32. *Id.*; *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

33. *First Unitarian Church*, 146 F. Supp. 2d at 1174.

34. *Id.* at 1177.

35. *Id.*

enforce the restrictions.³⁶ As a result, the LDS Church had “not been delegated any exclusive state function or any special status or rights.”³⁷

Next, the court proceeded to analyze the sale of the property under three prongs of the *Lemon* test:

Under the *Lemon* test, a government act does not violate the Establishment Clause if (1) it has a secular purpose, (2) its principal or primary effect neither advances nor inhibits religion, and (3) it does not foster an excessive entanglement of church and state.³⁸

Applying this test, the court found that the sale of the property did not violate the Establishment Clause.³⁹

Under the first prong, the court found that the City had a secular purpose for the sale of the property. That purpose was to enhance Temple Square, one of Utah’s major tourist draws.⁴⁰ As the sale helped with this enhancement of the LDS Church’s property, the court determined that there could be incidental benefits to the LDS Church. Nevertheless, “incidental benefits to a religion from governmental action do not invalidate that action” under the Establishment Clause.⁴¹

Under the second prong, the court stated that a reasonable observer would find that the City’s sale of the property to the LDS Church did not primarily affect an advancement of religion. The City did not advance the LDS Church because the City sold the property for its full market value and because the City intended for the sale to promote a secular purpose—the enhancement of a tourist attraction so that more tourists could be accommodated.⁴²

36. *Id.*

37. *Id.*

38. *Id.* at 1177–78 (citing *Lemon v. Kurtzman*, 403 U.S. 602, 612–13 (1971)).

39. *Id.* at 1179.

40. *Id.* at 1178. On average, 3.5 to 9 million people visit Temple Square annually.

Id. The square sits immediately to the west of the new plaza.

41. *Id.* (citing *Bauchman v. W. High Sch.*, 132 F.3d 542, 555 (10th Cir. 1997)). *Bauchman* involved a student suing her high school, the school district, and the choir director for forcing her to sing religious songs in the school choir when she did not share those beliefs. *Bauchman*, 132 F.3d at 546. The plaintiff’s Establishment Clause claim arose because she had been ridiculed for objecting to the nature of the songs. The Tenth Circuit found no violation of the Establishment Clause because of the “obvious secular purposes” of the songs and because any benefit to religious was “remote, incidental or indirect.” *Id.* at 555.

42. *First Unitarian Church*, 146 F. Supp. 2d at 1178. At least one state’s constitution requires a stricter standard than the Federal Constitution. In California, the government is prohibited from “(1) granting a benefit in any form (2) to any sectarian purpose (3) regardless of the government’s secular purpose (4) unless the benefit is properly characterized as indirect, remote, or incidental.” *Paulson v. City of San Diego*, 294 F.3d 1124, 1131 (9th Cir. 2002) (en banc), *cert. denied*, 123 S. Ct. 1786 (2003). Consequently, even if the government has a proper secular purpose, the transaction would be void if the government’s *prestige* or *power* is lent to a sectarian purpose. *Id.* at 1130. Because of these strict requirements, the City of San Diego improperly sold the

Under the third prong, the court determined that the sale of the government property for full market value to the LDS Church did not foster excessive government entanglement in religion.⁴³ In fact, the court maintained that “[t]o have refused to make an otherwise justified sale solely because the purchaser was the temporal arm of a religious organization or because the [p]roperty would be used by its new owner for religious purposes would have shown perhaps unconstitutional hostility to religion.”⁴⁴

C. *The Equal Protection Claim*

The court expressed its opinion that the plaintiffs had failed to raise issues of material fact under the Equal Protection Clause—evidence of discrimination among similarly situated individuals.⁴⁵ All pedestrians using the plaza would be treated the same, according to the easement restrictions. The Church could enjoy the property differently, but its right flowed from its ownership of the property, not from the easement. Thus, the LDS Church was not similarly situated with the easement users.⁴⁶ As a final point, the court stated that because the easement was a nonpublic forum, for Equal Protection purposes, the restrictions on the easement must only be rationally related to a legitimate government interest.⁴⁷

part of Mount Soledad city park that contained a cross and veterans memorial in *Paulson*. Admitting that the city had a secular purpose of preserving the war memorial on the site, the Ninth Circuit also scrutinized the transaction for any benefit to a sectarian purpose. *Id.* at 1132. The court found that by including in the sale bid invitations the fact that the cross would be conveyed with the property and that the purchaser must maintain a war memorial, the city was promoting a Christian message. *Id.* Moreover, the purchaser received a financial benefit from the city because it would not have to bear the cost of removing the cross and replacing it with a secular memorial. *Id.* at 1133. Thus, the Ninth Circuit held that the City of San Diego had lent its power and prestige to the preservation of the cross in violation of the California Constitution. *Id.*

43. *First Unitarian Church*, 146 F. Supp. 2d at 1179.

44. *Id.*

45. *Id.* at 1180.

46. *Id.* at 1179.

47. *Id.* (citing *ACLU v. City of Las Vegas*, 13 F. Supp. 2d 1064, 1074 (D. Nev. 1998), *rev'd*, 333 F.3d 1092 (9th Cir. 2003)); *see supra* notes 27–30 and accompanying text. The *ACLU* case centered on the Fremont Street Experience Mall in Las Vegas, Nevada. The City of Las Vegas contracted with a private company to demolish five blocks of Fremont Street to create a mall. *ACLU*, 13 F. Supp. 2d at 1068–69. The district court in that case held that the mall did not retain its status as a traditional public forum as the *ACLU* claimed because the mall had not been created for public expression, but for economic purposes. *Id.* at 1074–78. Although the mall was a nonpublic forum, the court nevertheless held that some of the restrictions were not rationally related to any

D. The Ruling

As a result of its holdings in this case, the district court granted the motions for summary judgment for the City and the LDS Church and denied the plaintiffs' motion for partial summary judgment.⁴⁸ The plaintiffs appealed.

IV. THE TENTH CIRCUIT'S REVERSAL

On appeal, the Tenth Circuit⁴⁹ analyzed the motions for summary judgment *de novo*⁵⁰ and reversed the district court's ruling. The court found that an easement could be a public forum.⁵¹ It analogized to the numerous situations where the government has easements across privately owned public sidewalks. But the court did not hold that the First Amendment applies to all easements.⁵² Here, the court found that there was a traditional public forum because the City had dedicated the easement for a pedestrian thoroughway.⁵³ It also distinguished this case from other nonpublic forum sidewalk cases because the Main Street Plaza easement allowed for more than just pedestrian ingress or egress to LDS Church buildings.⁵⁴

Next, the court maintained that the LDS Church had not changed the property sufficiently to change the status of the easement. The LDS Church removed the entire street from sidewalk to sidewalk, and it built a pedestrian plaza in the place of the street. Nonetheless, the LDS Church had replaced the sidewalks in the same locations. Also, the

legitimate government interest. These invalid restrictions included a ban on leafleting and a licensing scheme for message-bearing merchandise. However, the court upheld the ban on solicitations. *Id.* at 1078–85.

On appeal, the Ninth Circuit held that the mall remained a public forum. *ACLU v. City of Las Vegas*, 333 F.3d 1092, 1106 (9th Cir. 2003). First, the court determined that the fact that the mall was open for public access was dispositive that speech activities would be compatible on the property. *Id.* at 1101. Second, economic activity had no bearing on determining the status of the mall as a public forum. *Id.* at 1102–04. Third, the court did not find that the characteristics of Fremont Street had changed; it remained “a commercial district and public thoroughfare.” *Id.* at 1105. Additionally, the court agreed that the leafleting ban and the license scheme were invalid. The court then remanded the case back to the district court to determine if the remaining regulations were proper time, place, or manner restrictions. *Id.* at 1106–09.

48. *First Unitarian Church*, 146 F. Supp. 2d at 1180.

49. Judges Seymour, McWilliams, and Henry decided this case. *First Unitarian Church v. Salt Lake City Corp.*, 308 F.3d 1114, 1117 (10th Cir. 2002), *cert. denied*, 123 S. Ct. 2606 (2003).

50. *Id.* at 1120.

51. *Id.* at 1121–24.

52. *Id.* at 1123 n.5.

53. *Id.* at 1126.

54. *Id.* at 1126–28.

sidewalks remained connected to the City's pedestrian grid, so the purpose of the sidewalks had not significantly changed.⁵⁵ Thus, the changes were insufficient to alter the status of the sidewalks as a public forum.⁵⁶

Finally, the court determined that the speech restrictions were not valid. It held that the LDS Church's right to restrict speech activities amounted to a "First Amendment Free Zone."⁵⁷ The complete prohibition of public speech violated the allowable speech regulations in a traditional public forum. The only regulations allowed are those necessary to serve a compelling state interest and that are narrowly drawn to achieve that end.⁵⁸ The court held that the current restrictions did not meet this test.⁵⁹ Also, the regulations were not valid time, place, and manner restrictions. In other words, they were not content-neutral and narrowly tailored to serve a significant government interest, leaving open an ample alternative channel of communication.⁶⁰

The court held that the City must be the party responsible for regulating speech on the property despite the LDS Church's claim that this arrangement would amount to an unconstitutional entanglement of the City with the LDS Church in the joint administration of the property.⁶¹ The court then remanded the case to the district court for findings consistent with its opinion.⁶²

V. THE RAMIFICATIONS OF THE TENTH CIRCUIT'S RULING

A. *Easements as Public Fora*

The court first analyzed the issue raised by the City and the LDS Church that the First Amendment cannot apply to an easement restricted solely for the purpose of pedestrian passage because speech activities are beyond the scope of the easement.⁶³ The court rejected the City and

55. The reader should recall that the district court found significant the fact that the plaza no longer was connected to "the City's automotive, bicycle or transportation grid." See *supra* note 22 and accompanying text.

56. *First Unitarian Church*, 308 F.3d at 1129–31.

57. *Id.* at 1132.

58. *Id.* at 1131–32.

59. *Id.*

60. *Id.* at 1132.

61. *Id.* at 1133.

62. *Id.* at 1133–34.

63. *Id.* at 1121.

LDS Church's contention that the First Amendment does not apply to nonpossessory property interests (for example, easements)⁶⁴ or that the property interest was not significant enough for constitutional analysis.⁶⁵ The court acknowledged a small body of case law that applies the First Amendment to all property belonging to the government or to property owned by a private party but burdened by the government.⁶⁶

The court's reasoning on this point was sound. It supported its conclusion that easements can be public fora with cases that applied First Amendment principles to mailboxes controlled by the government⁶⁷ and to sidewalks that had no government ownership.⁶⁸ Even more importantly, the court observed that the U.S. Supreme Court had recognized that First Amendment analysis does not even require "tangible government property" or "physical situs."⁶⁹

64. *Id.* at 1122.

65. *Id.*

66. *Id.*; see *infra* notes 67–69.

67. *First Unitarian Church*, 308 F.3d at 1122 (citing *U.S. Postal Serv. v. Council of Greenburgh Civic Ass'ns*, 453 U.S. 114, 129 (1981)). In *U.S. Postal Service*, although the Supreme Court applied the public forum principles to mailboxes, it nevertheless found that mailboxes were not public fora. The mailboxes did not exist for the communication of ideas, but for the receipt and delivery of mail. *U.S. Postal Serv.*, 453 U.S. at 128–30. Justice Brennan disagreed, stating the following:

I believe that the mere deposit of mailable matter without postage is not "basically incompatible" with the "normal activity" for which a letterbox is used, *i.e.*, deposit of mailable matter with proper postage or mail delivery by the Postal Service. On the contrary, the mails and the letterbox are specifically used for the communication of information and ideas, and thus surely constitute a public forum appropriate for the exercise of First Amendment rights

Id. at 137–38 (Brennan, J., concurring in judgment).

68. *First Unitarian Church*, 308 F.3d at 1122 (citing *Venetian Casino Resort v. Local Joint Executive Bd.*, 257 F.3d 937, 945 n.6 (9th Cir. 2001)). In *Venetian Casino Resort*, Las Vegas intended to widen Las Vegas Boulevard (the Strip). In order to do so, it needed to add another lane of travel where the then-existing public sidewalk was located. The Venetian Casino entered into an agreement to construct a sidewalk on its property, abutting the Strip. *Venetian Casino Resort*, 257 F.3d at 939–40. After constructing the private sidewalk, some of the Venetian's workers demonstrated on the sidewalk. The police refused to cite anyone. The Venetian brought suit to prevent further demonstrations on its property. *Id.* at 940–41. The Ninth Circuit, in a 2–1 decision, held that even though the sidewalk was private property, it remained a public forum. The court reasoned that the sidewalk historically had been a public forum, that it was interconnected with public sidewalks, and that the agreement dedicated the sidewalk for public use. Therefore, the restrictions on speech on the sidewalk were subject to the First Amendment. *Id.* at 941–48.

69. *First Unitarian Church*, 308 F.3d at 1122 (quoting *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 800–01 (1985)). In *Cornelius*, the Supreme Court agreed with the respondents that the "forum" constitutes more than just the physical property, e.g., the workplace. *Cornelius*, 473 U.S. at 800. It also includes the "access" that the party wishes to gain from the government, for example, the charity drive. *Id.* at 788. However, the Court also took into consideration the special needs of the federal workplace to which the respondents sought access. *Id.* at 800–02.

Looking to the public forum “archetype,” the court concluded that the Main Street easement was subject to First Amendment scrutiny. According to the U.S. Supreme Court, “Public streets are ‘the archetype of a traditional public forum.’”⁷⁰ In fact, the court of appeals noted that many public highways and streets are owned by private owners, but that through the means of an easement, they are “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.”⁷¹ Consequently, the court chose to apply the public forum doctrine to the Main Street Plaza easement. Nevertheless, the court qualified its holding in footnote five, maintaining:

[T]he mere fact the government has an easement rather than fee title does not defeat application of the First Amendment. We are not holding the converse, that the First Amendment applies to all easements. Whether or not a particular government easement warrants application of forum principles will depend on the characteristics of the easement, the practical considerations of applying forum principles, and the particular context the case presents.⁷²

Despite these qualifications, the court did not apply these limiting factors. Instead, the court determined that because an easement can be a public forum under the First Amendment, it would then proceed to analyze the case under forum principles.

Footnote five takes a step in the right direction in that property held by a private party should be considered differently than property owned by the government outright. Courts should address the practicality of

70. *First Unitarian Church*, 308 F.3d at 1123 (quoting *Frisby v. Schultz*, 487 U.S. 474, 480 (1988)). One author described why streets and parks are the archetype of a traditional public forum:

Streets and parks are part of the experience of all citizens. We ordinarily use streets and parks in a wide variety of roles and statuses, and hence we subject them to an enormous diversity of competing demands and uses. No one of these uses has automatic priority. . . . It is this fact, and not a tradition of public usage for expressive purposes, which underlies the Court’s firm and correct conclusion that streets should be seen as public forums.

Robert C. Post, *Between Governance and Management: The History and Theory of the Public Forum*, 34 UCLA L. REV. 1713, 1793–94 (1987) (footnotes omitted).

71. *First Unitarian Church*, 308 F.3d at 1123 (citations omitted).

72. *Id.* at 1123 n.5 (citing *Ark. Educ. Television Comm’n v. Forbes*, 523 U.S. 666, 672–77 (1998)). In *Forbes* the Court stated, “In the case of television broadcasting, however, broad rights of access for outside speakers would be antithetical, as a general rule, to the discretion that stations and their editorial staff must exercise to fulfill their journalistic purpose and statutory obligations.” *Forbes*, 523 U.S. at 673. Accordingly, a court should find that speech rights are “antithetical” to the rights private property owners have over their property, even if the government has an easement on that property.

applying forum analysis to private property and analyze the larger context of the situation. For example, one court determined that a church, even when opened up for a public purpose on an election day, is never a public forum.⁷³ In this case, the Main Street Plaza is a privately owned public space—a downtown plaza that is obviously owned by a church.⁷⁴ In addition, courts should consider the issue that many places traditionally held out as public forums no longer serve the purpose of exchanging ideas.⁷⁵ Ignoring these considerations when private property is being scrutinized will not sufficiently protect private property owners' rights. A petitioner should have a higher burden when trying to gain access to private property under the public forum doctrine.

B. Types of Public Fora

The most important goal behind the public forum doctrine is to protect vital areas where communication can occur, “especially because of how indispensable communication in these places is to people who lack access to more elaborate (and more costly) channels.”⁷⁶ The most important aspect of the freedom of expression is to have the ability to speak, and the public forum presents a place where public discussion and the political process can be facilitated.⁷⁷ “[T]he purpose of the public forum doctrine is to give effect to the broad command of the First Amendment to protect speech from governmental interference.”⁷⁸ It is

73. *United Food & Commercial Workers v. City of Sidney*, 199 F. Supp. 2d 739, 742–44 (S.D. Ohio 2002).

74. *See generally* JEROLD S. KAYDEN ET AL., *PRIVATELY OWNED PUBLIC SPACE: THE NEW YORK CITY EXPERIENCE* (2000) (summarizing the development of zoning regulations and laws that encouraged private developers to build public spaces—plazas, arcades, and atriums—in New York City, and including photographs and analyses of the quality of 320 buildings in New York that maintain public spaces).

75. *See* Steven G. Gey, *Reopening the Public Forum—From Sidewalks to Cyberspace*, 58 OHIO ST. L.J. 1535, 1538–39 (1998). The doctrine needs reanalysis by the Supreme Court because those locations that have served for so long as traditional public fora no longer are the primary places where the public communicates. Technology has changed where the public speaks. *See infra* note 76. Accordingly, the doctrine is no longer as helpful to the public as it once was in providing venues for speech activities.

76. LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* §12-24, at 987 (2d ed. 1988). In an age where communication can be more effective and more cost-efficient through the use of the Internet, the principles behind the public forum doctrine should be reevaluated. *See infra* note 155. The anomalous holding in the instant case also requires the reader to reexamine the doctrine because now a private party no longer can control the expressive conduct on its own property if the government retains an easement for pedestrian use across the property. When the government is limited in regulating speech on its own property, the cost to the government is minimal. Bezanson & Buss, *supra* note 27, at 1406. The cost cannot be said to be the same for a private party.

77. *Post, supra* note 70, at 1718.

78. *Int'l Soc'y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 697 (1992)

not so important whether one speaks, or if another will accept or hate the expression as it is to have the ability to express oneself.⁷⁹ The doctrine exists so that the government will always provide a venue for the public to speak.

Nevertheless, not all government property is classified as public fora. Moreover, just because a piece of government property is a public forum does not mean that the public can do or say anything on the forum. The government can restrict speech activities in a public forum, but the level of restriction depends on how the forum is classified.⁸⁰ The courts have recognized three types of public fora: the traditional public forum, the designated public forum, and the nonpublic forum.⁸¹

The first type of public forum, the traditional public forum, includes

(Kennedy, J., concurring in judgments). For an overview of the historical development of the public forum doctrine in the U.S. Supreme Court, see DOM CARISTI, EXPANDING FREE EXPRESSION IN THE MARKETPLACE: BROADCASTING AND THE PUBLIC FORUM 30–45, 65–68 (1992); Post, *supra* note 70, at 1718–64.

79. See Jamin B. Raskin & Clark L. LeBlanc, *Disfavored Speech About Favored Rights: Hill v. Colorado, The Vanishing Public Forum and the Need for an Objective Speech Discrimination Test*, 51 AM. U. L. REV. 179, 225–26 (2001) (giving several examples of expression that many people find offensive but are nevertheless protected under the First Amendment). Another author quite eloquently described why the idea of a public forum is so valuable to a democratic society:

Although the dynamics of real public forums may never have been as pure and honorable as the myth, the essential reality grasped by the public forum concept remains as valid today as it was when thousands of Socialists packed into Union Square in the early days of this century to hang on every word of great progressive orators such as Eugene Debs. The larger reality behind the myth of the debate on the public street-corner is that every culture must have venues in which citizens can confront each other's ideas and ways of thinking about the world. Without such a place, a pluralistic culture inevitably becomes Balkanized into factions that not only cannot come to agreement about the Common Good, but also will not even know enough about other subcultures within the society to engage effectively in the deal-making and horse-trading that is the key to every modern manifestation of democratic government. If the public forum is a myth, it is a myth that is indispensable to democracy, and certainly indispensable to a democracy defined by a constitution such as ours, in which free speech and expression are essential components of our political self-definition.

Gey, *supra* note 75, at 1538–39.

80. The reader should recall that the district court characterized the easement through the plaza as a nonpublic forum. As such, the City could implement any restriction on speech that was rationally related to a legitimate government purpose. See *supra* notes 27–30 and accompanying text.

81. *First Unitarian Church v. Salt Lake City Corp.*, 308 F.3d 1114, 1124 (10th Cir. 2002), *cert. denied*, 123 S. Ct. 2606 (2003); see also *Ark. Educ. Television Comm'n v. Forbes*, 523 U.S. 666, 676–79 (1998); *Hotel Employees & Rest. Employees Union v. Dep't of Parks & Recreation*, 311 F.3d 534, 544–47 (2d Cir. 2002).

those types of government property that have been “devoted to assembly and debate.”⁸² Thus, a traditional public forum is a location where the government cannot use its proprietary interest to stop expressive activities, as a normal property owner can.⁸³ The traditional public forum is created by tradition or by government fiat.⁸⁴ Upon being deemed a traditional public forum, the government has only a limited ability to restrict speech activities on that property.⁸⁵ Any restriction on speech will be subject to strict scrutiny by the courts. This scrutiny requires the government to show that the speech restrictions serve a compelling government interest and are narrowly tailored to serve that interest.⁸⁶ Additionally, the government may impose content-neutral time, place, and manner restrictions on speech activities, but the restrictions must be “narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication.”⁸⁷

The second type of public forum is the designated public forum or the limited public forum. With the designated public forum, the government has opened a previously closed forum for public discourse.⁸⁸ A designated public forum is also subject to strict scrutiny.⁸⁹ The limited public forum is one that the government designates specifically to allow “certain kinds of speakers or . . . the discussion of certain subjects.”⁹⁰

82. *First Unitarian Church*, 308 F.3d at 1124 (quoting *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 45 (1983)). The court had already pointed out that streets and parks are the best examples of traditional public fora. *See supra* notes 70–71 and accompanying text; *see, e.g.*, *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 757–58, 761 (1995) (finding that the plaza surrounding the state capitol is a traditional public forum); *Frisby v. Schultz*, 487 U.S. 474, 480–81 (1988) (stating that city and residential streets are traditional fora); *United States v. Grace*, 461 U.S. 171, 179–80 (1983) (declaring that the sidewalks surrounding the U.S. Supreme Court are traditional fora); *Hague v. Comm. for Indus. Org.*, 307 U.S. 496, 515–16 (1939) (finding streets and parks to be traditional public fora).

83. *Post, supra* note 70, at 1730.

84. *First Unitarian Church*, 308 F.3d at 1124.

85. *Grace*, 461 U.S. at 177; *see also* *Bezanson & Buss, supra* note 27, at 1402–03 (stating that as long as the traditional public forum remains “public,” speech rights are attached to it—the equivalent of a “constitutionally mandated easement[.]”).

86. *Perry Educ. Ass’n*, 460 U.S. at 45; *see, e.g.*, *Hotel Employees & Rest. Employees Union*, 311 F.3d at 545; *First Unitarian Church*, 308 F.3d at 1131–32.

87. *Perry Educ. Ass’n*, 460 U.S. at 45.

88. *Ark. Educ. Television Comm’n v. Forbes*, 523 U.S. 666, 677 (1998); *see also Perry Educ. Ass’n*, 460 U.S. at 45. A designated forum is only different from a traditional forum in the method of its creation. The government must expressly create a designate public forum.

89. *See Hotel Employees & Rest. Employees Union*, 311 F.3d at 545 (citing *Cornelius v. NAACP Legal Def. & Educ. Fund*, 473 U.S. 788, 800 (1985)).

90. *Id.* (quoting *N.Y. Magazine v. Metro. Transp. Auth.*, 136 F.3d 123, 128 n.2 (2d Cir. 1998)). “Examples of limited public fora include state university meeting facilities opened for student groups, open school board meetings, city-leased theaters, and subway platforms opened to charitable solicitations.” *Id.* (citations omitted).

Strict scrutiny applies to restrictions that apply to the authorized genre of speakers or discussion, but restrictions on all other forms of speech need only be viewpoint neutral and reasonable.⁹¹

All other government property constitutes either a nonpublic forum or something that is not a forum at all.⁹² On nonpublic forums, the government may restrict speech so long as the restraints on speech activities are reasonable and viewpoint neutral.⁹³

The Tenth Circuit did not add to the doctrine of the public forum. Nonetheless, the court never addressed the possibility that the Main Street Plaza easement could be a limited public forum⁹⁴—allowing the forum to be used for one genre of speakers—the members of the LDS Church. Instead, the court analyzed the plaintiffs’ argument on appeal that the easement constituted a traditional public forum, not a nonpublic forum as the district court held.⁹⁵

C. *Determining the Status of the Forum*

The Tenth Circuit proceeded to evaluate the easement according to the public forum doctrine factors and held that the easement constituted a traditional public forum. The court studied the record for evidence of the objective characteristics of the easement, the compatibility of the easement with speech activities, and the history of the property.⁹⁶

91. *Id.* at 545–46. This type of speech content regulation on limited public fora “comes awfully close to content discrimination.” Bezanson & Buss, *supra* note 27, at 1404. In fact, someone not belonging to the genre of approved speakers would not likely win in court if that person sought to gain access to the forum. Post, *supra* note 70, at 1757.

92. *First Unitarian Church v. Salt Lake City Corp.*, 308 F.3d 1114, 1124 (10th Cir. 2002), *cert. denied*, 123 S. Ct. 2606 (2003).

93. *Hotel Employees & Rest. Employees Union*, 311 F.3d at 546. “Examples of non-public fora include airport terminals, military bases and restricted access military stores, jailhouse grounds, and the Meadowlands Sports Complex.” *Id.* (citations omitted).

94. The doctrine of the limited public forum has created problems for the courts to implement. It “lack[s] a principled basis for distinction between invalid content-based restrictions and legitimate re-designations of a forum.” Matthew D. McGill, *Unleashing the Limited Public Forum: A Modest Revision to a Dysfunctional Doctrine*, 52 STAN. L. REV. 929, 940 (2000). In response to this inherent flaw in the doctrine, most courts have shied away from its application to the cases presented before them. Consequently, courts “either conclude[] that the property is a non-public forum or [they] rest[] the holding of the case on the presence of viewpoint discrimination.” *Id.*

95. *First Unitarian Church*, 308 F.3d at 1124–31.

96. *Id.*

1. Objective Characteristics

In spite of the express language in the deed that stated no public forum was created, the court looked to the objective characteristics of the easement.⁹⁷ Specifically, the court stated:

The most important considerations in this analysis are whether the property shares physical similarities with more traditional public forums, whether the government has permitted or acquiesced in broad public access to the property, and whether expressive activity would tend to interfere in a significant way with the uses to which the government has as a factual matter dedicated the property.⁹⁸

First, the court examined the City's legislative and publicly stated purpose in creating the easement as the most important objective characteristic of the easement.⁹⁹ The court looked at long range City plans for the area,¹⁰⁰ the ordinance passed to allow for the street closure and sale,¹⁰¹ the right of reverter in the deed,¹⁰² the city council meeting requesting that the City negotiate the right of reverter, and statements from the City that the sale hinged on the creation of the easement.¹⁰³ In other words, the court looked at all other evidence of the City's intent except for the express statement of intent in the deed denying the creation of a public forum.¹⁰⁴

While the court claimed that it did not analyze the City's intent, it in

97. *Id.* at 1125. The government should not be able to hide behind a statement of intent when the public's constitutional rights are implicated. Thus, the government's intent is not a factor in public forum analysis. *See* *ACLU v. City of Las Vegas*, 333 F.3d 1092, 1104 (9th Cir. 2003).

98. *First Unitarian Church*, 308 F.3d at 1125 (quoting *Int'l Soc'y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 698–99 (1992)).

99. *Id.* at 1126–27.

100. According to the court:

The City's stated purposes for promoting and approving the overall project were to increase usable public open space in the downtown area, encourage pedestrian traffic generally, stimulate business activity, and provide a buffer closed to automobile traffic between the residential area to the north of the plaza and the business areas to the south.

Id. at 1126.

101. The city council passed the ordinance authorizing the sale on the condition that "the City retain a perpetual pedestrian easement 'planned and improved so as to maintain, encourage, and invite public use.'" *Id.* (citation omitted).

102. *See supra* note 9 and accompanying text.

103. *First Unitarian Church*, 308 F.3d at 1126.

104. Some of this evidence included the fact that the City's planning commission had recommended that the easement not be restricted more than what is allowed at a public park. However, the city council rejected that language in the final ordinance approving the sale of the land to the LDS Church. *Id.* at 1118. Nevertheless, the court stated, the City "cannot simply declare the First Amendment status of property regardless of its nature and its public use." *Id.* at 1124. As discussed below, the Main Street Plaza's nature and public use are not so different from cases where the courts have found property to not be public fora. *See infra* notes 111–30 and accompanying text.

fact did so.¹⁰⁵ The City's intent became the most persuasive *objective* characteristic of the easement. The court evaluated intent, which is subjective in nature. Using the City's *subjective* intent as the most important *objective* characteristic reduces the credibility of the court's opinion. The court should have only focused its scrutiny on those characteristics that were actually *objective*. Instead, the court determined that all of this *subjective* evidence implied that the easement contained a broad public purpose.¹⁰⁶ The court should have looked solely to the deed, which stated that the easement allowed for pedestrian passage and access, and analyzed the significance of that fact under the public forum doctrine.

Next, the court ignored the LDS Church's *objective* evidence regarding the use of the property. For example, most pedestrians, either Church businessmen or tourists, use the sidewalks through the plaza to gain access to Church facilities.¹⁰⁷ The court stated that it chose to ignore this evidence because it was "at odds with the publicly and legislatively stated purposes of the easement."¹⁰⁸ The court's statement here seems to indicate that the public purpose of the easement is the most important factor in the application of the public forum doctrine. Nonetheless, the court does not make this point clear and should have done so.¹⁰⁹ Additionally, it asserted that because these pedestrians entered the plaza for Church purposes, unrelated to the easement, the LDS Church would have allowed them to enter the property anyway.¹¹⁰ Thus, in the court's view, the evidence was irrelevant to whether the easement constituted a public forum.

105. Later in the opinion, the court even recognizes that it looked to intent by stating "the City's express intent not to create a public forum . . . is at odds with . . . the City's express purpose of providing a pedestrian thoroughway." *First Unitarian Church*, 308 F.3d at 1131. The City's purpose is intent, so the court looked beyond the scope of its inquiry of analyzing objective characteristics.

106. *Id.* at 1126.

107. *See supra* note 21. In fact, a subsequent three-month study of the pedestrian traffic using the Main Street Plaza proved that most of the pedestrians use the plaza for access to neighboring LDS Church property. On average, out of the thousands of daily pedestrians, only approximately 500 people traverse the plaza on a daily basis. Moreover, if the LDS Church at some point in the future chose to close down the plaza, these pedestrians would only have to walk an extra two blocks at most to arrive at their destinations. Heather May, *Advisory Board Backs City's Plaza Plan*, SALT LAKE TRIB., Mar. 5, 2003, at B2.

108. *First Unitarian Church*, 308 F.3d at 1127.

109. *See infra* notes 201–06 and accompanying text.

110. *First Unitarian Church*, 308 F.3d at 1127.

Finally, the court took into consideration the actual physical characteristics of the plaza.¹¹¹ The City and the LDS Church did compare the sidewalks to those in the *Hawkins* case.¹¹² The Tenth Circuit in the *Hawkins* case held that the sidewalks within the Galleria leading to the Denver Performing Arts Complex (DPAC) did not constitute a public forum because the “Galleria does not form part of Denver’s automotive, bicycle or pedestrian transportation grid, for it is closed to vehicles, and pedestrians do not generally use it as a throughway to another destination.”¹¹³ The court distinguished *Hawkins* from the instant case because the sidewalks through the plaza form part of the pedestrian grid, the public has access to the plaza, and the sidewalks are like other sidewalks that are public forums.¹¹⁴

*a. Main Street Plaza Compared to the Denver
Performing Arts Complex*

The Tenth Circuit’s distinction between *Hawkins* and this case seems unpersuasive. The Galleria in the *Hawkins* case was open to the public and was constructed on what used to be a public street.¹¹⁵ Moreover, the vast majority of the pedestrians using the Galleria did not use the throughway to go to another place.¹¹⁶ However, this fact did not mean that a pedestrian could not use the throughway for such purpose. The Galleria, a 600-foot throughway, connects to Fourteenth Street at one end and Speer Boulevard at the other if one passes through a sculpture park.¹¹⁷ A small distinction between the two cases is that Denver, the city itself, does not allow demonstrations or leafleting unrelated to the performances at the DPAC.¹¹⁸

However, the biggest distinction between the two cases is that Salt Lake City specified in the deed that the Main Street easement allowed for pedestrian passage, whereas Denver did not have such a document for the Galleria. Therefore, the Tenth Circuit could not find that the Galleria connected to the pedestrian grid when hardly anyone used the throughway except for access to the DPAC. Salt Lake City’s deed

111. See *supra* note 12 and accompanying text.

112. *First Unitarian Church*, 308 F.3d at 1127; *Hawkins v. City & County of Denver*, 170 F.3d 1281 (10th Cir. 1999).

113. *Hawkins*, 170 F.3d at 1287–88.

114. *First Unitarian Church*, 308 F.3d at 1127–28.

115. *Hawkins*, 170 F.3d at 1287. Compare to the sidewalks in the LDS case. See *supra* notes 6–12 and accompanying text.

116. *Hawkins*, 170 F.3d at 1287. Compare to the sidewalks in the LDS case. See *supra* note 21.

117. *Hawkins*, 170 F.3d at 1284.

118. *Id.* at 1288.

expressly mentioned that the easement was created for pedestrians, so the Tenth Circuit may have felt obliged to distinguish this case from *Hawkins* on that fact alone. Once the court found that the sidewalks running through the Main Street Plaza were an “archetype” of a public forum, it decided that it could not “examine whether special circumstances would support downgrading the property to a less protected forum.”¹¹⁹

b. Main Street Plaza Compared to the Lincoln Center

However, courts do not always classify all sidewalks and roads as public fora.¹²⁰ The Second Circuit handed down an opinion implicating the public forum doctrine shortly after the Tenth Circuit’s opinion on the Main Street Plaza case. In *Hotel Employees & Restaurant Employees Union v. City of New York Department of Parks & Recreation*,¹²¹ the Second Circuit concluded that the Lincoln Center Plaza was not a traditional public forum.¹²² That plaza is situated in the center of the Lincoln Center Performing Arts Complex, “bounded by Avery Fisher

119. *First Unitarian Church*, 308 F.3d at 1129 n.11 (citing *Frisby v. Schultz*, 487 U.S. 474, 481 (1988)). In *Frisby*, the Supreme Court held that all streets are public fora no matter who owns the title, including streets running through residential neighborhoods. *Frisby*, 487 U.S. at 480–81. However, the Supreme Court held that the city’s ordinance to prohibit picketing outside an individual’s home was not facially invalid. The ordinance was narrowly tailored to serve the state’s interest in preserving the home as a place where one should not be captive to speech that one does not wish to hear. Thus, the city could enforce an injunction against antiabortion picketers outside an abortion practitioner’s home. *Id.* at 484–88. *But see* *Thomason v. Jernigan*, 770 F. Supp. 1195, 1202–03 (E.D. Mich. 1991) (holding that the city’s action of vacating public pedestrian and parking access to the cul-de-sac in front of a Planned Parenthood clinic was not narrowly tailored).

120. *See, e.g.*, *United States v. Kokinda*, 497 U.S. 720, 727–28 (1990) (distinguishing a sidewalk leading to a post office from one abutting a street); *Hawkins*, 170 F.3d at 1287 (holding that the Galleria, a sidewalk connecting the various buildings of the Denver Performing Arts Center, was not a public forum); *Chicago Acorn v. Metro. Pier & Exposition Auth.*, 150 F.3d 695, 702 (7th Cir. 1998) (concluding that sidewalks leading to pier facilities are not traditional public fora because they are not through-routes); *Garrison v. City of Lakeland*, 954 F. Supp. 246, 250 (M.D. Fla. 1997) (maintaining that a private road leading up to a hospital was not a traditional public forum because it was not dedicated for public use by the city); *Rouse v. City of Aurora*, 901 F. Supp. 1533, 1537 (D. Colo. 1995) (holding that protestors could not demonstrate on a private sidewalk that provided access to the shopping center’s stores); *Chad v. City of Fort Lauderdale*, 861 F. Supp. 1057, 1061 (S.D. Fla. 1994) (stating that a sidewalk built within the last two years bordering a public beach is not a traditional or designated public forum).

121. 311 F.3d 534 (2d Cir. 2002). The LDS Church based its appeal to the Supreme Court on *Hotel Employees*. Heather May, *Plaza Case Appealed to High Court*, SALT LAKE TRIB., Mar. 13, 2003, at D1.

122. *Hotel Employees*, 311 F.3d at 548.

Hall on the north, the Metropolitan Opera House on the west, the New York State Theater on the south, and Columbus Avenue on the east.”¹²³ The Lincoln Center conveyed the plaza to the city after the performing arts complex was completed. However, Lincoln Center, Inc. manages the entire property.¹²⁴ Under its management powers, the company schedules events on the plaza, but it only approves events “having a performance, entertainment or artistic component.”¹²⁵

The Second Circuit held that the plaza was not a public forum because of its location and primary purpose. The plaza was the centerpiece of the performing arts complex, easily distinguishable from a typical park and easily recognizable as being “some special type of enclave.”¹²⁶ The fact that some pedestrians used the plaza to access surrounding streets was only an “incidental feature” of the plaza, not its primary purpose.¹²⁷ The plaza’s purpose served as an extension of the performing arts complex—a forecourt for the complex.¹²⁸ Moreover, the land had not been dedicated for public use.

In the Main Street Plaza case, the Tenth Circuit, like the Second Circuit, could have focused on the fact that the plaza was obviously a religious enclave and that the property served to connect two parcels of the LDS Church’s property, creating a seamless web.¹²⁹ In fact, the plaza runs directly through the middle of the Church’s property—a new centerpiece for the Church grounds. Instead, the Court decided that the City’s easement is “better compared to the easement which the Ninth Circuit held was a public sidewalk, and therefore a traditional public forum, in *Venetian Casino*.”¹³⁰

c. Main Street Plaza Compared to the Venetian Casino

The Ninth Circuit held that the private sidewalk in front of the Venetian Casino was a traditional public forum.¹³¹ The Ninth Circuit’s decision was based on the fact that the prior sidewalk in front of the property had been a public forum, that the general public used the sidewalk because it was connected to and indistinguishable from the

123. *Id.* at 540.

124. *Id.* at 540–41.

125. *Id.* at 541.

126. *Id.* at 550 (quoting *United States v. Grace*, 461 U.S. 171, 180 (1983)). *But see supra* note 21 and accompanying text.

127. *Hotel Employees*, 311 F.3d at 550.

128. *Id.* at 551.

129. *See supra* note 21 and accompanying text.

130. *First Unitarian Church v. Salt Lake City Corp.*, 308 F.3d 1114, 1128 (10th Cir. 2002), *cert. denied*, 123 S. Ct. 2606 (2003); *see also supra* note 68; *infra* note 156.

131. *Venetian Casino Resort v. Local Joint Executive Bd.*, 257 F.3d 937, 948 (9th Cir. 2001).

public sidewalks to the north and south, and that the sidewalk was dedicated for public use.¹³²

The Main Street case is most factually similar to *Hawkins* and *Hotel Employees*, where the courts did not find a public forum. Nevertheless, the most distinguishing fact from these cases is the dedication of the easement for public access and passage, which makes the Main Street case more like the *Venetian Casino* case.¹³³ Yet, no court has explicitly stated that a public dedication always creates a public forum. Therefore, the Tenth Circuit had to look at other factors, such as the compatibility of speech on the easement and the history of the property. However, these traditional public forum factors make the Main Street case seem more similar to *Hawkins* and *Hotel Employees*.

2. Compatibility of Speech Activities

The second factor the Tenth Circuit addressed was “whether speech activities are compatible with the purpose of the easement.”¹³⁴ Having found that the plaza sidewalks share many characteristics with other traditional public fora, the court concluded that prohibiting all speech activities on the easement was “implausible” and that speech activities should not interfere with pedestrian traffic because people are “capable of circumnavigating the occasional protestor.”¹³⁵ Therefore, the court held that speech activities are compatible with the easement.¹³⁶ Admitting that circumstances may arise wherein expressive activities could be disruptive to pedestrian passage, the court assumed that reasonable time, place, and

132. *Id.* at 947.

133. The dedication of the private Venetian Casino sidewalk to public use was intensely criticized by the dissent in that opinion. “The majority . . . cobbl[ed] together a dedication from various provisions in the contract, while ignoring the great weight of the contractual language demanding the opposite conclusion.” *Id.* at 956–57 (Brunetti, J., dissenting). The same criticism could be said of the Tenth Circuit in that they ignored the express language of the deed that clearly stated that the easement did not create a public forum. *See First Unitarian Church*, 308 F.3d at 1124.

134. *First Unitarian Church*, 308 F.3d at 1128.

135. *Id.* (quoting *Lederman v. United States*, 291 F.3d 36, 43 (D.C. Cir. 2002)). In *Lederman*, Robert Lederman was arrested for distributing literature at the East Front sidewalk on the U.S. Capitol Grounds. *Lederman*, 291 F.3d at 39–40. Lederman challenged the constitutionality of the ordinance under which he was arrested. The court held that the sidewalks, while not bordering a public street, were a public forum. *Id.* at 44. The court further held that the ban on expressive activities on the Capitol sidewalks was unconstitutional because the ordinance was not narrowly tailored, seriously prohibiting speech without providing a significant benefit to the government. *Id.* at 46.

136. *First Unitarian Church*, 308 F.3d at 1129.

manner restrictions are available to prevent potential disruptions.¹³⁷

The court did not analyze whether speech activities were compatible with the LDS Church's property rights.¹³⁸ At this point in the opinion, the court should have discussed "the practical considerations of applying forum principles, and the particular context the case present[ed]."¹³⁹ Instead, the court maintained, "[T]he effects of expressive activit[ies] such as congestion, noise, and disruption . . . are the necessary cost of securing our First Amendment freedoms and these effects must be tolerated to a reasonable extent."¹⁴⁰ Most government property, however, does not constitute a public forum.¹⁴¹ In fact, the free admittance to government property does not automatically create a public forum.¹⁴² Indeed, the First Amendment only creates a duty for the government not to restrict speech.¹⁴³ The private property owner has no such duty.¹⁴⁴

137. *Id.* at 1128–29.

138. *Id.* In *Greer v. Spock*, 424 U.S. 828 (1976), Justice Brennan feared that the rigid characterization of a place as a public forum or nonpublic forum would lead to unjust results. He desired a more flexible approach to the cases involving the protection of speech. He did not want the Court to focus on the presence of a public forum. *Greer*, 424 U.S. at 859 (Brennan, J., dissenting). He stated:

Realizing that the permissibility of a certain form of public expression at a given locale may differ depending on whether it is asked if the locale is a public forum or if the form of expression is compatible with the activities occurring at the locale, it becomes apparent that there is a need for a flexible approach. Otherwise, with the rigid characterizations of a given locale as not a public forum, there is the danger that certain forms of public speech at the locale may be suppressed, even though they are basically compatible with the activities otherwise occurring at the locale.

Id. at 860; *see also* Post, *supra* note 70, at 1744.

139. *First Unitarian Church*, 308 F.3d at 1123 n.5; *see supra* note 72 and accompanying text.

140. *First Unitarian Church*, 308 F.3d at 1129 (citing Int'l Soc'y for Krishna Consciousness, Inc. v. Lee, 505 U.S. 672, 701 (1992) (Kennedy, J., concurring in judgment)). The newlywed couple, which had just left the LDS temple on December 17, 2002, probably would not agree. Rather than being greeted by family members and friends after their wedding ceremony and enjoying their company, they had to suffer through a preacher shouting into a megaphone as the couple had their wedding pictures taken. No one stopped the preacher. Heather May, *Plaza Noise Not Protected Speech*, SALT LAKE TRIB., Jan. 9, 2003, at D3. That same week, a group of men shouted anti-Mormon catcalls through bullhorns at another wedding party. Reid, *supra* note 11.

141. *See infra* note 199 and accompanying text. One scholar, Jerold Kayden, argues that because public expression is occurring more often at privately owned areas, like shopping malls, private subdivisions, and stadiums, the government should put these private property owners on notice that this type of property should be open to the public. Molly McDonough, *Defining a Public Space: Courts Interpret the Meaning of 'Traditional Public Forum'*, A.B.A. J., Mar. 2003, at 24. Jerold Kayden studied many open, private areas in New York City that the public enjoys, and he argues that people using those areas should have greater rights. *See* KAYDEN ET AL., *supra* note 74, at 55–59.

142. *Greer*, 424 U.S. at 836; *see also* Post, *supra* note 70, at 1740–41.

143. U.S. CONST. amend. I.

144. *See* *Hudgens v. NLRB*, 424 U.S. 507, 518–20 (1976); *see also* *First Unitarian Church v. Salt Lake City Corp.*, 146 F. Supp. 2d 1155, 1165–66 (D. Utah 2001), *rev'd*,

Therefore, the goals of the public forum doctrine should be balanced against the private party's ownership rights to prevent private property from being unduly burdened by the First Amendment.

3. History

The third and final factor that the court analyzed was the history of the property. The court recognized that the government has the authority to close a public forum by "selling the property, changing its physical character, *or* changing its principal use."¹⁴⁵ However, the court here never considered whether the sale and the retention of the easement were sufficient to change the status of the forum. Consequently, the court scrutinized the history of Main Street before the sale, rejecting the argument that it should only consider the history of the easement since its creation at the moment of the sale of the property.¹⁴⁶ Upon evaluating Main Street's history, the court held that the use and character of the property had not changed sufficiently to convert the status of the forum.¹⁴⁷

The court looked solely to the history of Main Street, which demonstrated that Main Street had been a public forum. The court acknowledged that the "mere fact that a space is on what used to be a public street does not automatically render it a public forum."¹⁴⁸ On the other hand, the court found that the primary purpose had not changed—providing a pedestrian

308 F.3d 1114 (10th Cir. 2002), *cert. denied*, 123 S. Ct. 2606 (2003); S. Robert Carter, III, *The Sound of Silence: Why and How the FCC Should Permit Private Property Owners to Jam Cell Phones*, 28 RUTGERS COMPUTER & TECH. L.J. 343, 368 (2002) (reaffirming that the law does not require the private property owner to hold out their property for public discussion despite the fact that the many important gathering places are located on private property). *But see* McDonough, *supra* note 141, at 24 (discussing Jerold Kayden's arguments that private property owners should have this duty where their property is used as a place for expressing ideas).

The Supreme Court has concluded that where a private party provides facilities similar to those provided by municipalities, such as sidewalks, streets, and public parking, the First Amendment does not automatically apply to that private property. *Lloyd Corp. v. Tanner*, 407 U.S. 551, 568–69 (1972). The *Lloyd* Court did not give the petitioner First Amendment rights at a private shopping center. *Id.* at 570. *But see* *Pruneyard Shopping Ctr. v. Robins*, 447 U.S. 74, 81 (1980) (allowing a state constitution to create greater First Amendment protections so that speech rights could be granted at a private shopping center as long as those greater rights did not amount to a taking).

145. *First Unitarian Church*, 308 F.3d at 1130 (quoting *Lee*, 505 U.S. at 699–700) (emphasis added).

146. *Id.* at 1129–30.

147. *Id.* at 1130–31.

148. *Id.* at 1130 (citing *Hawkins v. City & County of Denver*, 170 F.3d 1281, 1287 (10th Cir. 1999)).

passage as part of the City's transportation grid. The pedestrians using the easement would be the same pedestrians who used the sidewalks abutting Main Street prior to the sale.¹⁴⁹ As Main Street previously had been open to public speech, the court determined that "the most important functions" of the property had not changed and that these functions were tied to speech activities.¹⁵⁰ Therefore, the history of the property aided the court's conclusion that the easement was a traditional public forum, unchanged by the sale of the property.¹⁵¹

Subsequently, the court compared the changes in this case to those in *Hawkins*. This comparison shows how slight the factual distinctions among the public forum doctrine cases are. The court stated the following:

In *Hawkins*, the court found that the walkways had changed sufficiently not only because they served a different purpose—ingress and egress to the DPAC facilities—but also because their physical nature was different, that is, they dead-ended at DPAC rather than remaining part of the city's pedestrian grid. Here, while certain physical characteristics of the walkways have changed, they are still intended to provide passage through, not to, Church property.¹⁵²

Despite what the court stated, the factual distinctions between the two cases were minimal. In both, pedestrians could use the properties to pass from one street to another.¹⁵³ Both throughways were constructed over prior public streets. Also, most people using the properties use them for ingress and egress.¹⁵⁴ In other words, the *Hawkins* case is hardly distinguishable from this case, except for the express public use dedication in the easement.

The court also ignored the fact that most of the property as a whole had been altered significantly. The sidewalk's purpose had not changed, but the property itself had. Motorists no longer can use it for passage, but pedestrians use the plaza daily to access the LDS Church's property.

Another unanswered question in the Main Street case is whether the historical analysis of the property is relevant to whether the locale is *actually* used for speech purposes.¹⁵⁵ The way people communicate has

149. *Id.* at 1130–31.

150. *Id.* at 1131.

151. *Id.*

152. *Id.* at 1130 (citation omitted).

153. *See supra* notes 115–17 and accompanying text.

154. *See supra* note 21.

155. The historical analysis can often draw arbitrary results, especially when different fora have different ages. Consequently, they have different traditions, making the comparison of one forum to another an exercise in line-drawing, for which places receive special constitutional speech protection. *Post, supra* note 70, at 1758–60. Moreover, how speech occurs has significantly changed over time:

Linking the public forum doctrine to quaint notions of Sunday strolls by Speakers' Corner will do nothing to open avenues of communication in the world where most modern communication takes place—inside public buildings

changed, but the court never addressed this issue. Instead, it continued to rely on the historical comparison of the new Main Street Plaza to the old Main Street.¹⁵⁶

The historical analysis was inconsistent and unhelpful for this situation. The petitioner's burden should be high for a court to find that a piece of private property constitutes a public forum. This burden should not be met by a weak historical analysis, for the law still recognizes that selling the property can change the status of the forum.¹⁵⁷

D. Regulating Speech on the City's Easement

On a traditional public forum, the government has the power to regulate speech activities only to the extent that the

regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end. The [government] 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.¹⁵⁸

Applying this standard to the speech regulations¹⁵⁹ on the Main Street

and halls, alongside public buildings dedicated to activities other than community gatherings, over government-developed networks such as the broadcast media and the Internet, and through programs funded by the government that facilitate the dissemination of ideas throughout the country.

Gey, *supra* note 75, at 1575. Gey also supports abandoning the historical comparison of a new, potential forum to a street. Instead, he argues, “[T]he public forum doctrine . . . [should] apply to any instrumentality ‘specifically used for the communication of information and ideas.’” *Id.* at 1576 (quoting *U.S. Postal Serv. v. Council of Greenburgh Civic Ass’ns*, 453 U.S. 114, 137 (1981) (Brennan, J., concurring in judgment)).

156. In *Venetian Casino*, the Ninth Circuit also did not analyze the history of the actual property interest. The property where the Venetian built the sidewalk had always been private property. The court scrutinized the history of the prior existing sidewalk along Las Vegas Boulevard, which had been demolished to make room for the added lane of road traffic. *Venetian Casino Resort v. Local Joint Executive Bd.*, 257 F.3d 937, 953 (9th Cir. 2001) (Brunetti, J., dissenting).

157. *Int’l Soc’y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 699–700 (1992) (Kennedy, J., concurring).

158. *First Unitarian Church v. Salt Lake City Corp.*, 308 F.3d 1114, 1131–32 (10th Cir. 2002), *cert. denied*, 123 S. Ct. 2606 (2003) (quoting *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 45 (1983)); *see supra* notes 82–87 and accompanying text. *But see, e.g.*, *Hawkins v. City & County of Denver*, 170 F.3d 1281, 1288–92 (10th Cir. 1999) (analyzing the “reasonableness” of the speech restrictions on a nonpublic forum).

159. *See supra* note 10. The Church’s speech rights arise from its property rights as the owner of the property. They do not arise from the easement. Therefore, all speech is banned by the easement.

Plaza easement, the court found that the restrictions were invalid.¹⁶⁰

In this instance, the Tenth Circuit compared the plaza speech restrictions to those in *Board of Airport Commissioners v. Jews for Jesus, Inc.*¹⁶¹ In that case, the government passed a statute that practically banned all First Amendment expression at the Los Angeles International Airport (LAX). The Supreme Court maintained that “such a ban cannot be justified even if LAX were a nonpublic forum because no conceivable governmental interest would justify such an absolute prohibition of speech.”¹⁶² In this case, the Tenth Circuit claimed that the City’s restrictions also created a “First Amendment Free Zone”¹⁶³ because no one could express an opinion except for the LDS Church. The court concluded that if the City truly wants an easement through the Main Street Plaza, it must allow speech because the easement is a public forum. “Otherwise, [the City] must relinquish the easement so the parcel becomes entirely private.”¹⁶⁴

Subsequently, the court acknowledged that the City does not have to allow speech on the easement that may affect public safety, upset the competing uses of the easement, or cause distressing levels of noise at inappropriate times.¹⁶⁵ Recognizing that the LDS Church has “the primary anchor of interest in the property,” the court emphasized that the City has the right to impose reasonable time, place, and manner restrictions that can take into account the Church’s property and religious interests.¹⁶⁶

On a final note, the court determined that only the City could regulate speech on the plaza, not the LDS Church.¹⁶⁷ The Church claimed that such

160. *First Unitarian Church*, 308 F.3d at 1132. “Once a new forum is labeled either public or non-public, the battle over whether private speech can occur in that forum is usually decided.” Gey, *supra* note 75, at 1548. The City and the LDS Church could not hope for the Tenth Circuit to uphold the restrictions if it held that the easement was a public forum.

161. 482 U.S. 569 (1987).

162. *Id.* at 575.

163. *First Unitarian Church*, 308 F.3d at 1132.

164. *Id.*

165. *Id.*

166. *Id.* at 1133. Salt Lake City already has codes against disturbing the peace. Some of the codes include prohibiting the issuance of a permit for a sound device within 500 feet of a church and prohibiting the disruption of a gathering. Unfortunately, since the Tenth Circuit handed down this opinion, and before the eventual sale of the easement, the police did enforce the codes on the plaza. The Mayor feared a lawsuit, especially because protestors on the plaza threatened legal action. Offended pedestrians expressed a desire not to call the police on obnoxious people because they did not want to feed the contention. See May, *supra* note 140. Arguably, the restrictions in the easement did prohibit expressive conduct similar to that which valid time, place, and manner restrictions prohibit because of the nature of the property. See *supra* note 10. Thus, the court went too far in concluding the easement was a First Amendment free zone. See *supra* notes 161–64 and accompanying text.

167. *First Unitarian Church*, 308 F.3d at 1133. *But see* Hotel Employees & Rest.

a holding would violate the Establishment Clause. Without analyzing the Church's claim under the *Lemon* test,¹⁶⁸ the court merely responded that it was "not persuaded."¹⁶⁹

Perhaps the reasoning behind the court's cursory holding on this issue encompasses the doctrine of state action. In *Hotel Employees*, handed down just weeks after the Tenth Circuit's decision, the Second Circuit upheld a licensing agreement with Lincoln Center, Inc., a private party, to allow Lincoln Center to regulate speech on New York City's property.¹⁷⁰ The court did not find a constitutional violation with the enforcement of the regulations. Consequently, it did not determine whether Lincoln Center was a state actor acting on behalf of New York City and thus liable as the government would have been if there had been a violation.¹⁷¹ While

Employees Union v. Dep't of Parks & Recreation, 311 F.3d 534, 554 (2d Cir. 2002) (allowing Lincoln Center Inc., to continue to determine which permits to issue for use of the Lincoln Center Plaza, which is city property).

168. See *supra* note 38 and accompanying text. The U.S. Supreme Court also recognizes two other establishment tests. Besides the *Lemon* test, the Court has used the endorsement test and the coercion test. The endorsement test questions whether "the challenged governmental action is sufficiently likely to be perceived by adherents of the controlling denominations as an endorsement, and by the nonadherents as a disapproval, of their individual religious choices." *County of Allegheny v. ACLU*, 492 U.S. 573, 597 (1989) (quoting *Sch. Dist. of Grand Rapids v. Ball*, 473 U.S. 373, 390 (1985)). The Supreme Court in *Lee v. Weisman*, 505 U.S. 577 (1992), established the coercion test. It states:

[T]he principle that government may accommodate the free exercise of religion does not supersede the fundamental limitations imposed by the Establishment Clause; and (2) it is beyond dispute that, at a minimum, the Constitution guarantees that government may not coerce anyone to support or participate in religion or its exercise, or otherwise act in a way which establishes a state religion or religious faith, or tends to do so.

Ross Schmierer, Comment, *An Attempt to Pick up the Fallen Bricks of the Wall Separating Church and State After Santa Fe v. Doe*, 67 BROOK. L. REV. 1291, 1301 (2002).

169. *First Unitarian Church*, 308 F.3d at 1133. The court did not address the issue of whether the sale of the property to a religion violates the Establishment Clause, indicating agreement with the district court that the sale did not constitute a violation. See *supra* notes 31–44 and accompanying text. The sale of the property to a religion may nonetheless constitute government speech in some abstract sense. If so, the government cannot favor or disfavor religion by such an action. See *Bezanson & Buss*, *supra* note 27, at 1406–09. Nevertheless, the courts do not overrule government actions that incidentally benefit a religion. See *supra* note 41 and accompanying text. The Church paid full price for the property and did not obtain any favoritism from the City. See *supra* note 19.

170. See generally *Hotel Employees & Rest. Employees Union*, 311 F.3d at 539, 541. Lincoln Center, Inc. limited expressive activities on the Lincoln Center to those "having a performance, entertainment or artistic component." *Id.* at 541.

171. *Id.* at 543–44. However, private parties may never rise to the status of a state actor. See *Carter*, *supra* note 144, at 367.

providing little guidance on the subject of state action, *Hotel Employees* is an important example of where a court allows a private party to regulate speech on government property.

If the Tenth Circuit had allowed the LDS Church to regulate speech on the easement, then it would have had to address whether the Church was a state actor. If the court had found that the Church was a state actor, the situation would have implicated the Entanglement Clause.¹⁷² The court never reached this issue, and it ruled that the City must regulate speech activities on the easement.

VI. ENDGAME

The Tenth Circuit reversed and remanded the district court's ruling.¹⁷³ Rather than ending the controversy, the ruling only stirred the local debate.¹⁷⁴ The LDS Church was upset that it paid for land that it thought it could control as the private property owner.¹⁷⁵ The Church thought that the ruling invalidated the easement, requiring the City to give it up, while the City contended that only the restrictions on the easement were invalid.¹⁷⁶

In order to end the controversy, Mayor Rocky Anderson proposed to sell the easement to the LDS Church in exchange for land the LDS

172. In determining whether a private party is a state actor, courts look at several factors: 1) [W]hether there was a sufficient nexus between the state and the private actor which compelled the private actor to act as it did; 2) whether the private actor has assumed a traditionally public function; and 3) whether there is a sufficient "symbiotic relationship" between the state and the private actor so that the state may be recognized as a joint participant in the challenged activity.

Citizens to End Animal Suffering & Exploitation, Inc. v. Faneuil Hall Marketplace, Inc., 745 F. Supp. 65, 69 (D. Mass. 1990) (citing *Blum v. Yaretsky*, 457 U.S. 991, 1004–05 (1982); see also *Rendell-Baker v. Kohn*, 457 U.S. 830, 841–42 (1982)). In *Faneuil Hall Marketplace*, the district court held that the marketplace, owned in fee simple by the city and leased to a private party, retained its status as a traditional public forum under both the public function and symbiotic relationship tests. *Faneuil Hall Marketplace*, 745 F. Supp. at 70–75. The district court in the Main Street case distinguished *Faneuil Hall* from the instant facts in that the lessor exercised police power over those who used the easement, and the marketplace had no distinguishable boundaries with the adjacent public areas. *First Unitarian Church v. Salt Lake City Corp.*, 146 F. Supp. 2d 1155, 1170 (D. Utah 2001), *rev'd*, 308 F.3d 1114 (10th Cir. 2002), *cert. denied*, 123 S. Ct. 2606 (2003). Seemingly, both *Hotel Employees* and *Faneuil Hall* imply that the LDS Church would have had to do more than just ask the police to remove those people who would have violated the easement restrictions. See *supra* notes 34–37 and accompanying text.

173. *First Unitarian Church*, 308 F.3d at 1133–34. J. Ted Stewart reversed his ruling in January 2003. Heather May, *Judge Reverses Himself on Plaza*, SALT LAKE TRIB., Jan. 31, 2003, at C3.

174. See *supra* note 11.

175. Snyder, *supra* note 19.

176. *First Unitarian Church*, 308 F.3d at 1126 n.8. The court did not resolve this contention between the City and the Church as to the effect of the case. The Church was reluctant to return to court to decide this issue. Heather May, *City Not Obligated on Plaza*, SALT LAKE TRIB., Dec. 23, 2002, at D1.

Church owned on the west side of town in Glendale¹⁷⁷—land necessary for the City to obtain a \$5 million commitment of funds for a community center on the site.¹⁷⁸ The proposed deal also required the City and the Church to each pay one half of the American Civil Liberties Union's (ACLU) attorney fees for the lawsuit.¹⁷⁹

In lieu of the easement-land exchange, the ACLU threatened to file another action against the City. It claimed that it would have two grounds for a lawsuit. First, the ACLU would claim that the City violated the Establishment Clause by endorsing the Latter-day Saints faith.¹⁸⁰ Second, it would claim that even if the City could sell the easement to the LDS Church, the property would remain a public forum because the property retains the public function of a sidewalk.¹⁸¹ In fact, one attorney for the ACLU stated that in order for the City to avoid another lawsuit, the LDS Church “would have to put up a brick-and-mortar fence and turn [the plaza] into a private courtyard or construct buildings on the plaza.”¹⁸²

Initially, the Avenues and Glendale neighborhoods, the City's transportation board, the Chamber of Commerce, and the Downtown Alliance all supported the land swap.¹⁸³ However, at least two city council members stated that they would not support the community center solution.¹⁸⁴ Members of the Glendale neighborhood, while supportive of the community center overall, were concerned about the increase in taxes that would be necessary to run the center.¹⁸⁵

177. Originally, the mayor just wanted to enforce the time, place, and manner restrictions on the plaza. His office developed a plan that would allow free speech on ten percent of the plaza, permitting the Church to restrict speech on the remainder. When the LDS Church expressed disapproval of the Mayor's plan, the Mayor developed the land swap proposal. Brady Snyder, *Rocky to Take Lead on Plaza*, DESERET NEWS, Mar. 20, 2003, at B1.

178. The Alliance for Unity plans to develop the site. The community center would house offices for the University of Utah and Intermountain Health Care, which would provide free legal, business, and medical advice, and educational opportunities for adults and children. Brady Snyder, *Council Questions Plaza Proposal*, DESERET NEWS, Jan. 6, 2003, at B1.

179. May, *supra* note 6. While asking for more in attorney fees, the ACLU agreed to a sum of \$200,000. Heather May, *SLC to Pony up \$200,000 to ACLU Lawyers*, SALT LAKE TRIB., Apr. 25, 2003, at A1.

180. May, *supra* note 6.

181. Snyder, *supra* note 178.

182. May, *supra* note 6.

183. Heather May, *Glendale Backs Deal to End Plaza Fight*, SALT LAKE TRIB., Mar. 22, 2003, at B2.

184. Brady Snyder, *2 on Council Seek Plaza Restrictions*, DESERET NEWS, Mar. 20, 2003, at A1.

185. May, *supra* note 183.

As a result, the land swap was not certain to occur. Therefore, the LDS Church filed an appeal to the Supreme Court on March 12, 2003, while still preferring the land swap as the ultimate solution to the controversy.¹⁸⁶

In May 2003, the City had the easement across Main Street Plaza appraised at \$500,000, or five percent of the plaza's overall value.¹⁸⁷ J. Philip Cook & Associates performed the appraisal, and they also appraised the LDS Church's land in Glendale at \$275,000 and the current overall value of the Main Street Plaza at \$9.3 million.¹⁸⁸ For the easement, the LDS Church would give the Glendale land to the City and pay \$104,586 for the ACLU's attorney fees and \$250,000 for the building of a community center on the Glendale land, for a total of nearly \$630,000.¹⁸⁹

On June 10, 2003, the Salt Lake City Council voted 6–0 with one abstention for the plan to exchange the easement for the LDS Church's land in Glendale and money.¹⁹⁰ The exchange became official on July 28, 2003.¹⁹¹ Both Mayor Anderson and the LDS Church's Presiding Bishop H. David Burton hoped the exchange would end the controversy.¹⁹²

Then, on August 7, 2003, the ACLU filed suit against Mayor Anderson and Salt Lake City for giving in to pressure from and unduly favoring the LDS Church, thus violating the Establishment Clause.¹⁹³ The ACLU also alleged that the City could not remove free speech from a traditional public forum even by a sale of the land to a private party, basing this claim mostly on the recent Ninth Circuit ruling¹⁹⁴ in *ACLU v. City of Las Vegas*.¹⁹⁵ Thus the controversy continues.

186. May, *supra* note 121.

187. Heather May, *Plaza Easement Appraisal Ready*, SALT LAKE TRIB., May 15, 2003, at A1. The ACLU criticized the appraisal as a "paltry" sum because First Amendment rights are "priceless." *Id.*

188. *Id.*

189. *Id.*

190. Heather May, *S.L. Council OKs LDS Plaza Swap*, SALT LAKE TRIB., June 11, 2003, at A1.

191. May, *supra* note 5.

192. *Id.*

193. Brady Snyder, *ACLU Rekindles the Main Plaza Ire*, DESERET MORNING NEWS, Aug. 8, 2003, at A1 [hereinafter Snyder, *ACLU Rekindles*]. The plaintiffs in this new suit include the Utah Gospel Mission, the First Unitarian Church of Salt Lake City, Shundahal Network, the Utah National Organization for Women, Craig Axford, and Lee Siegel. Brady Snyder, *ACLU Plaza Suit Includes Several Plaintiffs*, DESERET MORNING NEWS, Aug. 8, 2003, at A5.

194. Snyder, *ACLU Rekindles*, *supra* note 193; *see supra* note 47.

195. 333 F.3d 1092 (9th Cir. 2003).

VII. CONCLUSION

The Tenth Circuit's opinion in *First Unitarian Church* is a controversial ending to a complex situation. The factual distinctions among cases implicating the public forum doctrine do not fully justify the holdings.¹⁹⁶ To further illustrate that the factual distinctions are not sufficient, the district court compared the facts in this case to many of the same cases, and the district court ruled differently than the Tenth Circuit.¹⁹⁷ Relying on this line of cases, especially when applying the public forum doctrine to private property, will continue to be problematic for future litigants until the doctrine is made clearer.

The court should have taken into consideration the LDS Church's property stake much earlier in the case. The court's decision to analyze the easement separate and apart from the LDS Church's proprietary interest is unsettling. First, private property owners have no duty to hold out their property as public fora for expressive purposes.¹⁹⁸ Second, most government property is not open for expressive purposes. "The government would simply be unable to perform its proper functions if it had to work with and around a wide range of speech uses competing for government space."¹⁹⁹ Similarly, not every property burdened by a government easement should be a public forum. The private party's proprietary interest must be respected when determining the public forum status of a government easement on private property.²⁰⁰

The *Venetian* court stated that "by dedicating the property to public use, the owner has given over to the State . . . 'one of the most essential sticks in the bundle of rights that are commonly characterized as property,' the right to exclude others."²⁰¹ If this statement is conclusive in and of itself for public forum analysis, then the City's easement through Main Street Plaza has to be a traditional public forum. Consequently,

196. "[F]our different federal courts, confronted with three substantially similar programs, approached the public forum doctrine in five different ways . . . [and] reached three different decisions regarding the type of forum at issue." Suzanne Stone Montgomery, Note, *When the Klan Adopts-A-Highway: The Weakness of the Public Forum Doctrine Exposed*, 77 WASH. U. L.Q. 557, 558 (1999) (footnotes omitted).

197. See *supra* notes 15–30 and accompanying text.

198. See *supra* note 144.

199. Bezanson & Buss, *supra* note 27, at 1473.

200. See *Lloyd Corp. v. Tanner*, 407 U.S. 551, 570 (1972).

201. *Venetian Casino Resort v. Local Joint Executive Bd.*, 257 F.3d 937, 946 (9th Cir. 2001) (quoting *Dolan v. City Tigard*, 512 U.S. 374, 393 (1994)).

the rest of the court's analysis on history and compatibility was moot and, in fact, hardly relevant. Under this reasoning, a private owner who has property burdened by an easement dedicated to public use has to hold out the property as a traditional public forum.

The question for the courts should be whether the private property *is* public in nature, not whether it *is like* public property, because "property [does not] lose its private character merely because the public is generally invited to use it."²⁰² Thus, limiting a court's analysis of the public forum doctrine to whether private property has been dedicated to public use does not adequately address all of the concerns raised by this Casenote. The analysis should not be so simple when both property and First Amendment rights are in conflict. These concerns include whether an easement can have a limited public use, and whether the separate quality of the private property can put the public on notice that they are not accessing a public forum.²⁰³

Determining whether private property should be subject to constitutional standards, such as the public forum doctrine, is "necessarily fact-bound."²⁰⁴ Therefore, courts should look beyond the document dedicating the private property to public use. They must also determine whether the property's characteristics put the public on notice that a private party owns the property.

Under this modified public forum doctrine, courts will only use the first and second factors, objective characteristics and compatibility of speech, in analyzing private property burdened by a government easement or regulation.²⁰⁵ Their analysis will be limited to scrutinizing the objective characteristics of the property in deciding whether the public has notice of the private nature of the property. For example, if the government sold a traditional public forum, the private party should make the necessary changes to the property in order to put the public on notice. These changes might include putting up signs or changing the nature of the property, as the LDS Church did to Main Street. In addition, courts will evaluate the compatibility of the government property interest to determine if it has been dedicated for public use.²⁰⁶ In this case, there was a public dedication for pedestrian access and passage.

202. *Lloyd Corp.*, 407 U.S. at 569.

203. *See Venetian Casino Resort*, 257 F.3d at 945 (citing *Int'l Soc'y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 680 (1992)).

204. *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 939 (1982); *see also Citizens to End Animal Suffering & Exploitation, Inc. v. Faneuil Hall Marketplace*, 745 F. Supp. 65, 69 (D. Mass. 1990).

205. *See supra* note 96 and accompanying text.

206. Thus, a utility easement or an easement solely reserved for government access would not cause the private property to be dedicated for a public use. The public must be guaranteed some sort of use in order for the doctrine to even be implicated.

The courts should not look to the history of the property so that private property owners are not unduly burdened by constitutional constraints and so that they are not discouraged from purchasing property from the government in the future.²⁰⁷ In summary, under the modified approach, courts will decide whether the private property has been dedicated for public use. If so, they will hold that the property is a public forum unless the property owner puts the public on notice that the property is now private. Under this approach, the court would have concluded that the Main Street Plaza was not a public forum because the public had been put on notice.²⁰⁸

This method allows the government and private property owners to determine how the sale of the property will affect the property's public forum status. This method will permit privately held public sidewalks and parks to remain public fora because the public cannot tell that the property is private while also letting the government retain easements for limited public uses, such as pedestrian access and passage. If the government can allow pedestrian access and passage on its property without also creating a public forum, then government easements should not be treated differently.²⁰⁹

This method addresses all of the concerns expressed in this Casenote and even addresses U.S. Supreme Court Justice Black's concern regarding the rights of the private property owner:

I have never believed that [the First Amendment] gives any person or group of persons the constitutional right to go wherever they want, whenever they please, without regard to the rights of private or public property or to state law. . . . [The First Amendment] does not guarantee to any person the right to use someone else's property, even that owned by government and dedicated to other purposes, as a stage to express dissident ideas.²¹⁰

207. Since 1998, the LDS Church has been trying to acquire Martin's Cove, an area in Wyoming where the Martin Handcart Company, a group of LDS pioneers from Britain, became waylaid in the snow in 1856. Resistance has met the attempt to purchase the land. In January 2003, Senator Craig Thomas of Wyoming announced that the Bureau of Land Management would offer a twenty-year lease to the Church to manage the property. The Church has not yet accepted this compromise. It has expressed reluctance to accept anything other than full property rights because of the Main Street Plaza situation. Christopher Smith, *Senator's Announcement of Lease Offer on Martin's Cove Is News to Parties*, SALT LAKE TRIB., Jan. 18, 2003, at A1.

208. See *supra* text accompanying notes 19–23 (outlining the changes that would put the public on notice that the property had switched owners and now belonged to the LDS Church).

209. See, e.g., *supra* note 120.

210. *Brown v. Louisiana*, 383 U.S. 131, 166 (1966) (Black, J., dissenting).

While this solution will help create a better balance between free speech rights and private property rights, the entire doctrine needs reevaluation. The places where the public speaks have changed. The public forum doctrine guarantees a venue to speak, but the venues are changing. The U.S. Supreme Court should take the next public forum doctrine case on appeal, apply this modified approach, evaluate the principles behind the doctrine, and determine how the factors could be reworked to better meet the goals of the public forum doctrine.

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