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Architectural Trusteeship

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With regard to traditional public forum spaces, the Supreme Court has imposed certain duties on governments as "trustees." These duties include a responsibility to ensure access to public parks, streets, and (most) sidewalks, and adherence to a principle of anti-discrimination (although it may not include a duty to preserve any forum spaces in perpetuity, or require diversity of speech or speakers). The trusteeship principle is problematic in the sense that it continues what I (and others) believe to be the categorical error of treating forum doctrine as a matter of property principles, rather than deeper spatial concerns. However, the principle does provide a basis for imposing some obligation on government to open, maintain, and perhaps preserve certain spaces.

In an earlier post, I noted some of the benefits of Marvin's broad conception of spatial architecture. Here I raise a potential complication. With regard to public forum spaces, the trustee concept arises principally from the fact of governmental ownership and the need for minimal access for exercise of fundamental rights of speech, assembly, and petition. Trusteeship is rooted in the special nature of these places, in particular their historical connection to First Amendment liberties. I wonder what normative or other basis exists for treating other speech spaces in a similar manner. In other words, on what basis can government be said to have an obligation (whether judicially enforceable or not) of some sort to open and diversify not only traditional public forum spaces but new spaces, virtual spaces, private spaces, and regulated (but not publicly owned) spaces? I understand from Marvin's account that the doctrine can be interpreted to support this result, and that legislators can be "constitutional norm entrepreneurs." But to impose or argue for diversity, sufficiency, and other requirements across a broad range of channels and spaces, don't we need a trusteeship principle, or something like it, for the entire architecture? Can one be found in, or fashioned from, doctrine or other sources?

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