Property, Place, and Public Discourse

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I. INTRODUCTION

For their effective exercise, First Amendment rights require ample and adequate places in which speakers and listeners can communicate.[1] They require places where speakers and listeners can connect, communicate, and perhaps even confront one another. This Madisonian vision of public discourse is seriously threatened by our physical, spatial environment.[2] We live in what might be called a socio-fugal environment. The character and properties of our architectures, of our public spaces, do not generally invite or encourage public discourse. Vast public areas have effectively been privatized. The public spaces that remain are often designed to facilitate commerce and recreation, rather than expression. Opportunities for truly public discourse, discussions of public issues that take place *in public*, are thus relatively scarce.

Expressive rights are intimately connected to the concept of "place." We must speak in terms of "rights" because the adequacy of place typically affects more than the right of an individual speaker to express herself. The rights to assemble and to petition the government for redress of grievances are also implicated in many constitutional disputes involving access to place. Many of these cases involve more than a single speaker, and hence implicate the rights of expressive association. Cindy Sheehan may have started a lonely

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1. NAACP v. Button, 371 U.S. 415, 433 (1963) (noting that First Amendment rights require breathing space).

2. Free speech has long been associated with ideals of democratic self-governance. *See generally* ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT (1st ed. 1948).

vigil in Crawford, Texas, to protest the war in Iraq and mourn her son's death, but she did not remain alone for very long. And, of course, the rights of listeners and viewers to hear and see speech must also be considered. Public speech effectively invites public participation.

Public expression is somewhat unique in this sense. Many constitutional rights are, in a sense, purely "private." It is my personal right not to be subjected to unreasonable searches, to avoid self-incrimination, and to be free from cruel and unusual punishment.[3] To be sure, there is also social benefit in the recognition of those rights, but I do not require the participation of anyone else to effectively possess and assert them. They are not participatory in the same way as public expression.

First Amendment rights require markets, public participation, and community dialogs. None of this is possible without place. With regard to speech exercised in public, these rights can be effective only if and to the extent that speakers and listeners are in the same places. It is thus self-evident that if there is to be a market*place* of ideas, if speakers and listeners are to self-govern in some meaningful way, they must have ample public room in which to do so.

Place ought to lie at the center, rather than at the margins, of our constitutional discourse regarding freedom of expression. We should be as concerned with issues of place, or *where*, as we are with issues of *what* a person can legally communicate to others, or *who* may decide the scope of expressive rights, or *why* officials regulate speech.

This, however, has not been the case. A set of spatial rules governing where speech may lawfully occur has gradually developed.[4] But our current doctrines of place are as socio-fugal as our physical environment. It has been over sixty years since the Supreme Court identified any new "quintessential" public places for expressive activity. Public streets, parks, and sidewalks, officially

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3. *See* U.S. CONST. amend. IV (prohibiting unreasonable searches and seizures); *id*. amend. V (protecting the right against self-incrimination); *id*. amend. VIII (banning "cruel and unusual" punishment).

4. *See* Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37 (1983) (describing the public forum doctrine).

recognized in 1939 as presumptively open to expression, remain the only places to earn this distinction.[5] Further, even in these places, speakers have only very limited "easements" for expressive activity.[6] Most public spaces are considered mere properties; they are treated as if they are *owned* by the government. The properties where the public gathers are treated as if they have little or nothing to do with expression. Under the First Amendment, they are analyzed categorically, functionally. Thus, *malls* exist to facilitate commerce.[7] *Airports* exist to facilitate travel.[8] Under the current approach to place, there is no tradition of expression in these properties. Unless the government permits expression, no expressive tradition will ever transpire there. The upshot is that in the public places where people routinely gather, speakers have very limited rights to engage listeners on matters of public interest.

Of course, speakers still have the right to expect that the content of their expressions will not be used as a criterion for allocating space for speech. When the government deems it necessary or expedient to utilize spatial restrictions on speech, it is required to "narrowly tailor" these restrictions and to ensure that "ample" and "adequate" alternative places are available for the displaced expression.[9] These terms suggest a certain degree of spatial sensitivity. But in truth, as actually interpreted and applied, these are relatively minor limits, at least as compared to the fundamental expressive rights at stake. Today, access to public places is treated as more of an indulgence than as a fundamental right. It can be balanced away in favor of a growing list of interests, such as in governmental proprietorship and management, public order, aesthetics, privacy, repose, and now increasingly interests relating to "security." This is so even in "quintessential" public places such as streets and parks. Indeed, it is a

5. *See* Hague v. Comm. for Indus. Org., 307 U.S. 496 (1939) (recognizing streets and parks as public forums).

6. *See* Harry Kalven, Jr., *The Concept of the Public Forum:* Cox v. Louisiana, 1965 SUP. CT. REV. 1, 13 (arguing that speakers have "easement" for speech on public streets).

7. *See* Hudgens v. NLRB, 424 U.S. 507 (1976) (holding that labor picketers had no right to demonstrate at a shopping center); Lloyd Corp. v. Tanner, 407 U.S. 551 (1972) (holding that protesters of the Vietnam War had no right to distribute handbills in a shopping center).

8. Int'l Soc'y for Krishna Consciousness, Inc. v. Lee, 505 U.S. 672, 678–80 (1992) (holding that airports are non-public fora).

9. *See* Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989).

testament to the fragility of the fundamental rights to publicly assemble and communicate that they may yield even to such seemingly trivial concerns as the harm that will come to *public lawns* by their mere exercise.[10]

As troubling as this may be, we have entered a period of modernity that will even further challenge public discourse and our commitment to making room for public expression. The conditions of this late stage of modernity include: technological advance, social alienation, secularization, commodification, the erosion of physical boundaries and barriers, urbanization, diversification, democratization, and mobility. When we add the specter of terrorism to this list, it becomes apparent that public discourse is facing a substantial threat.

The extent to which spatiality intersects with these conditions, and is in turn affected by them, is truly remarkable. Place, then, is a significant socio-legal issue. Socio-fugal doctrine threatens to exacerbate an existing socio-fugal physical environment. Conditions of modernity, in turn, will impact both the application of law and our spatial environment. Because we are lawyers and not architects or city planners, the physical environment naturally cannot be our primary focus. We must assume a general deficit of socio-petal, or speech-facilitative, places and architectures. We must instead ask whether our legal doctrines of place can accommodate public discourse *given* the spatial environment, the *places*, that we actually have. And if they cannot, we must consider what changes might be made to preserve the exercise of fundamental public speech rights.

This Symposium focuses on the Rehnquist Court's contributions to speech jurisprudence. The Rehnquist Court presided at a time when the aforementioned conditions of modernity were just beginning to affect our public spatial environment. As the Rehnquist Court took shape, the basic doctrines of place had substantially materialized. Speech had already been removed from malls. Place

10. *See* Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288 (1984) (upholding prohibition on overnight demonstrations at the National Mall, in part on the ground that the lawn would be damaged); *see also* Timothy Williams, *Keeping Great Crowds off the Great Lawn*, N.Y. TIMES, Apr. 27, 2005, at B1 (reporting that the New York City Parks Department intends to limit gatherings on the Great Lawn to 50,000 people, "a move that would end an era in which hundreds of thousands of people turned to the park as a place to protest").

had been conceptualized as mere property. Public speech activity, which had been a great facilitator of the civil rights movement, was by then considered by many to be a public nuisance. But "place" was nevertheless still something of a work in progress. The Rehnquist Court's stewardship of public places spanned a period that witnessed unique challenges to public expression. This Article will examine the Court's responses to those challenges, with an emphasis on the manner in which its decisions regarding access to public places affected public discourse.

How has the Rehnquist Court's conception and treatment of "place" positioned us in terms of future possibilities for public debate and discourse? What sort of "expressive topography" has the Court fashioned, or at least contributed to? Does that topography encourage public debate and dialogue? Or does it facilitate separation and avoidance, driving speech further into private places? What impact has the Rehnquist Court's approach had on the prospects for robust public discourse?

I will argue that the Rehnquist Court largely left our "expressive topography" worse than it found it.[11] As had predecessor Courts, the Rehnquist Court treated public places as little more than public properties managed by public officials. But its impact on public discourse actually extended beyond this. The Rehnquist Court diminished the scope of speakers' rights in even quintessentially open places such as streets and sidewalks. Among other things, the Court's decisions also tacitly approved the practice of zoning expression in public places. The Court even recognized a listener's right to avoid offensive expression in *public* places. Finally, the Court refused to recognize any new "quintessential" public forums, places in which speakers can claim strong rights of public expression. Taken together, these developments substantially diminished the prospects for public discourse.

In the final part of this Article, I will make broad suggestions as to how we might go about preserving discourse in public places. Part of

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11. For additional discussions of the intersection of speech and spatiality, see Timothy Zick, *Space, Place, and Speech: The Expressive Topography*, 74 GEO. WASH. L. REV. 439 (2006) [hereinafter Zick, *Space, Place, and Speech*]; Timothy Zick, *Speech and Spatial Tactics*, 84 TEX. L. REV. 581 (2006) [hereinafter Zick, *Speech and Spatial Tactics*].

the challenge is to recognize that public expression is not merely symbolically important. Protests and other public expressive activities are not mere historical curiosities. The world over, speakers continue to gather and express themselves in public places.[12] Insofar as we view such exercises in our own country as ineffective or stale, we must ask what role our conception of place and corresponding doctrines play in affecting our exercise of public speech rights. It is imperative that speakers assert, on their own behalfs and on behalf of potential listeners, a constitutional right to place. Courts must finally be convinced to take "place" seriously.

We cannot fault the Rehnquist Court alone for the current state of place under the First Amendment. The Court inherited the principal constitutional doctrines of place, namely the "public forum" and "time, place, and manner" doctrines, from prior Courts. But there is nothing constitutionally sacred about either of these doctrines. Indeed, "place" itself is not a self-defining concept. The Rehnquist Court, like its predecessors, *chose* to implement a particular conception of place.

I will argue that the "forum" concept, which is rooted in principles of property, should be replaced by a distinct conception of "place." I will sketch a concept of "place" that is rooted in inter-disciplinary treatments of place, rather than in narrow legal notions of property.[13] I will then use that conception of place to advance a different analysis of spatial issues as they impact public discourse. With regard to the "time, place, and manner" doctrine, I will argue that place should not only be conceptually, but also *mechanically*, severed from time and manner. Place *is* different from these other things; if public discourse is to be preserved, it must be treated as distinct.

II. PLACE AND PUBLIC EXPRESSION

Speech is, of course, wholly ineffectual without an audience to hear it. Speakers naturally seek to reach listeners in public places,

12. *See, e.g.*, Joseph Kahn, *China Hopes Economy Plan Will Bridge Income Gap*, N.Y. TIMES, Oct. 12, 2005, at A9 ("The number of mass protests in China increased to 74,000 last year from 10,000 in 1994, according to police figures.").

13. I have articulated this theory of "expressive place" in greater detail elsewhere. *See supra* note 11.

where they can be found in large numbers. They use places as platforms for making statements, for garnering attention, and for facilitating social interaction. Without these places, there can be no meaningful public discourse. The manner in which Courts have treated place conceptually and doctrinally under the First Amendment fails to appreciate this intersection of speech and spatiality. Conditions of modernity, including fundamental changes to our expressive environment, have only further complicated this already complex relationship.

A. The First Amendment and Public Properties

Initially, speakers naturally sought to reach listeners on public streets and sidewalks. This, of course, was where potential audiences were generally found at the turn of the nineteenth century. But then-Massachusetts Supreme Judicial Court Justice Oliver Wendell Holmes, Jr., soundly rejected speakers' "right" to assemble and communicate in these public places.[14] The state, he said, *owned* the streets and sidewalks.[15] Like any private owner of property, it could deny speakers access as it saw fit.

Public discourse was saved, at least in principle, when this notion of ownership was seemingly rejected in *Hague v. Committee for Industrial Organization*.[16] The *Hague* Court stated, although in dictum, that wherever "title" to the public streets and sidewalks lay, these places were "immemorially" open to communicative activity, and in particular to "*assembly, communicating thoughts between citizens, and discussing public questions.*"[17] These particular places were held "in trust" by government for the benefit of the people.

Hague actually settled very little in terms of access to public places. For one thing, it left vague the implications of the government's status as "title holder" of public properties. For another, *Hague*'s commitment to speech rights in these quintessential

14. *See* Commonwealth v. Davis, 162 Mass. 510 (1895), *aff'd* Davis v. Massachusetts, 167 U.S. 43, 48 (1897) (upholding government's "right to absolutely exclude all right to use" streets and parks).

15. *Davis*, 162 Mass. at 512.

16. 307 U.S. 496 (1939).

17. *See id.* at 515 (emphasis added).

public places was merely dictum. But *Hague* said enough to open the streets and sidewalks, and even listeners' front doors, to the activities of Jehovah's Witnesses and other pioneering public speakers.[18] Willing, undecided, and even unwilling listeners could thus be reached where they were most likely to be found—on the streets and in their homes. In public, at least, listeners were not protected from personal, intimate forms of communication. Indeed, not even their "personal" spaces were off limits to speech, unless they manifested their desire to be left alone.[19]

In an influential article, Harry Kalven, Jr., read the *Hague* dictum and other cases that followed to support "a kind of First-Amendment easement" to the people to use streets and sidewalks as "forums" for expression.[20] Kalven realized that the provision of public space was critical to the impending civil rights movement. Indeed, he correctly predicted that the civil rights movement would need the streets if it was ultimately to alter hearts, minds, and policies.[21] Violent images of brutal police tactics *in the streets* played a significant role in the struggle against official segregation and private racism.[22]

As it turns out, the civil rights era may have been a high-water mark in terms of access to public places for expressive purposes. In addition to the streets, sidewalks, and public parks, the Court also permitted civil rights protesters to access other public places, such as libraries, to convey their messages.[23] And for a very brief moment in the early 1970s, the Court adopted the view that so long as the form of expression was not "incompatible" with a particular property, speakers ought to be able to reach listeners in that place.[24]

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18. *See* Kalven, *supra* note 6, at 16–21 (noting activities of Jehovah's witnesses and early solicitation cases).

19. *See* Martin v. City of Struthers, 319 U.S. 141 (1943) (invalidating ban on door-to-door solicitation).

20. *See* Kalven, *supra* note 6, at 13.

21. *See id*. at 11.

22. *See* MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY 440 (2004) (recounting protest tactics in Selma and the public's reaction to scenes of police brutality at street demonstrations shown on television).

23. *See* Brown v. Louisiana, 383 U.S. 131 (1966) (invalidating a breach of peace conviction for a silent demonstration in a public library).

24. *See* Grayned v. City of Rockford, 408 U.S. 104, 116 (1972) (inquiring "whether the manner of expression is basically incompatible with the normal activity of a particular place at a particular time").

But in the 1970s, political and social changes altered the spatial environment. Listeners did not remain on the streets and in parks. In the 1970s, they moved, *en masse*, into malls and other commercial structures. Of course, speakers naturally tried to engage listeners there as well. But first labor picketers, and later Vietnam protesters, were excluded from these "private" places.[25] Malls, it should be noted, closely resemble the "public squares" they replaced. However, the Court ultimately considered malls to be primarily commercial properties, not expressive places.[26] Fifth Amendment private property rights trumped First Amendment rights to engage in public discourse in these locations.[27]

Because they generally could no longer be found on streets and could not be reached in malls and other private commercial properties, speakers sought listeners in alternative public places. They claimed rights of access to the sidewalks near listeners' homes, near schools, and adjacent to other public buildings.[28] They attempted to gain access to public spaces such as public school mailboxes, military bases, and the advertising space on municipal buses.[29] But in the 1970s and 80s, speakers' claims to these latter spaces routinely failed as well. The broad principles of the *Hague* dictum did not apply to these places either. The properties were public resources, yes, but they were not open to expression.

It was not simply that the character of these places differed from streets, sidewalks, and parks. After the civil rights era, one could sense a broader shift in judicial, and perhaps public, attitude toward public discourse. Although this cannot be documented, one can well imagine that support for civil rights would not extend to labor pickets or Vietnam protests. Images of violence from these conflicts did not produce public solidarity, as had the struggle for civil rights.

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25. *See* Hudgens v. NLRB, 424 U.S. 507 (1976) (holding that labor picketers had no right to demonstrate at a shopping center); Lloyd Corp. v. Tanner, 407 U.S. 551 (1972) (holding that protesters of Vietnam War had no right to distribute handbills in a shopping center).

26. *See Lloyd Corp.*, 407 U.S. at 569–70.

27. *Id*.

28. *See, e.g.*, Carey v. Brown, 447 U.S. 455 (1980) (picket outside mayor's home); Police Dep't of Chi. v. Mosley, 408 U.S. 92 (1972) (grounds near school).

29. *See* Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37 (1983) (public school mail facilities); Greer v. Spock, 424 U.S. 828 (1976) (military base); Lehman v. City of Shaker Heights, 418 U.S. 298 (1974) (bus advertising cards).

Whatever the level of public support, we can say for certain that *judicial* support did not extend to attempts to access listeners on military bases or through bus advertising cards. Indeed, as speakers pursued listeners in these relatively remote corners of society, judicial opinions seemed to signal that public assembly and speech were something of a nuisance to be controlled by government.[30] Public expression interfered with governmental functions. It imposed speech on commuters. It was invasive. It caused tension in places, both public and private, where listeners expected peace and tranquility.

Thus, after the civil rights era, the notion that speech needed only to be "basically compatible" with a property to be permitted there fell rather quickly out of favor. Henceforth, if public discourse was to take place on public properties other than streets, sidewalks, and parks, it was incumbent upon speakers to demonstrate that the government *expressly* and *objectively* intended that this be so.[31] If they were to engage in public discourse in these places, speakers had to show not just that these properties *could* accommodate expression, but that they were specifically *intended to be* "forums" for expression, by showing that there was a history or tradition of expression there.[32]

Not surprisingly, most public properties have failed to meet this test. In particular, *new* public places necessarily lack the requisite tradition of open exchange. They are thus classified under the Court's now-familiar categorical approach not as "quintessential" public forums, but rather as either narrowly cast "designated" forums, principally designed to serve official purposes but with some room for speech activity; or as "non-public" forums (i.e., not forums for expression at all).[33] There are no recognized "easements" for speech in these places. The properties that can be categorized as designated or non-public forums serve primarily official functions. Their *managerial* traditions generally preclude any argument that speech is

30. *See, e.g.*, *Greer*, 424 U.S. at 836 (recognizing that government, "no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated").

31. *See Perry*, 460 U.S. at 45–46 (describing the standard for "designated" public forum).

32. *See* Cornelius v. NAACP Legal Def. & Educ. Fund, 473 U.S. 788, 802 (1985) (discussing the intent requirement for designated public forums).

33. *See Perry*, 460 U.S. at 44 (describing the "limited" public forum).

intended to occur there.[34] The burden on the speaker to demonstrate otherwise is quite high.

These "forums" were not intended to facilitate public discourse. They were intended, as are most properties, to serve more pragmatic functions. If a speaker is fortunate enough to demonstrate the requisite governmental intent to designate a place as open to expression, he or she is supposed to enjoy the same protection in that place as in quintessential fora such as streets and parks. But the Court has offered public officials sufficient leeway to regulate even these fora to their liking. In designated public forums, for example, the government can choose *who* speaks, and on *what* subject.[35] Thus, although the government technically cannot engage in outright viewpoint discrimination in determining access to these public properties, there is sufficient flexibility in the standards such that this is precisely what appears to happen in some contexts. In non-public forums, the government is subject to few constraints; it must only act "reasonably" and avoid express reliance on the speaker's viewpoint.[36]

This type of categorization and treatment of public properties renders access to streets, parks, and sidewalks all the more critical for public discourse. But as other public spaces were cordoned off from discourse in the 1970s and 80s under the auspices of the forum doctrine, the Court also limited access to these "quintessential" public spaces under the other principal doctrine, the time, place, and manner doctrine. For example, in *Clark v. Community for Creative Non-Violence*,[37] the Court upheld a prohibition on an overnight political demonstration on the National Mall, largely because of officials' concern that the activity would damage the lawn.[38] The opinion strongly suggested that so long as the government avoided allocating space based expressly on the content of expression, it would have a wide berth in managing public properties.[39]

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34. *See* Robert C. Post, *Between Governance and Management: The History and Theory of the Public Forum*, 34 UCLA L. REV. 1713, 1788–93 (1987) (discussing the distinction between "managerial" and "governance" authority over public properties).

35. *See Perry*, 460 U.S. at 44 (describing the scope of governmental discretion).

36. *Id*. at 46.

37. 468 U.S. 288 (1984).

38. *Id.* at 299.

39. *See id*.

That discretion extended not only to public parks, but to other public places as well. Thus, flyers displayed on public spaces such as utility poles and billboards that cropped up as commuters spent more and more time in their cars could be treated as eyesores. Public speech of this sort fell under the government's authority to manage the aesthetics of public properties.[40] Thus, the notion that public discourse, or at least certain forms of it, could constitute a "nuisance" had become part of First Amendment doctrine.[41]

Note that many of these "nuisances" had something in common. They involved not "pure" expression, but rather symbolic activity. It has long been suggested, but of course cannot be substantiated, that judges are biased against such forms of expression.[42] This too may have contributed to a collective negative mindset regarding public expressive activity. Protests, mass demonstrations, leafleting, and the like are, of course, much more disruptive than is "pure" expression. But that very disruption, the speaker's resistance of the *status quo*, is part of the message sought to be conveyed.

In sum, for those interested in speaking *in public*, the unmistakable thrust of the post-civil rights era decisions is that places generally occupied by the public are not fit places for public discourse. For example, malls are "private." Unless speakers can clearly and convincingly demonstrate otherwise, most other properties of which the government possesses "title" are not expressive forums. Listeners cannot be reached there. Even in those spaces "immemorially" open to public discourse, shifts in both

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> We do not believe, however, that either *United States v. O'Brien* or the time, place, or manner decisions assign to the judiciary the authority to replace the Park Service as the manager of the Nation's parks or endow the judiciary with the competence to judge how much protection of park lands is wise and how that level of conservation is to be attained.

Id.

40. *See* Members of the City Council v. Taxpayers for Vincent, 466 U.S. 789 (1984).

41. Although cases like *Community for Creative Non-Violence* were, technically speaking, "manner" cases in that they purported to regulate the manner in which speakers conveyed their messages, they also attempted to protect public properties from perceived harms. Speakers could not sleep *there* in protest, billboards were out of place *here*, utility poles were not *the place* for political flyers, etc.

42. *See* Kalven, *supra* note 6, at 12 (suggesting that courts are biased against "speech plus").

attitude and control have clearly taken place. Contrary to Kalven's early and optimistic view, not even streets and parks, the "quintessential" public forums, can be "commandeered" by the people to make their collective point.[43] The scope of the expressive "easement" in those places is uncertain, if it in fact still exists.

B. Place and Modernity

The past two decades have been politically and socially charged, even turbulent. We remain at war in Iraq and elsewhere. Simultaneously, we are fighting "culture wars" at home on issues ranging from racism to reproductive rights. Rhetoric can be sharp. Emotions, as always, can run high with regard to such charged issues. Public passion can quickly lead to public violence. In some sense, this is nothing new. Similar tensions existed during the 1960s and 70s, for example.

What is new, however, is the extent to which communication has been technologically enhanced. Much of the discussion today takes place via electronic media, including cable television and the Internet. But as recent war, political convention, and global trade summit protests have demonstrated, streets, sidewalks, and parks remain significant parts of our public dialogue. Modernity has ushered in new technologies. But, for reasons that will be explored below, it has not ushered out the resort to public places.[44] Speakers still routinely seek to reach listeners face-to-face and in public.

As always, the resort to public places puts pressure on officials to maintain public order. This tension is heightened today by something else that is new, namely the concern over terrorist attacks. In the public's mind, these fears may justify limitations on constitutional rights such as privacy and speech.[45] The combination of heated rhetoric and security concerns is one of the defining characteristics of public places of modernity. Taken to their extreme, safety and

43. *Id*.

44. *See infra* Part IV.A.

45. *See generally* Electronic Privacy Information Center, Public Opinion and Privacy Page, http://www.epic.org/privacy/survey/ (last visited May 16, 2006) (collecting polling data that demonstrates increased concern for security after September 11, 2001, and less salience for privacy issues).

security concerns could effectively destroy real public discourse in this country. There is, in any event, no question that "place" post-September 11 is not the same as it was prior to the events of that day. The question is what effect this will ultimately have on public discourse.

It is not simply that our rhetoric is heated and divisive and that our physical safety in public places is threatened. The conditions of modernity have affected the very *mechanics* of public speaking and public listening. Listeners are on the move again. In addition to malls and other places that I have already discussed, people can be increasingly found in airports, in subway cars and stations, at large public auditoriums, and, of course, in their cars going to all of these and various other places. Today's listener is a constantly and rapidly moving target, not at all prone to stay in place. Speakers must therefore constantly change locations to find an audience. They must lay claim to the few public places where listeners are likely to be found. This will naturally lead to an increase of intrusions into places one might otherwise think of as "private."[46] Conditions of modernity thus raise new issues of spatial privacy. Which places are fit for public discourse, and which are not?

Enhanced mobility substantially affects the intersection of speech and spatiality. It raises the question whether listeners are still reachable in public. Recognition of the constitutional right to engage in door-to-door solicitation was a significant victory following the move toward mass suburbanization.[47] But listeners are not home nearly as often now. They spend more time at work and at other "private" places in which speakers cannot engage them. They drive on super-highways, or take public transportation. They spend more and more time waiting in places of transport such as airports and train stations. If listeners cannot be reached on streets, or in malls, or in these other modern places, they may indeed be unreachable in any public places.

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46. Recent restrictions on protests near funerals are merely one example. *See Tenn. County Bars Protests near Funerals*, ASSOCIATED PRESS, Oct. 27, 2005, *available at* http://www.firstamendmentcenter.org/news.aspx?id=15985.

47. *See, e.g.*, Martin v. City of Struthers, 319 U.S. 141 (1943) (invalidating ordinance prohibiting distribution of handbills to residences).

The changes brought on by modernity are not just reflected in the character and availability of public places; the speech that happens there, when it does happen, is also different. Merely finding an increasingly mobile audience is difficult enough, but even when speakers locate an audience, it is increasingly difficult to obtain and maintain its attention. Speakers thus resort to outsized and provocative billboards to reach listeners in their cars, where they spend increasing amounts of time.[48] They may become generally more aggressive in their methods, and more inclined to push speech onto listeners wherever they can be found.[49] In this environment, places we might not generally think of as terribly important to public expression, even seemingly trivial ones like highway overpasses or utility poles, can actually be quite critical.

The act of *listening*, both privately and in public places, has also undergone dramatic changes. Advanced technologies enable listeners to filter opinions with which they disagree.[50] This is true not only in listeners' private places, such as at their personal computers or in their living rooms, but increasingly in public ones as well. Even while they are on the street, listeners have developed special tactics for controlling the speech that they hear. They utilize personalized technologies, including cell phones and MP3 players, that permit them to avoid hearing anything other than the limited discourse they choose not to filter. Thus, as they go from place to place, listeners increasingly occupy a personal speech-free zone.[51]

In sum, public places of modernity are under pressure from a range of sources, including political, cultural, and environmental changes. Public discourse itself is changing, with listeners resorting to self-help to protect their own privacy and repose in public. Listeners are moving. And speakers are following, eager as always to

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48. *See* Christine MacDonald, *Billboards in Your Face*, BOSTON GLOBE, July 24, 2005, at C1 (noting the rise of billboards as a means of advertising in recent years).

49. *See, e.g.*, David W. Dunlap, *Wrapping Historical Subway Columns in Modern Ads*, N.Y. TIMES, Jan. 5, 2006, at B3 (late edition) (noting the use of historical columns in Times Square subway station for commercial advertisements).

50. *See generally* CASS R. SUNSTEIN, REPUBLIC.COM (2001) (discussing the phenomenon of listener filtering through technology).

51. *See* David Carr, *Taken to a New Place, by a TV in the Palm*, N.Y. TIMES, Dec. 18, 2005, at 4–3 (late edition) ("So this is how we end up alone together. We share a coffee shop, but we are all on wireless laptops. The subway is a symphony of earplugged silence. . . .").

find the largest possible audience for their messages. As the Rehnquist Court convened, however, many of the places where the public typically gathered, such as malls, had already been deemed legally and constitutionally "private." Many other places were considered either narrowly limited forums for expression, or not open to expression at all. The extent to which even streets, parks, and sidewalks could be "commandeered" by speakers, and the scope of their expressive "easement" there, were in rather serious doubt. In some respects, then, the *fundamental* free speech question facing the Rehnquist Court was whether there was still a place for public discourse.

III. THE REHNQUIST COURT, PUBLIC PROPERTY, AND PUBLIC DISCOURSE

In his important article, Harry Kalven, Jr., asked whether the constitutional treatment of "place" was up to its next challenge—a civil rights movement that would depend partly on access to public places for its success.[52] We should ask similar questions in light of the unique challenges facing public discourse in our own time. Our places are modern ones. People, and speech, are increasingly mobile. Our "culture wars" and the "war on terror" present unique problems in terms of access to public places. We should ask whether the doctrines of place are tailored to meet the spatial realities of our time, and of times to come.

With these questions in mind, this Part examines the Rehnquist Court's stewardship of public places. Over the course of some twenty years, the Court placed an indelible mark on public places. The principal argument advanced here is that the Court made public discourse decidedly *more* difficult, indeed altogether less likely to occur. Like previous Courts, the Rehnquist Court granted broad authority to officials to manage public places as if they were nothing more than properties. But more than this, the Court diminished the expressive "easement" in places such as streets and sidewalks; encouraged the tactical use of place and expressive zoning; refused to recognize new "quintessential" public forums; recognized a right to

52. Kalven, *supra* note 6.

privacy in quintessentially expressive public places; and generally limited speakers' abilities to make intimate appeals to listeners in public places by broadening the right not to listen there.

A. Quintessential Forums and Expressive Easements

The Rehnquist Court continued the tradition of determining access to public places with reference to property principles and metaphors. Kalven suggested that while the government might possess *title* to public properties such as streets, sidewalks, and parks, speakers and listeners possessed an expressive "easement" to use them.[53] These properties were held "in trust" by government for the people.[54] According to the *Hague* dictum and the forum doctrine, these are properties in which public speech rights have historically been presumptively protected.

On the one hand, the Rehnquist Court read the "immemorially open" dictum in *Hague* very narrowly, effectively precluding the recognition of any new "quintessential" public forums.[55] By definition, new properties have not "immemorially" been used for expressive activity. I shall have more to say about the effects of this particular conception of "tradition" later, and about the effect of the Court's narrow conception of tradition under *Hague*. It suffices here to say that the Court's refusal to expand the category of "quintessential" public fora failed to account for the many changes that occurred in the spatial environment in the six decades after *Hague* was decided. The Court's notion of "tradition" essentially limited the types of public property ostensibly open to public discourse to only three: streets, sidewalks, and parks. Modern places, by which I mean any new public properties or classes of properties, are now presumptively closed to public discourse.

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53. *Id*. at 13.

54. *See* Hague v. Comm. for Indus. Org., 307 U.S. 496, 515 (1939) ("Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions.").

55. *See* Int'l Soc'y for Krishna Consciousness, Inc. v. Lee, 505 U.S. 672 (1992) (holding that only properties that have "immemorially" been used for expressive purposes qualify as "quintessential" public forums).

At the same time, the Rehnquist Court paid too little attention to the *spirit* of the *Hague* dictum. Its decisions show that even recognized "quintessential" public forums are in fact less *quintessentially* open to expression than the language of *Hague* would suggest. Speakers, it turns out, are not necessarily on safe constitutional ground merely because they are standing on properties such as streets, sidewalks, or parks. In fact, the Court further obscured what, if anything, a speaker gains by being in these places.

Three sidewalk cases demonstrate the effective demotion of the quintessential forum under the Rehnquist Court's approach. In *United States v. Kokinda*,[56] the Court indicated that not all sidewalks are created equal. The sidewalk in *Kokinda* happened to be located next to a postal office.[57] Based on the history of its use and the postal service's stated interests in preserving that use, that sidewalk was deemed a *non-public* forum.[58] Ordinarily, the Court refuses to view properties with this sort of specificity, preferring instead to deal with them more categorically. *Kokinda* indicated that a speaker cannot simply assume that *all* sidewalks are "quintessential" public forums. Indeed, some such public properties might not be open to expression at all.

Even if the sidewalk retains its "quintessential" label, the expressive "easement" there can take on a substantially diminished character. In *Hill v. Colorado*,[59] speakers were prohibited from approaching within eight feet of abortion clinic patrons to dissuade them from having the procedure.[60] The appeals of these "sidewalk counselors" were to occur on public sidewalks as the patrons entered the clinic.[61] The Court accepted that the sidewalk was a "quintessential" public forum.[62] However, it held that the patron's "right to be let alone" on public sidewalks limited the speaker's expressive "easement" there.[63] The patron's interests in privacy and

56. 497 U.S. 720 (1990).
57. *Id.* at 730.
58. *Id.*
59. 530 U.S. 703 (2000).
60. *Id*. at 707.
61. *Id.* at 708.
62. *Id.* at 715.
63. *See id*. at 717–18 (discussing the clinic patron's "right to be let alone" on sidewalks).

repose outweighed the speaker's right to make an intimate appeal on a public thoroughfare.[64]

Finally, in *Frisby v. Schultz*,[65] the Court upheld an ordinance that prohibited entirely peaceful "targeted picketing" on the sidewalk outside an abortion provider's home.[66] Like *Hill*, *Frisby* was also based in part on notions of "privacy" and "captivity," this time as applied to the home. The Court held that whatever "easement" people enjoyed on public sidewalks, it did not permit speakers to effectively trap a person inside his or her home.[67] Thus, to protect the sanctity and privacy of the unwilling listener's home, the Court held that nearby sidewalks were off limits to this form of public speech activity.

Public properties deemed presumptively open to expressive activity have always been few in number. If there is any guarantee of access to public places, it applies only to public streets and sidewalks and in public parks. The Rehnquist Court held that no other properties would qualify for this special spatial status. Moreover, even if a speaker appeared on one of these seemingly favored properties, the Court recognized substantial limits on his or her "easement" there. Today, although streets and sidewalks remain critical to public discourse, it is far from clear what special status these properties retain. It is equally unclear what a speaker actually gains from being in these places, as opposed to someplace else.

B. Expressive Zoning

The dilution of public speech rights in even "quintessential" public forums is also the product of a recent trend involving what I have elsewhere referred to as "spatial tactics."[68] As noted, one of the challenges with respect to places of modernity is the tension created by safety and security concerns. Spatial tactics, which represent the now-common official response to these concerns, consist of officials'

64. *Id*. at 718.
65. 487 U.S. 474 (1988).
66. *Id*. at 476, 488.
67. *See id*. at 486 ("The devastating effect of targeted picketing on the quiet enjoyment of the home is beyond doubt[.]").
68. *See* Zick, *Speech and Spatial Tactics*, *supra* note 11.

use or manipulation of place to contain, segregate, and control expressive and associative activity. These tactics are now routinely utilized on public streets and sidewalks. They result in the "speech-free" and "free-speech" zones that have appeared during recent political campaigns; at war protests; on university campuses; at public facilities including abortion clinics and courthouses; and, most recently, at (of all places) funerals.[69]

The zoning of expressive and associative activity is a socio-legal development largely of the past two decades or so. It thus coincides with the Rehnquist Court's tenure. Cultural unrest brought about by war, partisan politics, race relations, abortion politics, and threats of terrorism has contributed substantially to this trend. Legally and constitutionally, however, its roots can be found in three lines of Rehnquist Court precedent. The first, discussed above, cast some doubt on the significance of being in a "quintessential" public forum. The second is the Court's speech zoning precedents. The third is the Court's modification or restatement of the time, place, and manner doctrine. The combination of these things has contributed to, if not encouraged, the utilization of spatial tactics as a means of controlling public discourse.

Public officials have long used zoning measures to control the use of property.[70] If places such as streets, sidewalks, and parks are considered mere properties, one can easily imagine officials controlling their "expressive uses" through zoning as well. This practice or tactic began with local zoning of sexually explicit or "adult" speech. In *City of Renton v. Playtime Theatres, Inc.*[71] and, more recently, *City of Los Angeles v. Alameda Books, Inc.*,[72] the Rehnquist Court approved zoning measures that dispersed or concentrated adult expressive uses. It did so even though some of these zoning measures directly *targeted* the expression being regulated. The zoning measures were nevertheless treated as "content-neutral" on the ground that they addressed the harmful

69. *See id.* at 589–606 (describing the proliferation of speech zoning).

70. *See* Vill. of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926) (upholding comprehensive local zoning plan).

71. 475 U.S. 41 (1986).

72. 535 U.S. 425 (2002).

"secondary effects" associated with strip clubs and the like, rather than any expressive content associated with the dancing.[73]

The Court approved these zoning laws despite the fact that they were most likely content-based, and that their likely effect was to suppress, rather than merely regulate, expression. Writing for the majority in *City of Renton*, Chief Justice Rehnquist expressed no sympathy for the adult businesses' argument that there was little alternative space to be found in the area. This, he said, was a function of the vagaries of the local property market.[74] Local officials were entitled to substantial deference in dealing with the "secondary effects" of adult uses.[75] They were not required to facilitate the relocation of the displaced speakers by ensuring that adequate alternative properties were available.[76] Indeed, public officials' only obligation was to "refrain from effectively denying" the adult businesses' right to operate.[77] This is an effective way of controlling a form of expression many find objectionable by largely displacing it. Offensive entertainment businesses can be placed in zones with similar offending businesses; or they can be dispersed, creating "smut-free" zones throughout a community.

Three years after *City of Renton*, the Court announced a standard for time, place, and manner regulations that encouraged even more widespread application of expressive zoning and other spatial regulations. This standard was announced in *Ward v. Rock Against Racism*,[78] a case involving the regulation of sound equipment in Central Park. Time, place, and manner regulations of this sort had been governed by a form of intermediate scrutiny that required "narrow tailoring" of content-neutral speech regulations.[79] But in *Ward*, the Court clarified that so long as a regulation does not suppress "substantially" more speech than is necessary to serve the government's stated interests, and so long as those interests would be

73. *See City of Renton*, 475 U.S. at 47–49 (explaining the "secondary effects" theory).
74. *Id.* at 54.
75. *Id.* at 51–52.
76. *Id.* at 54.
77. *Id.*
78. 491 U.S. 781 (1989).
79. *See, e.g.*, Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 291 (1984) (applying intermediate scrutiny to a ban on overnight camping).

less well served absent the regulation, local officials were to be given deference.[80] The dissenters vigorously complained that this standard essentially nullified any tailoring requirement for time, place, and manner regulations.[81] Whether *Ward* went that far or not, it certainly did bring time, place, and manner scrutiny much closer to rational basis review than to intermediate scrutiny.[82]

In sum, as a result of decisions like *Kokinda* and *Frisby*, speakers no longer have the benefit of a presumptive easement in "quintessential" public speech fora. *City of Renton* demonstrated that ordinary zoning principles could be used to target and displace certain offensive expressive uses.[83] *Ward* loosened the standard that applies to spatial regulations. As a result, officials increasingly have relied upon zoning principles to subtly *displace*, rather than overtly *suppress*, expression.[84]

This is precisely what occurred in *Madsen v. Women's Health Center, Inc.*, *Schenck v. Pro-Choice Network*, and *Hill v. Colorado*, three abortion clinic protest cases decided during the Rehnquist era.[85] The cases involved separating protesters from clinic properties and patrons by means of spatial tactics such as "buffer zones" and "bubbles." The terms themselves even sound in spatial tactics. The Court did not uphold all of the zoning measures in these cases.[86] But it did validate, once again, the general principle that speakers and listeners can be separated by means of zoning, even if it carves up public properties such as streets and sidewalks. Taken together, these

80. *Ward*, 491 U.S. at 799–800.

81. *See id.* at 803 (Marshall, J., dissenting) (arguing that "the majority replaces constitutional scrutiny with mandatory deference").

82. *See* Susan H. Williams, *Content Discrimination and the First Amendment*, 139 U. PA. L. REV. 615, 644 (1991) ("The government interest and tailoring requirements are quite close to the *rational basis* standard applied to regulations that do not affect fundamental rights at all.") (emphasis added).

83. The Rehnquist Court did indicate that the "secondary effects" theory is of limited applicability. *See* Boos v. Barry, 485 U.S. 312, 321 (1988) (rejecting a claim that a 300-foot speech zone around an embassy targeted "secondary," rather than primary, speech effects).

84. *See* Burson v. Freeman, 504 U.S. 191, 211 (1992) (upholding, under strict scrutiny, the use of a 100-foot speech-free zone near polling places).

85. Hill v. Colorado, 530 U.S. 703 (2000); Schenck v. Pro-Choice Network, 519 U.S. 357 (1997); Madsen v. Women's Health Ctr., Inc., 512 U.S. 753 (1994).

86. *See, e.g.*, *Madsen*, 512 U.S. at 773-75 (invalidating 300-foot "approach and offer" and residential picketing provisions).

three cases suggest that all speech, not just "adult" speech, can be concentrated or dispersed based on ordinary zoning principles.

The combination of these lines of authority has emboldened public officials to use place as a means of controlling potentially disruptive expression. During the past several years, there has been a rise in the use of what are variously referred to as "demonstration zones," "buffer zones," "free speech zones," and "speech-free zones."[87] In the 1980s and 90s, college campuses once again became flashpoints for racial and other tensions. Unlike when campus violence erupted in the 1960s, this time officials were ready. They resorted first to speech codes, and then to spatial zoning to reign in charged campus expression.[88] In the 1990s, abortion "counselors" mounted protests at health care clinics. Once again, spatial tactics such as zoning were used to limit speakers' access to listeners.[89] War and other political protests have also given rise to the use of zoning tactics. Entire areas of cities have been declared "speech-free" zones.[90] For example, at the most recent national party conventions, protests were sharply limited through spatial tactics.[91] At the Democratic National Convention in Boston, officials even resorted to building an enclosed zone in which speakers were told they must hold their demonstrations.[92]

Political dissent has been a major casualty of this new spatial order.[93] Insofar as the success of political and social movements depends on things like freedom of movement, ease of assembly, and spontaneous expression, these tactics present substantial obstacles.

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87. *See* Zick, *Speech and Spatial Tactics*, *supra* note 11, at 589–606 (describing the trend and its effects).

88. *See id.* at 601–04 (discussing speech zones on campuses).

89. *See Hill*, 530 U.S. 703 (upholding statute that limited protester's access to abortion clinics and clinic patrons).

90. *See* Menotti v. City of Seattle, 409 F.3d 1113 (9th Cir. 2005) (upholding a restricted zone as valid time, place, and manner regulation); Citizens for Peace v. City of Colorado Springs, No. Civ. A. 04CV00464-RPM, 2005 WL 1769230 (D. Colo. July 25, 2005) (upholding security zone that closed all public streets around the hotel).

91. *See* Zick, *Speech and Spatial Tactics*, *supra* note 11, at 592–95 (discussing recent limits on public protest, particularly political protest).

92. *See* Bl(a)ck Tea Soc'y v. City of Boston, 378 F.3d 8, 10 (1st Cir. 2004) (upholding the use of a protest cage to house demonstrators at the 2004 Democratic National Convention in Boston).

93. *See generally* Zick, *Speech and Spatial Tactics*, *supra* note 11.

They separate speakers and listeners in public places. They facilitate listener avoidance of expression that is presumptively offensive or dangerous, a presumption arising from official displacement. Listeners are "protected" not only from the speakers, but from their messages as well. In the course of protecting itself and its officials, the government is driving protest into corners and placing it, quite literally, in pens and cages.

These structures are manifestations of a general sense that, to paraphrase Kalven, every protest is a danger to society, and every gathering in public a mob.[94] They are, stated differently, the most recent manifestation of the concept of public-expression-as-nuisance. This "nuisance" is dealt with not by encouraging confrontation and an exchange of ideas, or by protecting the right of speakers to dissent and protest, but by official policies of spatial separation, avoidance, and control. Speakers generally cannot reach out to public officials in public places; nor can they readily access their more general intended audiences. We see this dynamic at work in our most significant and symbolic public ceremonies. For example, the first Bush inauguration was as spatially open as any of its predecessors. The second, however, took place in a city wrapped, as one journalist put it, in a "steel cocoon."[95] Protesters at the second inauguration were hidden behind bleachers and in other out-of-the-way places. Kalven suggested that the openness of our public places is an "index of freedom."[96] The trend toward zoning public expression and of carving up our public places is an indication that neither the expression itself nor the places in which it occurs are held in high regard.

We must, of course, have a degree of order on the streets.[97] Officials must be kept safe. So must speakers and listeners. But the balance between order and security on one hand, and the exercise of public speech rights on the other, is now skewed sharply in favor of the former. Make no mistake: spatial tactics and place are used to

94. *See* Kalven, *supra* note 6, at 32.

95. *See* David Johnston & Michael Janofsky, *A Steel Cocoon Is Woven for the Capital's Big Party*, N.Y. TIMES, Jan. 19, 2005, at A16.

96. Kalven, *supra* note 6, at 12.

97. *See id*. at 10–11 (distinguishing between revolution, civil disobedience, and protest).

affect this balance. Courts, hesitant to second-guess official spatial policies in the first place, are now discouraged from doing so by both the extraordinary breadth of official control over public property and the leniency of the *Ward* standard. So long as officials can articulate a legitimate and content-neutral interest and displacement serves that interest in some minimal fashion, the zoning of speech will continue to be permitted.

It is, of course, impossible to definitely link, in a causal sense, cases such as *Kokinda*, *City of Renton*, and *Hill* to the culture of tactical zoning we now see in many public spaces. A confluence of legal, political, and social forces have given rise to spatial tactics. What we can say, however, is that these Rehnquist Court decisions together created the conditions for a new spatial order. They signaled a judicial willingness to tolerate restrictions on public discourse through the regulation of public property, with reference to property principles and theories of managerial control. They treated zoning as a presumptively *neutral* way to manage public speech and to limit expressive "easements" on public properties. These decisions regarded public officials less as "trustees" of public property than as, once again, its rightful owners.

C. Placelessness

Modernity displaces people. This does not necessarily carry negative connotations. Technology breaks down barriers, enabling us to travel virtually anywhere and to communicate with anyone regardless of where we, or they, happen to be. We are a people constantly on the move. In a world in which boundaries keep coming down, we find ourselves inhabiting a world comprised of undifferentiated, homogenous, transitory space. In this spatial environment we sometimes experience what anthropologists have called "placelessness."[98] We spend less and less time in culturally vibrant and significant places—and more and more time in undifferentiated spaces.

The phenomenon of placelessness affects public discourse. The modern listener spends more and more time in airports, train stations,

98. *See* EDWARD C. RELPH, PLACE AND PLACELESSNESS (1976).

bus stations, and on subways, trains, and buses. He or she is constantly traveling along highways and superhighways. If these are the places we are more likely to inhabit, we must ask: What are the possibilities for public discourse *there*? How can these modern public places be incorporated into our *expressive* culture?

Consider an ordinary highway overpass. Under the categorical approach, as applied by the Rehnquist Court, it is highly unlikely—not impossible, but highly unlikely nonetheless—that this type of property will be considered an expressive "forum."[99] The government will, in all likelihood, not have invited speakers to express themselves there. Nor is expression the primary function of these structures or the reason they are built. Like so many modern places, overpasses would be treated as physical conveyances, not as speech forums. So long as the government has a reasonable explanation for prohibiting speech there, it may do so; driver safety and aesthetics come readily to mind as two eminently "reasonable" justifications upon which the state might rely.

Listeners might still be reached as they travel on the highways. Radio broadcasts and billboards will beckon for their attention. But radio and billboards are means of communication that belong to relatively wealthy interests. As things now stand, the "poorly financed causes of little people" are quite unlikely to reach listeners in these places of modernity.[100] In this way, and in others rarely appreciated, the allocation of place tilts the marketplace of discourse in favor of those with resources. When one considers how difficult it is to reach listeners in this day and age, highway overpasses and other similar public properties where messages might cheaply be conveyed become far more important to public discourse than their doctrinal treatment indicates.

Placelessness gives rise to even more significant problems in terms of public discourse. Speakers have moved from place to place over time, seeking opportunities to interact with listeners in public places. Speech was first prohibited in malls because they were considered "private" properties. Speakers then moved to airports and

99. *But see* Ovadal v. City of Madison, 416 F.3d 531, 536 (7th Cir. 2005) (holding that a highway overpass, as part of a sidewalk, constituted a traditional public forum).

100. Martin v. City of Struthers, 319 U.S. 141, 146 (1943).

other large transit hubs, where vast numbers of people now gather on a daily basis, but speech has generally been prohibited there as well. The Rehnquist Court refused to recognize any additional "quintessential" public forums. In *International Society for Krishna Consciousness, Inc. v. Lee*, the Court held that airports have neither the tradition nor the functional characteristics associated with streets, sidewalks, or parks.[101] With regard to tradition, the Court reasoned that airports as a class are *new* structures, far too recent in vintage to support the idea that speech has "immemorially" been permitted in them.[102] Moreover, the Court emphasized that the function of airports is to facilitate travel, not speech.[103] Thus, in these "non-public" fora, and presumably in all similar modern facilities, government may effectively prohibit expression so long as it acts reasonably and does not expressly base its regulation on the speaker's viewpoint. In *Lee*, the Rehnquist Court closed the class of "quintessential" public fora to all properties other than public streets, parks, and sidewalks—the places mentioned in 1939 in the *Hague* dictum.

The flaws in the Court's stated rationale are almost too obvious to be taken seriously. As Justice Kennedy (who has incidentally proven to be the Court's most spatially sensitive member) noted in concurrence, the function of *streets* is just as clearly to facilitate movement rather than speech, yet streets are deemed "public forums."[104] Only Justice Kennedy seemed to grasp the larger implications of *Lee*. He understood that the case involved not merely access to an airport, or to airports as a category of property, but rather the denial of access to listeners in some of the only modern public places where they might regularly be found.[105] Anticipating that new places or properties were bound to arise in the future, Justice

101. Int'l Soc'y for Krishna Consciousness, Inc. v. Lee, 505 U.S. 672, 681–82 (1992).

102. *Id.* at 680 (noting "the lateness with which the modern air terminal has made its appearance").

103. *Id*. at 682 (noting that "the record demonstrates that Port Authority management considers the purpose of the terminals to be the facilitation of passenger air travel, not the promotion of expression").

104. *Id*. at 696–97 (Kennedy, J., concurring).

105. *See id*. at 697–98 (noting the forces of modernity and their effects on public discourse).

Kennedy espoused a far more flexible forum analysis, one that came closer to the "compatibility" standard of the early 1970s.[106]

Unfortunately, the majority did not share Justice Kennedy's spatial sensibilities. The Court did not connect its forum determination with the modern problem of placelessness. It did not connect the problem to prior decisions prohibiting expression in other typical gathering places like malls. By freezing the category of traditional or quintessential public fora, the Court created a situation that will result in the proliferation of what anthropologists and human geographers call "non-places."[107] More and more public places will simply be devoid of expression and of expressive culture. They will be undifferentiated spaces, rather than meaningful places.

D. The Right Not *to Listen: Public Privacy and Captivity*

Modernity has also given rise to two other phenomena that impact public speech rights. First, as a result of urbanization, immigration, and other forces, we now have less space in general, and less personal space in particular, than we used to. Second, social alienation is on the rise again. This alienation manifests itself in the aforementioned "culture wars," social and political battles over things such as abortion, religion, war, the rights of homosexuals, and race.

Zoning, which separates speakers and listeners and thereby facilitates a degree of physical avoidance, can be used to relieve some of the pressures associated with crowding and cultural conflict. Spatial tactics lessen the opportunities for public confrontation. But sometimes these tactics are not enough. Sometimes an individual speaker insists on getting very close to an undecided or unwilling listener. Often, listeners object strongly to such invasions of their personal space.

At least where gated communities have not arisen, the home is one place where speakers might still locate otherwise mobile listeners. But in *Frisby v. Schultz*, as discussed above, the Rehnquist

106. *See id*. at 695 (proposing that a place should be a public forum if it is suitable for discourse in terms of its physical character and is compatible with other uses).

107. *See* MARC AUGÉ, NON-PLACES: INTRODUCTION TO AN ANTHROPOLOGY OF SUPERMODERNITY (John Howe trans., 1995).

Court held that a small group of abortion protesters did not have the right to engage in "targeted picketing," however peaceful, on the sidewalk near an abortion provider's residence.[108] In *Frisby*, the Court was particularly skeptical that the picketers sought to convey a message to the public at large.[109] Even if they were, the Court held that they could not do so by effectively thrusting their message on an unwilling listener in his home.[110]

Frisby involved an admittedly delicate balance. It is, of course, reasonable to protect a person from being essentially trapped, or held "captive," in his or her home. On the other hand, *Frisby* might also be interpreted as further support for protecting listeners from offensive speech by limiting expression in public places. The Court gave little thought to how manner restrictions, perhaps limitations on the number of picketers, their volume, or their timing, might mediate this tension. It relied instead on place, and on the notion that principles of residential privacy and "captivity" can limit public discourse that takes place on public streets. This might be less troublesome if speakers could readily reach listeners elsewhere. But the fact is that they often cannot. Having lost the battle over places such as abortion clinics, speakers moved to confront the abortion provider where he could more readily be reached, his home. By relying on listener "captivity" to prevent speech on the sidewalk, the Court set a dangerous precedent. If principles of privacy apply in this context, why not by extension to public places where listeners might argue for repose? Why not to funeral processions, for example, or to the streets outside hospitals?

In the event, the Rehnquist Court did not confine principles of privacy and captivity to the home. *Hill v. Colorado* upheld a statutory eight-foot protective "bubble" around abortion clinic patrons as they traversed the public sidewalks near clinics.[111] The statutory bubble

108. *See* Frisby v. Schultz, 487 U.S. 474, 484–85 (1988). The law in *Frisby* might plausibly have been interpreted to prohibit *all* use of public sidewalks in subdivisions. Through some artful limiting, however, the Court managed to narrowly confine its holding to standing outside a person's home and essentially picketing the homeowner while therein. *See id*. at 482–83 (providing narrow construction).

109. *Id*. at 486.

110. *See id.*

111. Hill v. Colorado, 530 U.S. 703, 730 (2000) (upholding an eight-foot bubble as a valid

was not expressly designed to protect the patrons from violence, but rather from public discourse. We know this, in part, because the statute prohibited approaching a patron for the purpose of "oral protest, education, or counseling."[112] In context, if not on its face, the statute discriminated based on content. The Court upheld it nonetheless, as a tailored means of protecting access to the clinic (which was not really compromised in light of other statutory restrictions on protesters), psychological repose, and clinic patron privacy.[113]

This "public privacy" rationale bears some emphasis. The Court had previously been reluctant to embrace the principle of "captivity" on *public* properties.[114] Yet the listeners in *Hill*, who were on public sidewalks before they reached the clinic doors, were nevertheless held to be "captive" to the speech of the protesters. According to the Court, the patrons possessed a right not to listen, based on personal privacy, even while occupying a quintessential public forum.[115] This holding, if it is more than an abortion-speech anomaly, has substantial implications for public discourse. Do listeners have a more general right not to hear speech in public places? Lest anyone think the notion farfetched, some courts have held as such. The captivity/privacy rationale has been applied to busy intersections, highways near homes, subways, library lobbies, and public monuments, among other places.[116] As a result of decisions such as *Frisby* and *Hill*, the "right not to listen" may play an increasingly

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place regulation).

112. *Id*. at 707.

113. *Id.* at 730.

114. The Court has traditionally insisted that while in public, listeners must avert their eyes or otherwise avoid offensive expression. *See, e.g*., Erznoznik v. City of Jacksonville, 422 U.S. 205 (1975) (outdoor movie theater); Cohen v. California, 403 U.S. 15 (1971) (public courthouse).

115. *Hill*, 530 U.S. at 718.

116. *See* Frye v. Kan. City Police Dep't, 375 F.3d 785 (8th Cir. 2004) (upholding restrictions on display of aborted fetus signs at a busy intersection); Texas v. Knights of the Ku Klux Klan, 58 F.3d 1075 (5th Cir. 1995) (rejecting a Klan application to participate in the "adopt-a-highway" program); ACLU v. Mineta, 319 F. Supp. 2d 69 (D.D.C. 2004) (limiting advertisements in subway system); Gay Guardian Newspaper v. Ohoopee Reg'l Library Sys., 235 F. Supp. 2d 1362 (S.D. Ga. 2002) (involving a free literature table in library lobby closed to expression); Wash. Tour Guides Ass'n v. Nat'l Park Serv., 808 F. Supp. 877 (D.D.C. 1992) (upholding regulation of solicitation at national monuments).

important role in determining the scope of modern public discourse.[117]

Limitations on access to "personal" spaces represent yet another limitation on public discourse based on spatial rationing. The home must, of course, be protected to some degree. But it is not altogether clear that manner and time restrictions cannot provide sufficient protection in all but the most unusual circumstances. Bubbles and buffers can render certain messages wholly ineffective. There is a world of difference between delivering an intimate appeal in hushed and reverent tones and delivering it, over the din of protest, from eight or more feet. Moreover, insofar as *Hill* is interpreted to support a more generalized notion of public privacy, certain forms of public discourse will be rendered all the more difficult, and all the more ineffective. In modern public places, speech increasingly takes place only from "safe" and "comfortable" distances, if it occurs at all.

IV. "PLACE" AND THE PRESERVATION OF PUBLIC DISCOURSE

The Rehnquist Court's property/place decisions negatively affected the prospects for public discourse. To be sure, the Court in many cases simply followed precedent. For example, it applied a conception of place as mere property that has been circulating at least since *Hague*'s now-famous dictum. Since the 1970s, government officials have steadily gained managerial authority over public properties under the "forum" doctrine.[118] The Rehnquist Court's decisions certainly continued that trend. But more than this, the Court's decisions further reduced the public space available for expressive activity. Cases such as *Frisby*, *Kokinda*, and *Hill* diminished speakers' expressive "easements" in places where they had been thought to be well established. The Court placed its imprimatur on the now-ubiquitous tactic of expressive zoning. Finally, the Rehnquist Court refused to recognize any new presumptively open fora for public speech.

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117. *See generally* Franklyn S. Haiman, *Speech v. Privacy: Is There a Right Not to Be Spoken to?*, 67 NW. U. L. REV. 153 (1972) (reviewing the doctrine of captivity and analyzing the right not to receive expression).

118. *See* Post, *supra* note 34, at 1733 (discussing official, managerial authority over public properties).

It is perhaps tempting to casually dismiss these developments. After all, technology has brought so many other speech "forums" into being in the past twenty years that it can hardly be said that there is a deficit of speech in this country. This Part argues that, despite the proliferation of electronic speech fora, providing material public space for speech remains critical to the health of our expressive culture. Rather than abandon them, we must preserve public places such that public debate and expression continue to occur there.

If meaningful public discourse and expression is to be preserved, "place" must be brought from the background to the foreground of speech analysis. The First Amendment itself recognizes the significance of "place" to public expression. Thus, speakers need not rely solely on old Supreme Court dictum to press claims to public places. There is, at least in some limited sense, a constitutional "right" to place. But to convince courts to recognize this right, "place" must be defined; more than this, it must be treated as an independent constitutional concept. A meaningful concept of place that reconnects speech and spatiality must replace dated and speech-restrictive notions such as trusts, expressive "easements," and "forums." As elsewhere, I will draw on the work of scholars in other disciplines to sketch a conception of "place" that differs from property and forum.[119] I will explain why "place" as conceptualized should be preferred, and what a spatial analysis based on "place" might look like. Finally, after establishing "place" as a distinct concept, I will argue in favor of not only conceptually but also *mechanically* separating place from things such as "time" and "manner," and of reviewing spatial restrictions strictly.

A. Private Filters and Public Speech Events

Before seeking to reconceptualize place and spatial analysis, it bears emphasizing how important place is to public expression. With all of the new communications media available, one must wonder why speakers even bother to utilize public places like streets and parks. There are several reasons why these and other public places

119. *See* Zick, *Space, Place, and Speech*, *supra* note 11; Zick, *Speech and Spatial Tactics*, *supra* note 11, at 617–25 (discussing the theory of "expressive place").

remain critical to public expression. First, given the increased ability of listeners to use technology to filter speech they do not wish to hear, public places are one of the last locales where the undecided listener might be reached.[120] In *Republic.com*, Cass Sunstein examined the manner in which various technologies have enabled us to hear only what we want to hear.[121] He argued that an individualized "Daily Me" filters messages with which we disagree and otherwise fragments our expressive environment.[122] This threatens to diminish the communication opportunities that tools such as the Internet and satellite technologies appear to offer. Sunstein worries that the "sidewalks" and other "forums" that cyberspace and other new media create will not be open avenues of communication, but rather narrow vehicles for self-selected opinion reinforcement, which leads to errors, confusion, group polarization, and other evils.[123]

These are serious concerns, and they are closely related to this Article's focus on opportunities for *public* discourse and expression. If, as Sunstein argues, technologies of modernity effectively enable listeners to ignore speakers *in private*, the physical places we occupy together become even more critical to public discourse. Under these circumstances, streets and sidewalks cannot be considered merely *symbolically* important to the marketplace of ideas or relics of times past. If we can avoid what we do not want to hear in private, perhaps the *only* opportunity for meaningful public discourse will occur in public places. In modern times, it is only in these places that speakers have an opportunity to "impose" their views on undecided or "unwilling" listeners.[124] It is only there that things such as political dissent will be heard.

Second, public places offer a platform for making a collective statement in a manner that the Internet cannot replicate. Things such as movement, volume, mass, and emotion do not exist in online

120. *See generally* SUNSTEIN, *supra* note 50 (discussing the phenomenon of listener filtering of information through advanced technologies).

121. *Id.*

122. *Id.* at 7.

123. *See id.* at 51–86 (discussing the dangers of consumer filtering).

124. Of course, those with few or no resources or with no Internet connection have no choice but to make their point in freely accessible public places.

settings, or at least are differently experienced. As I have suggested elsewhere, the Internet and other communications forums can provide powerful *supplements* for speech that takes place mainly in private.[125] However, they cannot reproduce the sense or character of place. They cannot replicate the emotive aspect of being somewhere and speaking to listeners there.[126] They cannot facilitate or replicate conflict. Perhaps most importantly, speech that takes place in technological, metaphysical fora is not generally going to be heard by government officials. The reason is simple—the argument that speech is easy to avoid, to filter out, applies to public officials as well. Metaphysical speech competes with a cacophony of other speech for the attention of busy lawmakers and other officials. This, surely, is part of the reason why people continue to gather in public places to demonstrate the world over.[127] Those who view public speech and protest as outmoded or ineffective should keep two things in mind. The first is the continued prevalence of the practice, which indicates it has special meaning, at least for those who participate. The second is the possibility that the lack of spontaneity or emotion one sometimes witnesses in the streets is not necessarily a manifestation of public disinterest; it may instead be a product of spatial tactics and other regulations of place that together have sapped protests of all vitality.

Third, and related to the desire to make a collective point, protests and demonstrations in public places tend to garner substantial media attention. The public cannot easily avoid these events when they are covered by one or more media outlets. Likewise, public officials can far more readily ignore a massive spam-like email campaign than they can the latest "million-something" march. These are public events. They become matters of public concern, particularly when officials react with violence or other tactics of control. Protests and demonstrations, as events, can *become* the story. This may dilute the speakers' message somewhat, but it may also engender sympathy for their cause. In any event, it certainly gets the message noticed.

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125. *See* Zick, *Speech and Spatial Tactics*, *supra* note 11, at 648–49.

126. Imagine viewing a painting at the Guggenheim Museum, or seeing the Last Judgment at the Sistine Chapel. Now imagine viewing these things on the Web, as part of a "virtual" tour.

127. *See, e.g.*, Joseph Kahn, *China Hopes Economy Plan Will Bridge Income Gap*, N.Y. TIMES, Oct. 11, 2005, at A9 ("The number of mass protests in China increased to 74,000 last year from 10,000 in 1994, according to police figures.").

Fourth, it may simply be that technology-based communication has become so routine and familiar that speakers are beginning to long for more traditional face-to-face interactions. If this is so, rather than a societal trend that shuns public places in favor of the private fora of technology we may indeed witness a return to real public places. This only becomes more likely as the initially public resource of the Internet becomes subject to private property divisions or constructs; access to public streets and sidewalks requires no password, no credit card, and (at least at this point in time) no form of identification or validation whatsoever.

Finally, in addition to having tangible significance, public places are indeed *symbolically* important. Their openness is, as Harry Kalven suggested, an "index of freedom."[128] Public places are far more than mere museum parcels. They remain a critical component of self-governance and the marketplace of ideas. It is especially important that we see, hear, and experience truly public speech activity in this country, and it is important that speakers have an opportunity to assemble and to engage the public and public officials on matters of pressing public concern. The symbolic significance of public speech does not lie in its success at persuasion or in its erudition. It lies in the fact that public speech events are part of a distinct expressive culture.

B. A Right *to Place*

Although it does not mention it by name, the Constitution acknowledges the importance of "place" to expression. The First Amendment protects not only the freedom to speak, but also the right of the people "peaceably to assemble."[129] It protects the right to "petition the government for a redress of grievances."[130] It protects, by implication, the right to associate with others, and to gather and

128. Kalven, *supra* note 6, at 12.

129. U.S. CONST. amend. I; *see, e.g.*, De Jonge v. Oregon, 299 U.S. 353, 364 (1937) ("The right of peaceable assembly is a right cognate to those of free speech and free press and is equally fundamental."); *see also* THOMAS I. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 292–98 (1970) (discussing rights to assembly and petition).

130. U.S. CONST. amend I.

speak together with them in public places.[131] Self-governance and marketplace theories recognize that these public rights are empty without places where listeners and speakers can be brought together.[132]

Speakers therefore need not cling solely to the exceedingly thin reed of the *Hague* dictum for the proposition that there is a fundamental *right* to place. Yet despite this constitutional recognition, the Rehnquist Court, like its predecessors, refused to acknowledge spatial facilitation as a constitutional obligation of government. Even the streets and sidewalks were constitutionally downgraded. Also, the Court refused to recognize any additional "quintessential" speech fora. As in other First Amendment contexts, the Court chose to focus instead solely on content discrimination.[133] Thus, even when *where* is the most pressing issue, doctrine dictates that courts continue to focus on questions of *why*.[134] "Place" has now been effectively subsumed by considerations of content distortion.[135] In other words, although there is a right to official neutrality there is no right to place.

If we still believe in some form of public democratic governance, place must be reincorporated into First Amendment discussions. Speakers should not be shy about staking a constitutional claim to place. This does not by any means entail treating such right as absolute. Nor does it mean that the right to place should replace the right to neutrality when considering issues of speech and spatiality. But neither should spatial facilitation be considered, as it is now, to be outside of judicial competence or consideration. Given the

131. *See, e.g.*, Edwards v. South Carolina, 372 U.S. 229, 235 (1963) (noting that public protest is "an exercise of . . . basic constitutional rights in their most pristine and classic form").

132. *See generally* MEIKLEJOHN, *supra* note 2.

133. *See* Lillian R. BeVier, *Rehabilitating Public Forum Doctrine: In Defense of Categories*, 1992 SUP. CT. REV. 79, 101–03 (explaining the "Distortion" and "Enhancement" models of the First Amendment).

134. *See id*. at 104 (arguing that public forum doctrine should be considered a "whole-hearted rejection" of the idea that government has a duty to provide space for expressive activity).

135. A focus on distortion can sometimes have the incidental effect of making room for private speech on public property. *See, e.g.*, Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384, 393–94 (1993) (invalidating a refusal of a church's request to display a religious-oriented film series on school premises). It does less well, as the Rehnquist Court decisions demonstrate, in preserving public speech on public property.

constitutional recognition of place, courts should far more carefully consider the impact that spatial regulations have on opportunities for public discourse. In order to do that, they must first have a proper conception of "place."

C. Property, Forum, and "Place"

In *Hague*, place entered First Amendment discourse as nothing more than a form of property. The government held *title* to streets and sidewalks, but it held them *in trust* for the people.[136] But if public expression is to remain vibrant, place cannot continue to be treated this way. It cannot be parceled out and carved up with reference to simplistic property analogies such as "easements," "zoning," and "trusts." Place must be updated to take into account modern conditions such as listener mobility, private filtering, societal displacement, and other circumstances. Place thus cannot be preserved by reference to simple analogies, or by slight tweaks to existing forum doctrine.[137] Sixty years of experience, including the recent twenty-year-plus Rehnquist Court stewardship of public space, suggests that the concept of "place" itself must be reconsidered.

Fundamentally, we must change what judges *see* when they consider public space. A distinct concept of "place" is precisely what is missing in analyses of speech and spatiality, including the Rehnquist Court's treatment of public places. As I have argued elsewhere, law provides a very limited and constraining conception of "place."[138] If place is to be refashioned, we must look elsewhere for insight and understanding. There is, fortunately, no shortage of material. Robust discussions of "place" have occurred in disciplines

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136. *See* Hague v. Comm. for Indus. Org., 307 U.S. 496, 515 (1939) ("Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions.").

137. *See, e.g.*, Steven G. Gey, *Reopening the Public Forum—From Sidewalks to Cyberspace*, 58 OHIO ST. L.J. 1535, 1567–75 (1998) (proposing several modifications to public forum doctrine); Calvin Massey, *Public Fora, Neutral Governments, and the Prism of Property*, 50 HASTINGS L.J. 309, 311 (1999) (proposing an analysis based on an analogy to the common law of nuisance).

138. *See* Zick, *Speech and Spatial Tactics*, *supra* note 11; Zick, *Space, Place, and Speech*, *supra* note 11.

ranging from philosophy, to human geography, to anthropology.[139] Studies in these and other disciplines indicate that there is a marked difference between *property* and *forum*, the concepts that currently dictate spatial analysis in speech cases, and *place*. I will explore, in necessarily general terms, the principal differences between these concepts. I will then suggest both *why* and, in terms of analysis, *how* we should begin to incorporate a particular concept of "place" into First Amendment jurisprudence.

Property is, of course, fundamentally a thing, or *res*. As presently conceived, a "forum" is simply a type of property on which government permits some expressive activity. Simply put, a "forum" is an abstract categorical construct used to classify properties. When judges consider place, it is as a mere backdrop for expressive activity. When issues of speech and spatiality arise, courts examine "property" issues, not issues of "place." They ask about the function of the property, or class of properties, or about their traditional uses.[140] Public space is generally treated as a resource that governments allocate among competing uses. *Expressive* uses are often treated like any other typical use of property.

Place differs from property and from forum in that it is more than mere background for expressive activity. Place is constitutionally bound to expression. It does not exist separately from speech, but constantly intersects with it. Place should thus be considered *primary* to expressive rights. Although the Rehnquist Court's decisions, like those of the 1970s, treated place as merely a secondary aspect of expressive activity, these precedents actually highlight the primacy of place. They demonstrate what happens to public discourse and interaction when access to streets is diminished, forum categories are frozen, place is zoned and parceled, placelessness takes hold, and speakers and listeners are separated. The Court's decisions created a spatial order that substantially decreased opportunities for public expression, assembly, and petition.

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139. *See* Zick, *Speech and Spatial Tactics*, *supra* note 11, at 617–30 (discussing interdisciplinary research on place). *See generally* THE ANTHROPOLOGY OF SPACE AND PLACE: LOCATING CULTURE (Setha M. Low & Denise Lawrence-Zúñiga eds., 2003).

140. *See, e.g.*, Int'l Soc'y for Krishna Consciousness, Inc. v. Lee, 505 U.S. 672, 678–83 (1992) (discussing airport terminal properties).

The conventional property-forum paradigm also assumes that public space, like air, water, or any other public resource, is a brute, rather than *constructed*, fact. A "forum" is treated as the product of presumptively neutral and "objective" governmental allocations of place. This obscures the power of place to substantially skew public discourse. While it may be possible to view *properties* in purely functional terms, it is not possible to view *place* in this way. A place, unlike a property or forum, takes on meaning only as it is utilized by speakers and listeners. Each place is a unique social construct. Courts should acknowledge the functional capacities of places and their compatibility with expressive activity, but these should not be determinative of speech rights. They do not offer a complete picture of place. The analysis should focus on how a place is actually used and by whom, and why this place, as opposed to some other, is preferred by speakers.

As constructs, places are also *dynamic* in a way that properties and forums are not, and indeed cannot be. Places can themselves communicate something about social and political contests. In part, this is because speakers are often intimately connected to places. They write on, or inscribe, public places. Speakers and listeners develop a connection to certain places—what one anthropologist has called "topophilia."[141] There is no analog for this phenomenon with respect to properties or forums.

Conceptually and physically, then, "place" is broader than property or forum. It is not limited to the physical space a speaker occupies, such as a sidewalk. In *Frisby*, for example, it was actually the listener's *home*, not the *sidewalk*, that was the relevant "place."[142] This is where the abortion practitioner *lived*. The home was the site of a social contest. Similarly, the abortion clinic was one of the places involved in the speech controversy in *Hill*. In these cases and others, particular places were actually elements of the speech controversy. They could not be wholly separated from the expression at issue. Speakers often insist on speaking in a particular location because the

141. *See generally* YI-FU TUAN, TOPOPHILIA: A STUDY OF ENVIRONMENTAL PERCEPTION, ATTITUDES, AND VALUES (Morningside ed. 1990).

142. *See* Frisby v. Schultz, 487 U.S. 474, 484–85 (1998) (discussing the importance of home).

"place" relates closely to their message. In other instances, places symbolize conditions, conflicts, emotions, or collective memories on a broader scale. The National Mall in Washington, D.C., is such a place. It represents a history, one that is written each time a new event takes place there. Unlike properties, then, places do not merely exist. Places *happen*; they are events.

The fact that place intersects with expressive activity in various ways suggests that we should think of place as a highly *variable* concept. Properties and forums may be susceptible to the current simplistic categorization of "traditional," "designated," and "non-public" fora.[143] But places are more varied and complex than this. Indeed, if we conceptualize places with reference to the manner in which they are utilized, the messages they communicate, and their general cultural impact, we can conceive of an entirely different typology of places, an "expressive topography."[144] I will elaborate on this concept below. The basic idea is that courts should not merely separate classes of properties—streets, airports, etc.—into formalistic property categories. They should instead identify and analyze distinct places, sites that are *primary* to expression, *constructed*, *dynamic*, and *variable*.

Courts should adopt this spatial perspective because it describes with far greater accuracy the manner in which speech and spatiality intersect on the ground, where expressive activity takes place. Viewing place as expressive more accurately captures the insights of anthropologists and other scholars who have demonstrated how people actually use and relate to place. It comports with what can happen to public expression when place is manipulated. Now, when they consider issues of spatiality, courts devote nearly all of their energy to categorizing property. A concept of "place" based on the principles set forth above will return attention to the substantive intersection of speech and spatiality.

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143. *See* Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45–46 (1983) (discussing forum categories).

144. *See generally* Zick, *Space, Place, and Speech*, *supra* note 11.

D. Determining Access to Places Rather than Properties

Focusing, then, on the *variability* of place, we can map an expressive topography by identifying places in terms of their intersection with expression, the manner in which place is utilized, and the manner in which specific spatial regulations impact the remaining places on the expressive topography. In other words, we identify places by *connecting* them with speech, rather than by separating them from it, as forum analysis typically does.[145]

1. A Topography of Places

Seen from this perspective, the Rehnquist Court's stewardship of public space affected a number of discrete spatial types. Its expressive zoning and time, place, and manner decisions ultimately gave rise to what might be called *tactical* places, the products of spatial tactics such as cages and speech zones.[146] Those precedents also effectively limited speakers' access to *inscribed* places. These might be public spaces such as highway overpasses on which speakers seek to post or write their messages. They are also sacred places such as the National Mall and Central Park, where a robust expressive culture and public "topophilia" have developed over time.

The Court also contributed to the modern phenomenon of placelessness by effectively validating the creation of *non-places*. These are places where large numbers of the public gather, but where expression is generally forbidden. They are modern places, such as shopping malls, airports, and other transport terminals, where speech on matters of public concern is not permitted to interfere with private commercial activity. Because of the Court's narrow focus on property functions and traditions, new places such as these cannot be deemed presumptively open to expression.[147] The Court also limited speaker

145. The concept of the expressive topography, and each of the spatial types in the discussion that follows, are examined and explained in greater detail in Zick, *Space, Place, and Speech*, *supra* note 11. The spatial labels are borrowed principally from THE ANTHROPOLOGY OF SPACE AND PLACE, *supra* note 139.

146. *See* Zick, *Speech and Spatial Tactics*, *supra* note 11.

147. *See* Int'l Soc'y for Krishna Consciousness, Inc. v. Lee, 505 U.S. 672, 679 (1992) (holding that an airport is a "nonpublic" forum).

access to *embodied* places, the personal spaces of listeners. This type of place was at issue in *Hill*, in which the Court recognized a public right to privacy on the public streets near abortion clinics. There is, finally, reduced access now to what might be called *contested* places. These are places that are themselves at the center of political or social conflicts, such as the home in *Frisby* or the abortion clinics in *Hill* and *Madsen*.

This brief description is not intended to cover the entirety of the expressive topography.[148] Nor, as the reader will have noticed, are the spatial types mutually exclusive. A single place may share the expressive attributes of more than one of these types.[149] These spatial types do not determine rights. They should, rather, lead courts to consider the special character of the place at issue, the intersection of speech and spatiality in that place, and the relation of that place to public discourse more generally. Merely thinking in terms of place rather than property or forum will improve the balancing of speech and governmental interests that already takes place in determining access to public spaces. It will also provide grounds for reconsidering the current presumption that a number of public places are not open to expressive activity.

2. Getting into Public Places

I have described elsewhere what effectively analyzing or "reading" place entails, and how consideration of access to place differs from consideration of access to property.[150] I will do so only briefly here. Those looking for bright-line rules or a revised spatial formalism will be disappointed. But if the discussion of place thus far has demonstrated anything, it is that "place," properly conceived, is too complex for such things. Let me very briefly, then, suggest the types of considerations that should be placed in the balance on the

148. It does not, for example, consider the phenomena of cyber-places or metaphysical places. *See* Zick, *Space, Place, and Speech*, *supra* note 11, at 481–84 (discussing cyberspace as place).

149. For example, the highway overpass might be an *inscribed* place, insofar as speakers are permitted to "write" or speak on it. It may, on the other hand, constitute a *non-place*, insofar as speech of any kind is barred there.

150. *See* Zick, *Space, Place, and Speech*, *supra* note 11.

side of public speech rights when courts consider the fundamental issue of access to place.

The discussion that follows assumes the acceptance and application of the basic theory of place sketched above. The spatial analysis should proceed based on a conception of places as primary to expression, constructed, dynamic, and variable. The primary focus should be on the manner in which speech and spatiality intersect in places. More specifically, courts should analyze the nature of the place in question, how place relates to content, how it is being utilized, by whom, and in what social or political context, and how a denial of access to this place might affect public discourse on the expressive topography more generally. Access, and its scope, should turn on these considerations rather than on the rigid categorization of property.

Let us briefly consider some examples to determine what effect this approach might have on the analysis of speakers' efforts to access public places. In the abortion clinic cases, the Court treated limitations on access to listeners at abortion clinics as a simple application of the time, place, and manner doctrine to speech on public sidewalks.[151] But there were in fact two distinct types of places in those cases. The clinics were *contested* places; being *there* was part of the expressive message. As Justice Scalia pointed out in his dissent in *Hill*, the clinics have effectively become "a [place] of last resort for those who oppose abortion."[152] Thus, the variety of access restrictions, such as buffer zones and personal bubbles, should have been more carefully scrutinized, rather than subjected to some form of anemic judicial scrutiny. Review of contested places requires an appreciation of the terms of the contest, its participants, and the manner in which place is used to defuse or otherwise affect the contest. Courts should recognize, in particular, that content discrimination may be lurking in this context. And if the clinics are indeed "places of last resort" for these speakers, some form of facilitation for speakers who seek to reach their intended audience may be required. This is precisely the sort of recognition that results

151. *See, e.g.*, Hill v. Colorado, 530 U.S. 703 (2000); Schenck v. Pro-Choice Network, 519 U.S. 357 (1997); Madsen v. Women's Health Ctr., Inc., 512 U.S. 753 (1994).

152. *Hill*, 530 U.S. at 763 (Scalia, J., dissenting).

from seeing *places*, rather than fora or properties. It should color not only the identification of discrete places but also the manner in which courts view tailoring and other aspects of spatial restrictions.

Courts assessing fora or properties rather than places sometimes miss the spatial point. For example, the core issue in *Hill*, raised by the eight-foot protective bubble around clinic patrons, was not whether access to listeners could be restricted on the *streets*, but rather what sort of access should be permitted to the *embodied* place of the listener. As Justice Kennedy noted in his dissent in *Hill*, embodied places implicate things such as expressive immediacy and emotive appeal.[153] Courts focusing on sidewalks obviously cannot appreciate the dynamism of place in this example. If they cannot see place itself, courts of course cannot recognize its communicative aspects. Unless they see and interpret place, courts also cannot appreciate how a spatially enforced prohibition on "counseling" near abortion clinics is used to target certain speakers and their messages. Finally, without an understanding and appreciation of the expressive topography, courts cannot gauge the impact of any spatial regulation on the ability to reach listeners in other places where they might be found and persuaded. They cannot, in other words, understand the *relative* importance of places.

Similarly, the Court in *Lee* held that airports are properties that have not traditionally been open to expression. Thus, airports were held to be non-public fora.[154] But, of course, *Lee* was about much more than solicitors' access to airport terminals. The decision turned airports, and seemingly any other modern property, into *non-places*, rather than merely *non-public fora*. *Lee* actually denied speakers access to two places. First, they were essentially barred from the embodied places of listeners, as in *Hill*. Second, they were forced out of the larger place of the terminals. The Court did not seem to recognize, or, if it did, to care, that these speakers were now displaced from both malls and terminals. Again, today these are among the only places where large numbers of listeners can readily be found. Viewed in this light, the inconvenience and possibility of

153. *See id.* at 788 (Kennedy, J., dissenting) ("Nowhere is the speech more important than at the time and place where the act is about to occur.").

154. *See* Int'l Soc'y for Krishna Consciousness, Inc. v. Lee, 505 U.S. 672, 679 (1992).

some misconduct associated with solicitation in embodied places seem rather trivial. A court focusing on and interpreting place rather than property or forum would have forced officials to use something other than displacement to address such concerns. It would also have been reluctant to flatly pronounce that all new properties are presumptively off limits to expressive activity.

Finally, limiting or denying access to other public places by constructing *tactical* places raises serious and unique expressive concerns. As I have explained elsewhere, the spatial tactics that are used to construct tactical places are not mere time, place, and manner regulations.[155] These tactics actually *create* distinct places—zones, pens, and cages. With respect to these places, courts must be acutely aware that spatial restrictions are often responses to particular forms of expression, particular groups, or perhaps even particular points of view. At the least, tactical places disparately burden protest and dissent. They keep speakers from other public places where listeners can be found. Again, in terms of dynamism, courts must ask what these access barriers *communicate* about things such as protest and dissent. In light of the expressive character of these places, courts should not simply presume that these are ordinary, neutral spatial restrictions. Instead, they should seriously inquire whether there are less restrictive alternatives to building cages and placing people in speech pens.

Note that two particularly problematic forum-based concepts recur throughout the foregoing analysis. The Court has emphasized that a property's expressive future will depend to a large extent on two factors, namely its functions and its traditional usage. As *Lee* demonstrates, expressive rights in public places often turn substantially on considerations of what a property was constructed to do and whether there has been a tradition of governmental allowance of speech on that property.[156] In short, forum doctrine focuses on *property* functions and traditions.

But places have *expressive* functions and traditions as well. The primacy, dynamism, and construction of place indicate that place

155. *See* Zick, *Speech and Spatial Tactics*, *supra* note 11.

156. *See Lee*, 505 U.S. at 680 (noting "the lateness with which the modern air terminal has made its appearance").

often functions in tandem with speech, not apart from it. Thus, merely considering what a place was *originally* designed to do is not sufficient. If it were, sidewalks, which again are designed to facilitate travel, would not be speech fora. As they are used by speakers, places take on expressive functions. In addition, places have *constitutional* traditions, not just managerial ones. When access to certain places is denied, these expressive traditions are fully at stake. Embodied places, for example, are part of a rich constitutional tradition of public discourse. That tradition extends back to the efforts of the Jehovah's Witnesses to break into listeners' personal spaces and to engage in solicitation in their presence, even at their homes.[157] In cases such as *Hill*, *Frisby*, and *Lee*, the Court should have considered this tradition in determining the legitimacy of spatial access restrictions. Similarly, contested and tactical places should be considered with their historical forebears, including the many spatial restrictions rejected during the civil rights era, in mind. Courts must recognize that social movements are severely hampered by the very types of spatial restrictions that have now become routine in our public places. Without access to these places, social movements may not occur at all. Finally, inscribed places such as parks and monuments are also part of an expressive tradition, one that extends well beyond the immediate contest.

In terms of the future of public expression, assembly, and petition, much depends on courts and officials being mindful that it is not merely access to property that is at stake. It is, rather, access to "place." This will require developing a sense of what place is, and what it does in relation to expressive activity. It will require not only a new vision of place, but an approach to it that recognizes and respects its primacy, dynamism, construction, and variability. Courts must learn first to locate place, and then to interpret it as it intersects with expression.

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157. *See* Schneider v. State, 308 U.S. 147 (1939) (invalidating municipal ordinances that prohibited distribution of handbills on public streets); Lovell v. City of Griffin, 303 U.S. 444 (1938) (invalidating ordinance that forbid distribution of literature without permission of city official).

E. Time and Manner, and Place

If "place" is, as I contend, an independent concept that is intimately connected to speech, we should seriously challenge its being joined doctrinally with things such as time and manner. This is a critical issue. As the Rehnquist Court's decisions demonstrate, even if a speaker is able to gain *initial* access to a public space, his or her right to speak there may be sharply limited by more "local" spatial regulations. Time, place, and manner doctrine thus cannot be separated from first-order access issues. Indeed, regulations of these "contextual" elements are often determinative of access to public places. In this section, I will briefly present some arguments in favor of separating place from time and manner, and of applying a more heightened form of judicial scrutiny to spatial regulations.[158]

Time, place, and manner have historically been considered aspects of expressive context or environment. They have been treated as related to speech, but only tangentially so. Under prevailing doctrine, the regulation of these contextual factors is subject to a rather weak and anemic version of intermediate scrutiny.[159] So long as a regulation is not *expressly* based on content, the government need only state a substantial interest in regulating the time, place, or manner and tailor its regulation such that adequate alternative channels of communication remain available.[160]

In truth, all of these elements can substantially affect public speech rights. Rationality review should not be applied to time and manner restrictions. But "place" is different from these other matters in several respects. Consequently, it should receive an even greater degree of judicial attention.

First, regulating place is not merely a matter of maintaining a basic sense of order in public places. This may have been all there was to it in the early days.[161] But changes to the spatial environment

158. Again, the interested reader is referred to Zick, *Speech and Spatial Tactics*, *supra* note 11, for a more detailed discussion of these issues.

159. *See* Williams, *supra* note 82, at 644 ("The government interest and tailoring requirements are quite close to the *rational basis* standard applied to regulations that do not affect fundamental rights at all.") (emphasis added).

160. *See* Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989).

161. *See* Cox v. New Hampshire, 312 U.S. 569, 576 (1941) (holding that the regulation

brought about by conditions of modernity, the development of the "public forum" doctrine, and the Rehnquist Court decisions on expressive zoning have raised the profile of place and its importance to expressive rights. If place ever truly was mere context or background, it is certainly no longer. Without place, time and manner are more or less inconsequential. Place, as noted, is *primary* to expression.

Second, given the expressiveness of place, spatial restrictions can often have a more substantial effect on expressive content than time or manner regulations. The prohibition of a particular *manner* of speaking, such as burning a draft card or posting a sign on public property, can indeed have a substantial impact on things such as the emotive quality of speech or the efficient delivery of messages. Unduly limiting the *time* during which speech is allowed can also substantially impact expression.[162] But in either case, the essence of the message itself can still be conveyed, even if perhaps less effectively, by other means or at other times. Unless they are truly narrowly tailored, however, spatial regulations can effectively suppress speech altogether. Places currently considered "adequate" and "ample" alternatives under the time, place, and manner doctrine may in fact be *miles* away from intended audiences.[163] Even if a spatial restriction does not wholly suppress a message, the displacement itself is expressive in a way that time and manner regulations are not. The fact that speakers are caged or otherwise displaced, for example, communicates something, symbolically, to those who pass by. Listeners can see and even experience spatial restrictions; they are evident to potential listeners in a way that time and manner regulations are not.

This highlights a third distinction. Restrictions on place are often different *in character* from those on time and manner. Restrictions on time and manner can delay the communication of messages, reduce

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was necessary "'to prevent confusion by overlapping parades or processions, to secure convenient use of the streets by other travelers, and to minimize the risk of disorder.'" (quoting State v. Cox, 16 A.2d 508 (N.H. 1940))).

162. *See*, *e.g.*, Saia v. New York, 334 U.S. 558, 562 (1948) ("Annoyance at ideas can be cloaked in annoyance at sound.").

163. *See* Zick, *Speech and Spatial Tactics*, *supra* note 11, at 591 (discussing speech zones used during presidential campaign).

the volume at which speech is delivered, or impact such things as the size of placards or the activity that accompanies speech. These can be more than mere inconveniences to speakers. But spatial regulations can be so physically coercive as to chill speech altogether. This is particularly true of speech zones and other tactical architectures.[164] These regulations, unlike those relating to time or manner, operate directly on the body. They threaten specific reprisals for moving outside a zone that is marked by some architecture or another as "free."

Finally, content discrimination can more readily be hidden in spatial regulations than in time and manner ones. That is not to say, of course, that time and manner restrictions cannot harbor content discrimination. But given their nature, it is more difficult to slip distortion into these types of regulations. Limiting one group to a particularly unattractive time or prohibiting a unique form of expressive conduct for no apparent reason rather plainly suggests content discrimination. But spatial regulations are unique in this respect as well. They are often presented as efforts to *accommodate* speech concerns. They purport to set aside space for expressive uses by constructing "free speech zones." Spatial tactics thus often give the appearance of facilitating speech, while, in reality, suppressing and chilling it. This is why spatial tactics benefit substantially from a presumption that place is neutral. Judges will have a much more difficult time identifying content discrimination with regard to place; unless, that is, they are encouraged to look more rigorously for it.

In light of these differences, courts should be far more skeptical of spatial regulations than they are at present. Because place is primary to expression, they should demand some real evidence that a compelling interest will be served by displacing speech in the manner proposed. They should translate their heightened appreciation for and knowledge of place into careful scrutiny as to whether spatial regulations are, in fact, *narrowly* tailored. None of this is beyond judicial competence. Scrutiny of this sort will require attention to such things as the physical characteristics of places, the separation or distance between speakers and listeners, the forms or types of

164. *See id.*

communication possible in the place, and other meaningful opportunities for speakers and listeners to interact in public. This approach will sometimes give speakers access to listeners in situations that are disturbing, uncomfortable, or even dangerous. But these, too, are fundamental aspects of our tradition of public discourse. The First Amendment does not, and should not, protect us from these things. Place should not be used to "protect" us from speakers we may not wish to hear.

V. CONCLUSION

Public expression, assembly, and petition are integral aspects of our First Amendment heritage. Place has played a substantial role in that heritage. Some of our most important social movements, such as the civil rights movement of the 1960s, depended for their success on access to public places. First Amendment jurisprudence itself would have been far different had it not been for the pioneering efforts of groups, such as the Jehovah's Witnesses, who used public places to engage listeners.

Today, however, we live in an increasingly disciplined, even militarized, spatial environment. Neither our physical environment nor our laws encourage the type of public interaction First Amendment theorists hale and a thriving expressive culture requires. The cause of material public discourse suffered major setbacks during the Rehnquist era. By cutting back on the "easement" on sidewalks and streets, placing its imprimatur on spatial tactics such as expressive zoning, creating "non-places," and restricting speakers' ability to enter the embodied spaces of listeners, the Court made it less likely that public citizens will be able to speak to, hear, or persuade one another in public settings.

Regardless of the state of our technological advancement, public streets, sidewalks, parks, and other traditional expressive places remain critical components of our expressive culture. So, too, do more modern public places such as airports and highways. We must find a way to preserve expressive liberties in these and other public places. To do this, we must alter both our conception of place itself and the constitutional analysis of issues of speech and spatiality. We must begin by separating "place" from dated notions of property and

from the confines of the "public forum" doctrine. As scholars in a range of disciplines have concluded, place differs in material respects from property. Courts must spend the time locating and interpreting place, rather than formalistically categorizing properties. Place should also be segregated from its contextual cousins, time and manner. Place is different from these things; it should be treated as such.

We must, in short, bring place into the foreground in an effort to preserve public expression. For those who consider the proposed re-conceptualization of place radical, I suggest that there is no preordained conception of "place" for us to follow. Property is merely a convenient conceptual framework, not a required one. For those who consider the chances of taking the proposed spatial turn at this historical and doctrinal juncture to be slim or even none, I ask forbearance; in constitutional law few things are ever *finally* settled.