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Space, Place, and Speech: The Expressive Topography

Timothy Zick*

Introduction

Place is central to human existence. It is one of the means by which we structure our lives. Place is often itself an event, a center of meaning. Consider the following places: Ground Zero, the White House, the National Mall, Tiananmen Square, and Auschwitz. These are not mere locales or sites. They are not undifferentiated spaces. They are all dynamic places, expressive aspects of cultures. In their unique ways, these places say something about politics, pain, triumph, and loss. They are repositories of memory, conveyors of rhetoric. The experience of being in these places is very different from the experience of being elsewhere.

Contrast these opening observations regarding certain meaningful places with the current First Amendment conception of “place.” To the extent that “place” enters constitutional discourse at all, it is as nothing more than a resource, a parcel of property, or an inert element of the expressive background.¹ Even the most sacred place does nothing; it says nothing. The current First Amendment conception of “place” as inert *res* is a distinctly lawyerly one.² It does not appreciate the importance of place to expressive and associative activity. It does not adequately take into account that *where* a speaker or group of speakers is placed profoundly impacts expressive message, persuasive efficacy, participation, and symbolic meaning.

Courts and commentators spend far more time examining issues of “what” speakers are permitted to say, in terms of categories of protected and unprotected speech, and “why” the government seeks to regulate expression, than they do inquiring about the significance of “where” a speaker seeks to exercise First Amendment rights. The result is a very anemic expressive topography and constitutional doctrine of place. Insofar as free speech doctrine is concerned, there are basically two types of places—the “public forum” and the “non-public forum.”³ This simplistic binary categorization is supposed to cover places ranging from streets to military bases to candidate

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¹ See *infra* Part I.A (discussing the current First Amendment conception of “place”).

² See *id.* (noting the concept's reliance on property metaphors such as “trust” and “easement”).

³ See *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45–46 (1983) (discussing the distinction between “traditional” public fora and “non-public” fora). In *Perry*, the Court also recognized a category it termed a “limited” public forum. See *id.* As Robert Post has convincingly noted, however, this category of forum appears to be of such limited application that its very existence seems doubtful. See Robert C. Post, *Between Governance and Management: The History of the Public Forum*, 34 UCLA L. REV. 1713, 1757 (1987) (discussing the difficulty a speaker has in gaining access to a “limited” public forum).

debates to even metaphysical places. With some alterations occasioned by the time, place, and manner doctrine,⁴ the forum paradigm purports to plot or map the entire expressive topography, the public space potentially open to expressive activity.

In terms of the First Amendment, "place" is dramatically undertheorized. The forum concept has been criticized for, among other things, its rigidity, its lack of a coherent theoretical foundation, and its myopic focus on property characteristics to the exclusion of expressive rights.⁵ Given these criticisms, it is doubtful that anyone would maintain that the forum doctrine actually captures the essence of "place." The time, place, and manner doctrine grants the government substantial authority to displace speech.⁶ Courts routinely conclude that the government's (unsubstantiated) interests outweigh the right of speakers to express themselves in a particular place, or that there exist ample and adequate alternative places where a speaker can convey her message. The analysis proceeds as if speech and spatiality are wholly separate and distinct elements; that places are mere abstract locations or properties to be categorized. So long as the government does not deny access to *all* places, the courts have reasoned, speakers have not been denied any constitutional right to communicate.⁷

Nearly five decades of experience with the property model of place, and the associated forum and time, place, and manner doctrines, demonstrate that these legal conceptions are incapable of either describing the expressive topography that we have or maintaining a system of place that is true to fundamental expressive freedoms.

It is imperative, especially now, that courts and scholars engage "place." Owing to technological advances in travel and communication, the planet is rapidly shrinking. In communicative terms, we tend to see this development as mostly beneficial. We can communicate across local and even global borders, and we can do so relatively cheaply. But there is a paradox here. As the planet shrinks, we are left with more and more *space*, but fewer and fewer *places* in which to connect with one another through expressive activity. Our communication is being driven, legally and technologically, into private realms and spaces. The importance, in particular, of public physical places and our meaningful social connections to "place" are in danger of receding into memory. Entire aspects of an expressive culture, including face-to-face proselytizing and political assembly and dissent, have been substantially diminished and devalued as a result of our failure to grasp the importance of "place."

⁴ See *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (noting that government may, so long as it does so in a content-neutral manner, regulate the context of expressive activity, including the elements of time, place, and manner).

⁵ See sources cited *infra* note 112.

⁶ 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.").

⁷ See, e.g., *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 54 (1986) (holding that so long as the city did not entirely deny business the opportunity to operate, no First Amendment violation had occurred).

“Place” is too critical as a First Amendment concept for courts to simply continue to mechanically apply a fundamentally flawed model. The basic problem is that the law lacks the tools and insights necessary to reconsider a concept like “place.” Judges and scholars need a new perspective with respect to place; one that accounts for its complexity, recognizes its expressive power, and reunites speech and spatiality. As I have urged elsewhere, this context is one in which constitutional law and theory can benefit substantially from conceptual borrowing.⁸ Anthropologists, sociologists, geographers, philosophers, and other scholars have been systematically studying “place” for many decades. Neither confined to nor constricted by legalistic property models of place, these scholars have discovered that “place” represents far more than the inert background concept it has long been assumed to be in their respective fields of study.

In specific terms, courts and legal scholars need two things if they are to better understand place and appreciate the intersection of speech and spatiality: an alternative conception of place and a revised expressive topography. A cross-disciplinary perspective on “place” can further both of these projects.

The insights of scholars from other disciplines can be used to derive a conception of place that acknowledges and appreciates its expressive element. This Article posits such a conception, which it calls “expressive place.” The principles of expressive place are borrowed from cross-disciplinary scholarship in which place has emerged as primary, constructed, dynamic, and variable. Place, in other words, is the opposite, or near opposite, of the narrow legal conception of property, or *res*. The concept of expressive place appreciates that speech and spatiality combine, collide, and coexist in a variety of contexts that give rise to unique and differentiated spatial types.

Cross-disciplinary borrowing will also produce a more accurate description of the expressive topography. The problem with the binary model of place is not categorization per se. The problem, rather, is twofold. First, the categories “public” and “non-public” do not account for the variability and complexity of expressive place. Second, these spatial categories are doing too much of the work in First Amendment analysis, and the wrong kind of work at that. They are being used in many cases to determine expressive rights, rather than inform analysis of the intersection of speech and spatiality.

This Article posits that the expressive topography consists, roughly speaking, of at least six spatial types. Borrowing language and concepts used in other disciplines, the places will be referred to in this Article as embodied, contested, inscribed, tactical, cyber-places, and non-places.⁹ This topography does not cover every conceivable type of place, but most substantial First

⁸ See Timothy Zick, *Speech and Spatial Tactics*, 84 TEX. L. REV. 581 (2006) [hereinafter Zick, *Speech and Spatial Tactics*]; see also Timothy Zick, *Are the States Sovereign?*, 83 WASH. U. L.Q. 229 (2005) (borrowing from the concept of “sovereignty” as it has been developed in international relations scholarship).

⁹ Many of the spatial labels are borrowed directly from Setha M. Low & Denise Lawrence-Zuniga, *Locating Culture*, in *THE ANTHROPOLOGY OF SPACE AND PLACE: LOCATING CULTURE* 1 (Setha M. Low & Denise Lawrence-Zuniga eds., 2003). See *id.* at 1–37 (surveying the approaches of anthropology, environmental psychology, sociology, architecture, geography, and urban planning to place, and outlining various spatial types).

Amendment issues that directly implicate place can be examined within one, or sometimes more than one, of these spatial types.

A brief description of each of the spatial types will help to demonstrate the basic contours of the proposed expressive topography. *Embodied* places implicate the competing interests of a speaker to reach an intended listener or viewer by, in some sense, invading her "space" and of an unwilling listener or viewer to privacy and psychological repose. Efforts by "sidewalk counselors" to persuade women not to have abortions are the primary example. *Contested* places are perhaps the most common spatial type. They involve the claimed right of a speaker to inhabit a particular place and express himself there, in part because the place itself is part of a specific political or social contest. For example, civil rights protesters during the 1960s sought to protest library segregation policies in the library itself, or outside a jail, as opposed to someplace else. *Inscribed* places consist of two types. Highway overpasses and utility poles are sometimes used as vehicles for "inscribing" or writing on place. There are also "inscribed" places of a more sacred, symbolically powerful sort. These places are locales that have been closely identified over time with the exercise of expressive and associative rights. The best known examples of this spatial type are the National Mall and Central Park in New York City. *Tactical* places are the product of the government's use of space as a strategy or technique of control. Broadly speaking, institutions like schools and prisons are tactical places. So are the zones, cages, buffers, and other architectures now routinely used by government to discipline and control public expressive and associative activities. *Non-places* are locales like malls, airports, and subways. Modern citizens spend an abundance of time in these places, but public expression is tightly regulated there, if it is permitted at all. Finally, for purposes of this discussion, *cyber-places* are the various locales "in" cyberspace. These include weblogs, chat rooms, and websites.

The object of this topographical redesign is not to further complicate matters by adding more categories of places. The six spatial types do real work, although it is of a fundamentally different kind than the "forum" concept. Public forum doctrine has been criticized for, among other things, making categorization of property as "public" or "non-public" the dominant, and often dispositive, issue for many speech claims.¹⁰ The proposed topography, by contrast, is based not upon *property* principles, but *expressive* principles. It is based upon the theory of "expressive place." What is at stake in this replotting is not mere descriptive accuracy; the larger and more important idea is to refocus courts on the speech issues that have received truncated, if any, attention under the public forum and time, place, and manner doctrines. In contrast to the current topographic conception, the labels or categories of expressive place do not establish rights or determine governmental powers. The approach is thus not mechanical; the reconceptualization of place and revised expressive topography will shed valuable light on the complex intersection of speech and spatiality. These refinements will assist courts in accu-

¹⁰ See sources cited *infra* note 112.

rately locating, “reading,” and ultimately valuing “place” in First Amendment disputes.

Part I of this Article examines the current conception of place as *res* or property, the expressive topography this conception has produced, and the theory of the First Amendment that drives both of these concepts. It concludes with a brief summary of the principal doctrinal and theoretical criticisms of the current approach to place.

Despite the criticisms, there have been no significant efforts by scholars to seriously rethink “place” or the critical intersection of speech and spatiality. Part II elaborates the conception of “expressive place.” In contrast to the property model of place that molds the current expressive topography, expressive place is far more than a backdrop for expressive scenes. Expressive place is not secondary to speech; it is of primary importance to expressive and associative rights. This conception does not treat place as simply given; place is, rather, constructed and given meaning as it becomes part of an expressive culture. Unlike place-as-*res*, expressive place is not inert; it is dynamic and interacts with speech in a variety of ways. Expressive place is not silent; as the label implies, this conception views and treats place as *vocal*. Expressive places are repositories for memories. They often represent practices, histories, conflicts, and accomplishments; they are condensations of values and they often convey meanings. Finally, expressive place is not binary or trinary; it is variable, consisting at least of the six spatial types described above.

Proceeding from this theoretical perspective, Part III replots the basic expressive topography. The six spatial types—embodied, inscribed, contested, tactical, non-places, and cyber-places—are each examined. They are described first in general terms, with reference to their roots in interdisciplinary scholarship. The spatial types are then connected to their individual First Amendment contexts, with examples of each place drawn from existing free speech jurisprudence. Once again, this new topography is intended to inform the analysis that occurs *within* the public forum and time, place, and manner doctrines. The labels do not themselves determine rights; rather, the topography offers a general framework for “place” that courts and scholars should use to inform their analyses of issues of speech and spatiality.

Part IV examines the theoretical and doctrinal benefits that will flow from reconceptualizing place and replotting the expressive topography. The spatial turn provides judges and scholars with the analytical tools necessary for moving beyond the idea of place as mere property. It provides a long-absent theoretical foundation for place, as well as a far more accurate description of the expressive topography. The expressive place framework also offers an alternative method for systematically evaluating issues of speech and spatiality. Courts evaluating spatial claims should first locate the specific place on the expressive topography. Next, they should adopt a theory of the First Amendment that is appropriate in light of the place and spatial issues involved. Lastly, when examining the substance of these claims, courts should actively and consciously think, analyze, and read “places” rather than narrowly categorize properties or “fora.” This approach entails adopting the concept of expressive place and taking into account the unique

values and expressive concerns raised by specific places. It entails reconceptualizing things like property function and spatial tradition that currently drive forum analysis. Finally, Part IV proposes revisions to the time, place, and manner doctrine that will improve the manner in which things like spatial neutrality, tailoring, and adequacy are evaluated.

I. The Current First Amendment Conception of "Place"

Insofar as the First Amendment is concerned, "place" is property. The idea that place is merely property, or *res*, accounts for the First Amendment doctrine of place, the present map of our expressive topography, and the basic spatial theory with which courts approach matters of place under the First Amendment.

Of course, most places are indeed forms or species of property. The question, ultimately, is whether that is *all* they are. Before we answer that question, let us first look at what place is right now. This Part provides a general overview of the present First Amendment conception of place. It concludes with a summary of the principal critiques of this treatment of place.

A. Place as Property

From the moment the Supreme Court first considered claims by speakers to access specific locations for expressive purposes, "place" has been treated under a legal property paradigm. Spatial controversies initially centered on speakers' rights to use the public streets, parks, and sidewalks to reach potential listeners and viewers.¹¹ The first response of the courts was to treat the state as the *owner* of these public properties.¹² Like any private owner of property, under this theory the state was at liberty to exclude speakers from "its" space at will.

This conception constituted a defining moment in the history of place. Courts had to decide who should have access to public spaces, and under what specific terms. Faced with arguments regarding the scope of the government's right to exclude speakers from public properties like streets and parks, judges naturally drew upon principles of property.

But if, as these early Court decisions posited, the state owned public spaces outright, if it possessed the entire property "bundle of rights" with regard to these spaces, then one's ability to reach an audience in those places would be seriously compromised. It took some four decades, but the Supreme Court ultimately rejected the idea that the government owned the public thoroughfares.¹³ Among other things, the ownership principle simply granted too much power to the government to ban expressive activity in public spaces. The streets and parks had to be in some sense regarded as property within the public domain.

¹¹ See *Davis v. Massachusetts*, 167 U.S. 43 (1897) (upholding the government's "right to absolutely exclude all right to use" streets and parks).

¹² *Id.* at 48.

¹³ See *Hague v. Comm. for Indus. Org.*, 307 U.S. 496 (1939) (rejecting the ownership principle as to streets and parks in favor of a conception of property trusteeship).

Beginning in the 1940s, the Court began to treat the government as the “trustee” of the public streets, parks, and sidewalks.¹⁴ One traditional property concept (trusteeship) was thus substituted for another (ownership). This shift in status meant, at least, that the state could not ban speakers from public streets, parks, and sidewalks. In a landmark article, Harry Kalven, Jr., invoking still another property metaphor, proclaimed that the demise of the ownership principle granted speakers a “First Amendment easement” to use these public spaces for expression and association.¹⁵

This “easement,” however, applied only to the public streets, parks, and sidewalks. The public’s right to access the mass of other public spaces had yet to be determined. In the 1960s and 1970s, the Court decided this issue on a place-by-place basis. It adjudicated access claims to a variety of public properties, including a public library,¹⁶ the space around a public jail,¹⁷ a municipal theatre,¹⁸ advertising space on public buses,¹⁹ and portions of a military base.²⁰ Although its approach to these cases was largely ad hoc, two general principles emerged. On the one hand, there had to be limits on the government’s ability to restrict expression in public places speakers had every right to be.²¹ On the other hand, the government as “trustee” had to retain the power to limit access to public places in order to maintain order and to preserve the properties for their original and intended use.²² In other words, the bundle of rights in the *res* of public space was to be divided.

The difficulty, of course, lay in balancing the competing rights of the public to access and the government to manage public properties. One approach was to ask whether the speaker’s activity was “compatible” with the particular property in question.²³ The “compatibility” test required that courts examine both the nature of the intended speech and the character of the property in question. It would not, for example, be “compatible” with the public library to stand on a table and speak through a megaphone to deliver one’s message.²⁴ On the other hand, to sit or stand idly in the reading room was not an “incompatible” use of this particular property.²⁵ Stated another way, the government did not possess the authority to deny access to speakers who were essentially “invitees” on the property and using it in a

¹⁴ See *id.* at 515 (“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.”).

¹⁵ See Harry Kalven, Jr., *The Concept of the Public Forum: Cox v. Louisiana*, 1965 SUP. CT. REV. 1, 13.

¹⁶ *Brown v. Louisiana*, 383 U.S. 131 (1966).

¹⁷ *Adderley v. Florida*, 385 U.S. 39 (1966).

¹⁸ *Se. Promotions, Ltd. v. Conrad*, 420 U.S. 546 (1975).

¹⁹ *Lehman v. City of Shaker Heights*, 418 U.S. 298 (1974).

²⁰ *Greer v. Spock*, 424 U.S. 828 (1976).

²¹ See *Brown*, 383 U.S. at 142.

²² See *Adderley*, 385 U.S. at 47.

²³ See *Grayned v. City of Rockford*, 408 U.S. 104, 115 (1972) (inquiring “whether the manner of expression is basically incompatible with the normal activity of a particular place at a particular time”).

²⁴ See *id.*

²⁵ *Id.* (citing *Brown*, 383 U.S. 131).

manner consistent with its primary purpose. The compatibility approach seemed to place the burden on the state to show that speech was not appropriate on the property in question.

The "compatibility" test did not survive. In fact, it faded from view almost immediately.²⁶ After a period of clumsily feeling its way through a new group of public properties, the Court finally articulated what is now commonly referred to as the "public forum" doctrine.²⁷ The topography produced by this doctrine, which essentially consists of "public" and "non-public" places or fora, is examined below. Here, we need to pay specific attention to the linchpin of the approach, the concept of the "forum." What is this concept? And how, if at all, did it affect the treatment of place as property?

In its ordinary usage, "forum" refers to public space that is open to communicative and expressive activity. Harry Kalven, Jr., from whom the Court borrowed the term, originally used forum in this sense. As noted, Kalven argued for an implied "easement" for speech on the public streets.²⁸ He recognized that place was indispensable to speech and expressive association. Kalven thus seemed to embrace the notion that whatever property characteristics streets possessed, "forum" had a broader significance. Indeed, the degree to which property was open to expressive activity, Kalven said, was an "index of freedom."²⁹

The Court, by comparison, has never demonstrated any particular enthusiasm for the idea that place is an integral aspect of expressive freedoms. The "forum" concept was probably most attractive to the Court because it seemed to be based upon the Court's preconceived notion that place was merely property. The idea of an "easement" fit comfortably within this conception of place. The abstraction of the "forum" thus gave place a new label. It provided a new language for speaking in terms of issues of place. But it did not signal any deviation from the mindset that public space was little more than a public resource—something to be managed, parceled, and partitioned by the government. As discussed below, the forum concept's principal contribution to the law of free expression, if one chooses to characterize it this way, was to provide the basis for a rigid categorization of public space.

Although the conception of place-as-*res* did not change, the nature of the state's relationship to public property was altered by the forum approach. As noted, by the 1960s the state had been labeled a "trustee" of some significant public properties.³⁰ Under the forum paradigm, however, the state's position was more akin to that of "proprietor" of public space than a "trustee."³¹ Proprietorship status seemingly applied only to spaces other than streets, parks, and sidewalks; in reality, with this change in status, the

²⁶ See Post, *supra* note 3, at 1732, 1735 (discussing the Court's rejection of the unified "compatibility" standard).

²⁷ See *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45–46 (1983) (articulating the "forum" approach).

²⁸ See Kalven, *supra* note 15, at 13.

²⁹ *Id.* at 12.

³⁰ See *supra* notes 16–22 and accompanying text.

³¹ See *Int'l Soc'y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 678 (1992) (noting

government regained nearly the entire “bundle of rights” associated with ownership of public space, including the critical right to exclude others.

This expanded grant of authority to the government in its ability to regulate public space was facilitated by the parallel emergence of the time, place, and manner doctrine, which was also developing in the 1960s and 1970s. As the time, place, and manner doctrine developed into a very lenient review of spatial regulations, something akin to rational basis review, the government gained the power to essentially decide whether *any* public space will be open or closed to expressive activity.³²

Note that this additional discretion to close space, or at least substantially displace speech, is the product of yet another set of property principles. The government has long had the power to “zone” land for particular uses.³³ Courts are reluctant to interfere with this traditional proprietorship function. A similar judicial approach has developed with regard to the zoning of what might be called “expressive uses.”³⁴ The upshot is that if there is an “easement” on *any* public property for speech activity today, it is indeed a very narrow one. One struggles to articulate what, in particular, a speaker gains by locating herself in even a “traditional” public forum.

Like any proprietor, the government is generally treated as if it has something like a “property management plan” with regard to the spaces under its control. At present, the First Amendment provides for minimal interference with these plans. The government can thus convert spaces it had previously opened to expression into “closed” spaces.³⁵ It has the general authority, in all spaces, to exclude speakers in order to preserve the property for its planned use.³⁶ In some spaces, it may refuse access to any speaker whose choice of subject matter, or mere identity, is inconsistent with the property management plan.³⁷ This construction, of course, comes very close to treating the government as the outright owner of public property. The speaker now bears the burden of demonstrating that she “belongs” on the property in question. If she does not, she has no First Amendment protections there; she is akin to a “trespasser” on the government’s property.

In sum, the conception of place-as-*res* is manifested in the labels the Court uses to describe the government’s relationship to place (owner, trustee, proprietor) and the property metaphors that describe or are inherent in

that where the government acts as proprietor, its speech restrictions are not subject to heightened review).

³² See Williams, *supra* note 6, 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.”).

³³ See, e.g., *Vill. of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926) (upholding a comprehensive local zoning plan).

³⁴ See, e.g., *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 54 (1986) (upholding targeted zoning law as applied to “adult” entertainment uses).

³⁵ See *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 45–46 (1983) (noting that a “designated” public forum does not have to remain open).

³⁶ See *Greer v. Spock*, 424 U.S. 828, 836 (1976) (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”).

³⁷ See *Perry*, 460 U.S. at 46 (describing the standards for a “non-public forum”).

the doctrine of place (easement, zoning, invitee, trespasser). It is apparent, as well, in what place does or represents in First Amendment controversies. Like any other property, or *res*, place is always inert in these contexts. It exists apart from any constructive process, as a brute fact or preexisting public resource. Place neither does anything nor communicates anything; it is, so far as one can tell from reading the leading cases, wholly separate from the substance of any expressive content or message.

B. *The Current Expressive Topography*

The “forum” concept provides the basic constitutional benchmark for determining when expression is out of place, and has been used by the Court to plot the current expressive topography. The topography consists of the natural and man-made features of the public spaces potentially open to expressive and associative activity. To map and understand this expressive topography, we should think in terms of both a macro- and a microgeography of place. At the macro level, the geography consists of “fora.” At the micro level, the government is authorized under the time, place, and manner doctrine to further partition forum spaces. There are also other places, like schools and governmental workplaces, that need to be briefly considered in order to round out the expressive topography. These places are subject to special constitutional rules.

1. *The Expressive Macrogeography*

As noted, the Court quickly abandoned the speech-facilitative “compatibility” standard.³⁸ No doubt a substantial part of the reason for this was that the standard was thought to provide insufficient structure and certainty at a time when “place” was beginning to take a multitude of forms. The complexity of place was believed to require a more rule-bound paradigm.

Structure and certainty were to be supplied by the forum analysis, first fully articulated by the Supreme Court in *Perry Education Association v. Perry Local Educators’ Association*.³⁹ In its opinion, the Court, for the first time, presented in detail its map of the expressive topography. The Court’s conception of the expressive topography consists of two, or perhaps three, types of fora. First, there are “traditional” or “quintessential” public fora.⁴⁰ The Court has reasoned that the public streets, sidewalks, and parks have “by long tradition or by government fiat . . . been devoted to assembly and debate.”⁴¹ These are apparently the only public spaces that fall into this category.⁴²

Second, there are “designated” public fora, or spaces the government has opened up to expressive activity. These fora arise only “by purposeful

³⁸ See *supra* notes 23–26 and accompanying text.

³⁹ *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37 (1983).

⁴⁰ *Id.* at 45.

⁴¹ *Ark. Educ. Television Comm’n v. Forbes*, 523 U.S. 666, 677 (1998) (citing *Perry*, 460 U.S. at 45).

⁴² See *id.* at 678 (noting that the Court has “rejected the view that traditional public forum status extends beyond its historic confines”).

governmental action”;⁴³ mere inertia or inaction is not enough to convert any public space into a place designated for expressive activity. Indeed, the Court has emphasized that the intent to create a “designated” public forum must be clearly manifested.⁴⁴ The “objective” indicators of this intent include such things as “the policy and practice of the government” and the “nature of the property and its compatibility with expressive activity.”⁴⁵

Third, and finally, all remaining public spaces are either “nonpublic” fora, or not expressive fora at all.⁴⁶ I have purposefully excluded from this general description the concept of the “limited public forum,” which, as others have noted, is a doctrinally incoherent concept.⁴⁷ *Perry* aside, the Court generally has carved the expressive topography into public fora (“traditional” or “designated”) and “non-public” fora.

There are, thus, in reality only two types of fora—“public” and “non-public.” As she traverses this basic topography, a speaker’s rights ostensibly vary according to which type of property she manages to access. In the traditional public forum, the government may not ban expressive activity altogether; it can enforce a content-specific regulation only if it has a compelling need and the regulation is narrowly tailored to meet that need.⁴⁸ The government may then, as discussed below, enforce content-neutral time, place, and manner regulations.⁴⁹

The same rules apply in the “designated” public forum. Assuming the state has manifested the requisite intent to permit expression in these places and they remain open for this purpose, the First Amendment rules are precisely the same in the designated public forum as they are in the traditional public forum.⁵⁰ The difficulty for the speaker is that she must demonstrate, according to the “objective” factors mentioned above,⁵¹ that the state intended to open this property to public discourse. Otherwise, as noted, she is essentially a “trespasser” there.

A steep drop-off in expressive rights occurs, however, as the speaker moves from a “public” forum to a “non-public” forum. In non-public fora, where the state has not manifested any intent to open the property to public discourse, the speaker has very few rights. Here, the state’s relationship to place is closest to the ownership metaphor.⁵² The government may make

⁴³ *Id.* at 677.

⁴⁴ See *Cornelius v. NAACP Legal Def. & Educ. Fund*, 473 U.S. 788, 802–03 (1985) (discussing the intent requirement).

⁴⁵ *Id.*

⁴⁶ *Forbes*, 523 U.S. at 677.

⁴⁷ See Post, *supra* note 3, at 1757 (arguing that the Court’s conception of the “limited” public forum “shrinks the limited public forum to such insignificance that it is difficult to imagine how a plaintiff could ever successfully prosecute a lawsuit to gain access to such a forum”); Steven G. Gey, *Reopening the Public Forum—From Sidewalks to Cyberspace*, 58 OHIO ST. L.J. 1535, 1536 (1998) (describing the concept of the “limited” public forum as “oxymoronic”).

⁴⁸ See *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 45 (1983) (describing standards for traditional public fora).

⁴⁹ *Id.*

⁵⁰ See *id.* at 46.

⁵¹ See *supra* notes 43–45 and accompanying text.

⁵² See *Perry*, 460 U.S. at 46 (“[T]he State, no less than a private owner of property, has

distinctions in access based upon subject matter, as well as on the basis of a speaker's identity.⁵³ Regulation of a speaker's access must only be "reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view."⁵⁴ Of course, it is extraordinarily difficult to demonstrate that the state has specifically *targeted* a particular viewpoint. Consequently, most restrictions on expressive activity in the non-public forum, even those that exclude certain classes of speaker or subject matter, will likely survive scrutiny. The "property manager" is in full control of these public spaces.

Courts and commentators often treat forum analysis as if it constitutes a map of the entirety of public space. It has indeed been utilized to determine issues of access to an extraordinary range of public spaces. These have included things like mailboxes,⁵⁵ airport terminals,⁵⁶ military bases,⁵⁷ the stage at a candidate debate,⁵⁸ and even "metaphysical" spaces.⁵⁹ Like the concept of "property," the "forum" concept has been flexibly expanded to meet modern circumstances. The forum concept is not invariably utilized in these contexts. Rather, the Court seems to think in terms of "forum" whenever it believes the concept offers a useful organizing principle or analogy.

In order to draw a comprehensive map of the expressive macrogeography, we must take into account some additional, special types of places. Certain places have come to be governed by distinct sets of rules. Schools, government workplaces, and prisons are the primary examples. The Court does not generally treat the school itself as a forum for expression; rather, it has developed a special set of rules that govern expressive rights in this context. These rules take into account such things as administrators' needs to maintain order and to serve pedagogical objectives.⁶⁰ A similar circumstance prevails in the government workplace, where special concerns have been held to dictate a specific balancing of employee speech rights and employers' rights to pursue mission, efficiency, and disciplinary goals.⁶¹ Finally, prisons are not treated as expressive fora; rather, expression may be regulated in light of the disciplinary interests these places serve.⁶² These last-mentioned

power to preserve the property under its control for the use to which it is lawfully dedicated." (quotation omitted)).

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *See id.*

⁵⁶ *Int'l Soc'y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672 (1992).

⁵⁷ *Greer v. Spock*, 424 U.S. 828 (1976).

⁵⁸ *Ark. Educ. Television Comm'n v. Forbes*, 523 U.S. 666 (1998).

⁵⁹ *See Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 831 (1995) (applying forum principles to Student Activity Fund ("SAF"), although acknowledging that "[t]he SAF is a forum more in a metaphysical than in a spatial or geographic sense"); *see also Cornelius v. NAACP Legal Def. & Educ. Fund*, 473 U.S. 788 (1985) (applying forum principle to charitable campaign).

⁶⁰ *See Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260 (1988); *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675 (1986).

⁶¹ *See, e.g., Connick v. Myers*, 461 U.S. 138, 138 (1983) (balancing employee speech rights and employer interests in discipline and efficiency).

⁶² *See Procunier v. Martinez*, 416 U.S. 396, 413-14 (1974) (holding that prison regulations of expression must further important governmental interests unrelated to the suppression of

examples account for a relatively small portion of the expressive macrogeography and are evaluated using special standards.

In sum, the general mapping of space for First Amendment purposes is generally dictated by forum categorization. The resulting topography consists of public streets, parks, and sidewalks marked off as separate “quintessential” public spaces, while the remaining mass of public property is mapped according to two principles. The first is governmental intent: can the speaker demonstrate an affirmative governmental intent that public discourse occur in this place as a “designated” public space? The second is the nature of the property itself. This inquiry includes an examination of the property’s characteristics, its primary use or function, and the history or tradition of expressive activity on the property in question. The current expressive macrogeography is based primarily upon principles of *res* or property, not expression.

2. The Expressive Microgeography

Under the public forum doctrine, where a speaker stands ostensibly determines what rights she has. But this picture is incomplete, for even within the various fora, there are additional measures the state may take to control the place of speech activity. Thus, even if a speaker is fortunate enough to find herself in a traditional or designated public forum, her place, and her expressive rights, are not assured. The government has broad authority to control the location of speech *within* these fora. To complete the description of the present topography of expression, we must account as well for a set of micro- or subgeographic principles.

Well before the Court turned its attention to categorizing properties as “fora,” it wrestled with even more rudimentary principles of speech and spatiality. Suppose, for example, that two groups intended to march down the same street at precisely the same time.⁶³ Or similarly, suppose that a speaker claimed a right to present his views in the middle of a busy intersection, or on an unwilling listener’s doorstep, or on city overpasses and utility poles.⁶⁴ As the examples indicate, where one speaks implicates fundamental societal interests in things like order, tranquility, safety, and aesthetics.

At bottom, governments exist to provide these things. Few of us would wish to live in a society that permitted a speaker to drive a sound truck up and down city streets at four o’clock in the morning, blasting his message into the homes of sleeping residents.⁶⁵ Nor do we generally want our public

expression and that the limitation must be no greater than necessary to further governmental interests).

⁶³ See *Cox v. New Hampshire*, 312 U.S. 569, 576 (1941) (discussing need for order on streets).

⁶⁴ See, e.g., *Schneider v. New Jersey*, 308 U.S. 147, 160 (1939) (“[A] person could not exercise this liberty by taking his stand in the middle of a crowded street, contrary to traffic regulations, and maintain his position to the stoppage of all traffic”); *Members of City Council v. Taxpayers for Vincent*, 466 U.S. 789, 807 (1984) (upholding the city’s power to limit display of campaign signs on utility poles).

⁶⁵ See *Kovacs v. Cooper*, 336 U.S. 77, 88–89 (1949) (upholding an ordinance prohibiting “raucous” noises from sound trucks).

spaces cluttered with flyers, posters, and other materials. On the other hand, few of us would wish to live in a society that permitted the government to shut off vast public areas to all communicative activity or permitted the government to choose, particularly with reference to the content of the speech, who could speak in which places.

The microgeographic principles of the First Amendment are an attempt to accommodate these concerns. The streets and parks cannot be entirely closed to expression; nor is the government granted unbridled discretion to partition public space, as when it provides permits for parades or demonstrations, for fear that content discrimination lurks in such discretion. A speaker may not, however, "exercise [First Amendment rights] by taking his stand in the middle of a crowded street, contrary to traffic regulations," or "insist upon a constitutional right to form a cordon across the street and to allow no pedestrian to pass who did not accept a tendered leaflet."⁶⁶ At a general level, the time, place, and manner precedents stand for the rather unremarkable proposition that the First Amendment does not grant anyone a right to speak wherever he pleases.⁶⁷ The boundaries of the expressive microgeography are not drawn in absolute terms; there is no escaping that the trustee-state must ultimately balance competing interests.

The Court has struggled to maintain the delicate balance of a speaker's rights to access public spaces and the government's power to manage them as "trustee" and "proprietor." First Amendment doctrine requires that a valid place regulation be content-neutral,⁶⁸ serve important governmental interests, be narrowly tailored to serve those interests, and leave open ample and adequate alternative avenues of communication.⁶⁹ On its face, this standard appears to constrain spatial manipulation of the content of expression. It is stated in terms that very closely resemble "intermediate" judicial scrutiny, a standard with some actual teeth.

In truth, that balance has tipped decidedly against any notion that speakers possess an "easement" to exercise their rights on governmentally managed properties. The Court has substantially weakened the bite of the scrutiny applied to spatial regulations.⁷⁰ Although the Court has held that any regulation that is "*justified* without reference to the content of the regu-

⁶⁶ *Schneider*, 308 U.S. at 160 (invalidating four municipal ordinances that prohibited house-to-house solicitation and distribution of circulars as an unconstitutional ban on speech; failing to properly balance an individual's strong interest in public speech with the city's insufficient interest in keeping the streets free from litter).

⁶⁷ See *Poulos v. New Hampshire*, 345 U.S. 395, 405 (1953) ("The principles of the First Amendment are not to be treated as a promise that everyone with opinions or beliefs to express may gather around him at any public place . . . a group for discussion or instruction.").

⁶⁸ That the restrictions on speech "are justified without reference to the content of the regulated speech." *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 (1984) (upholding a National Park Service regulation that prohibited demonstrators from sleeping in a symbolic tent city erected on the National Mall as part of a movement to bring attention to the plight of the homeless).

⁶⁹ *Id.*

⁷⁰ See *Williams*, *supra* note 6, 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.").

lated speech” will be deemed content-neutral,⁷¹ spatial regulations are nearly always *justified* with reference to order, safety, and other content-neutral interests that are presumptively significant or important.⁷²

The Court has also held that the tailoring of spatial regulations need not be the least restrictive or intrusive means available to the government, only that the regulation not displace or suppress substantially more speech than is necessary to serve the government’s interests.⁷³ Courts seem reluctant, however, to interfere with judgments regarding spatial tailoring; local officials are considered to have greater competence to determine the scope of regulations of place.⁷⁴

Finally, the abundance and “adequacy” of spatial alternatives have not generally been matters of serious scrutiny under the time, place, and manner analysis.⁷⁵ Alternative places need not even be realistically available to the speaker to be considered “ample.”⁷⁶ In terms of “adequacy,” places are treated as fungible; whatever the spatial regulation, it seems as if there will always be an alternative location the speaker can use to make her point.

The power to regulate the place of expression *within* speech fora, including those traditionally open to expressive and associative activity, thus grants the state a substantial second layer of spatial authority. Merely standing in a public forum is no guarantee of expressive or associative rights. It seems to be, at most, some form of “plus factor” for the speaker.⁷⁷ To determine a speaker’s rights, we also need to know the nature of the government’s “property management plan” for the place in question. Again, so long as that plan is *justified* in neutral terms, there is a substantial likelihood that it will be enforced.⁷⁸ In that event, the speaker will have to move to some other place on the expressive topography. And if that place is not available or is unattractive for some reason or another, the speaker may actually be foreclosed from speaking altogether.

The contours of the microgeography of expression are a product of this highly deferential approach to governmental regulation of location *within* fora. Like the forum concept, the time, place, and manner doctrine is

⁷¹ *Clark*, 468 U.S. at 293 (emphasis added); see also *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (holding that any regulation “that serves purposes unrelated to the content of expression is deemed neutral”; this is so “even if it has an incidental effect on some speakers or messages but not others”).

⁷² See *Williams*, *supra* note 6, at 640 (characterizing “significant state interest” requirement as “a type of lowest common denominator”).

⁷³ See *Ward*, 491 U.S. at 800 (explaining that regulatory means cannot be “substantially broader than necessary to achieve the government’s interest”).

⁷⁴ See, e.g., *Clark*, 468 U.S. at 299 (upholding restriction on overnight camping on National Mall on ground that courts lack “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”).

⁷⁵ See *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 54 (1986) (holding that so long as the city did not entirely deny business the opportunity to operate, no First Amendment violation had occurred).

⁷⁶ See *id.* (noting that displaced adult establishments would have to fend for themselves in the market).

⁷⁷ I am indebted to Professor Robert Tsai for making this particular observation.

⁷⁸ *Clark*, 468 U.S. at 293.

grounded in the conception of place-as-res.⁷⁹ Place regulations are treated more or less as ordinary zoning measures. The government may determine the proper place for each "expressive use." Under this analysis, local governments may concentrate or disburse sexually explicit entertainment establishments; speakers can be confined to "free speech zones"; expression can be banned from entire city blocks and vast portions of public parks; speakers can be prohibited from entering the personal space of listeners; and access to "fora" from arenas to airports can be tightly regulated or denied altogether.⁸⁰ So long as it does so without reference to speech content and makes a reasonable effort to tailor spatial regulations, the government is generally free to map the expressive microtopography as it wishes.

In sum, as described above, there are two aspects to our current expressive topography. At the macro level, the government shapes the expressive topography by deciding which spaces, aside from streets, parks, and sidewalks, shall be "fora" for expression.⁸¹ At the micro level, the government plots the more localized boundaries of public spaces.⁸² Within this stratum, the government determines *where* on the streets and sidewalks, in the parks, at the public auditorium, and on the university campus a speaker may present her views. In these respects, place is critical to the exercise of expressive rights. Depending on the shape it takes, this topography may determine whether those views will be heard at all.

C. Spatial Theory

The current expressive topography is plotted with implicit reference to the conception of place-as-res, but it is also the product of a specific theoretical approach to issues of speech and spatiality. As Professor Lillian BeVier has noted, the Court's treatment of place has in some sense always reflected a tension between two distinct approaches to the First Amendment.⁸³ On the one hand, the Court has historically been concerned that citizens must have some access to at least some public spaces for the purpose of expression and association. It has held that the government cannot absolutely prohibit access to public streets and parks.⁸⁴ On the other hand, issues of speech and spatiality are typically decided with reference to the principle of governmental neutrality.⁸⁵ So long as the government remains neutral with regard to expressive content as it distributes access to public spaces, there will likely be no First Amendment violation.⁸⁶

⁷⁹ See *supra* notes 32–33 and accompanying text.

⁸⁰ See generally Zick, *Speech and Spatial Tactics*, *supra* note 8 (describing the various spatial regulations currently used to control public expressive activity).

⁸¹ See *supra* Part I.A.

⁸² See *supra* Part I.B.

⁸³ Lillian BeVier, *Rehabilitating Public Forum Doctrine: In Defense of Categories*, 1992 SUP. CT. REV. 79, 101.

⁸⁴ See *Hague v. Comm. for Indus. Org.*, 307 U.S. 496, 515 (1939) (holding that public streets and parks have "immemorially" been open to expression).

⁸⁵ BeVier, *supra* note 83, at 102.

⁸⁶ *Id.* at 102–03.

BeVier has labeled these competing approaches the "Enhancement" and "Distortion" models, respectively.⁸⁷ An Enhancement model of the First Amendment "is concerned with how much speech takes place in society and with the overall quality of public debate."⁸⁸ Rules adopted under this model focus on enhancing both the quantity and quality of public debate.⁸⁹ The Enhancement model "sometimes imposes *affirmative duties* on government to maximize the opportunities for expression."⁹⁰ It is characterized by its presumption that judicial review is an appropriate mechanism for improving public debate, as well as its focus on the substance of speech claims.⁹¹ The Enhancement model assumes that individuals have "a constitutionally protected interest in *effective* self-expression."⁹² The model is ultimately Madisonian in nature, in that it is concerned with enhancing public deliberation. It is rooted in the principle that "debate on public issues should be uninhibited, robust, and wide-open."⁹³

The Distortion model, by contrast, is rooted in the marketplace theory of the First Amendment.⁹⁴ It "portrays the First Amendment as embodying nothing more than a set of constraints upon government actors."⁹⁵ The sole focus of this model is governmental neutrality.⁹⁶ Whereas the Enhancement model includes a positive obligation on the part of government to facilitate and make room for expression, the Distortion model is entirely negative in character.⁹⁷ As BeVier notes, the model itself is not ambitious; it seeks only to restrain the government from censoring speech based upon its subject matter or viewpoint.⁹⁸ The Distortion model anticipates a far more modest role for judicial review. The model doubts the capacity of judges to identify, much less rectify, governmental policies that have a negative impact upon expressive and associative rights.⁹⁹

As the discussions of place and the current expressive topography demonstrate,¹⁰⁰ very little of the Enhancement model has survived with regard to judicial considerations of place. As a "trustee," the state was arguably obligated to facilitate expression to some minimal degree; but even this obligation was stated in the negative, as a proscription on banning *all* access to public spaces like streets and parks, rather than an affirmative duty to

⁸⁷ *Id.* at 101-03.

⁸⁸ *Id.* at 101.

⁸⁹ *Id.*

⁹⁰ *Id.* (emphasis added).

⁹¹ *Id.*

⁹² *Id.* at 102.

⁹³ *Id.* at 101 (quoting *N.Y. Times v. Sullivan*, 376 U.S. 254, 270 (1964)).

⁹⁴ See *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 390 (1969) ("[The] purpose of the First Amendment [is] to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail . . ."); *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) ("[T]he best test of truth is the power of the thought to get itself accepted in the competition of the market.").

⁹⁵ BeVier, *supra* note 83, at 102.

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Id.* at 103.

⁹⁹ *Id.* at 102-03.

¹⁰⁰ See *supra* Part I.A-B.

make room for speech.¹⁰¹ Under the time, place, and manner doctrine, the trustee's primary obligation was to remain neutral with regard to expressive content.¹⁰² The "compatibility" test might have moved the Court in the direction of some form of the Enhancement model, had it survived.¹⁰³ But the combination of the public forum and time, place, and manner doctrines marks a clear choice by the Court to approach *all* issues of speech and spatiality from the perspective of the Distortion model.

Indeed, Professor BeVier demonstrates convincingly that place jurisprudence was never truly concerned with actively enhancing expressive activity.¹⁰⁴ Instead, she argues, the public forum doctrine should be considered a "whole-hearted rejection" of the Enhancement model.¹⁰⁵ The forum categories themselves, she argues, are designed to ferret out distortion of expression where it is most likely to occur, and to otherwise leave state authority over place intact.¹⁰⁶

The only conceivable impediment to this view, as BeVier notes, is the existence of a category of fora, namely the "traditional" public forum, that is supposed to remain open to expression come what may.¹⁰⁷ The conflict is illusory, once one accounts for the effect that the time, place, and manner doctrine has on even these most "public" fora. As noted, even in "quintessential" fora, expressive activity is heavily constrained.¹⁰⁸ Time, place, and manner doctrine is no more concerned with expressive facilitation than is the forum doctrine; its primary function is to ensure governmental neutrality.

Together, the public forum and time, place, and manner doctrines focus on "securing the negative right to be free from deliberate governmental distortion of public debate."¹⁰⁹ As a result of the choice to follow the Distortion rather than the Enhancement model, judges are only minimally involved when issues of speech and spatiality arise, relying mostly upon the forum categories and deferring to local spatial regulations. The public forum and time, place, and manner doctrines eschew any affirmative obligation on the part of government to make room for speech in favor of a single-minded focus on governmental neutrality in the distribution of the resource of public space.

D. Critiques of the Current Treatment of Place

Whether or not they agree with its fundamental premise, commentators have generally resigned themselves to the conception of place-as-res. The

¹⁰¹ See *supra* notes 14–22 and accompanying text.

¹⁰² See *supra* notes 32–33 and accompanying text.

¹⁰³ See *supra* notes 23–27 and accompanying text.

¹⁰⁴ BeVier, *supra* note 83, at 104.

¹⁰⁵ *Id.*

¹⁰⁶ See *id.* at 109 (noting that deference to the government in a non-public forum "must be justified in principle by the systematic absence in nonpublic fora of the kinds of First Amendment risks that the model is designed to prevent").

¹⁰⁷ See *id.* at 105–08 (discussing the application of the Distortion model to traditional public forum); *supra* notes 40–42 and accompanying text (describing "traditional" public fora).

¹⁰⁸ See *supra* notes 70–78 and accompanying text.

¹⁰⁹ BeVier, *supra* note 83, at 117.

treatment of place as mere property is, as one scholar noted, “deeply entrenched.”¹¹⁰ Legal scholars have simply abandoned any critical assessment of the property paradigm. On the limited occasions when scholars have proposed alternative approaches or refinements to the public forum doctrine, they have done so from within the property paradigm.¹¹¹

Although they have not sought to reconceptualize *place* itself, commentators have been unsparing in their criticism of the *doctrine* of place, in particular the public forum doctrine.¹¹² Indeed, it is difficult to find a staunch defender of current doctrines of place.¹¹³ This truth is evident both off and on the Supreme Court, where dissatisfaction with forum doctrine in particular has been apparent almost from the beginning.¹¹⁴

To briefly summarize, there are three primary criticisms of forum doctrine. First, the doctrine has been characterized as essentially unprincipled and theoretically bankrupt.¹¹⁵ It is said to depend upon a “myopic focus on formalistic labels” like “public” versus “non-public” fora.¹¹⁶ The doctrine has been criticized as “crude, historically ossified, and seemingly unconnected to any thematic view of the free expression guarantee.”¹¹⁷ The Court, in short, is accused of never having justified its map of the expressive topography. It has fallen to commentators to endeavor to provide the missing theory or justification.¹¹⁸ These revisionist accounts may provide some

¹¹⁰ Calvin Massey, *Public Fora, Neutral Governments, and the Prism of Property*, 50 HASTINGS L.J. 309, 310 (1999); see also BeVier, *supra* note 83, at 117 (“It is quite possible that the Court started off with a fundamental error—misconceiving the speech issues involved in the public forum problem as *property* issues.”).

¹¹¹ See, e.g., Massey, *supra* note 110, at 311 (proposing that access to public spaces be determined “by making an analogy to the common law of nuisance”); Gey, *supra* note 47, at 1577 (proposing a focused balancing or “strong interference analysis” in forum cases).

¹¹² Representative critiques of the public forum doctrine can be found in Massey, *supra* note 110, at 309–12; Gey, *supra* note 47, at 1535–38; LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 993 (2d ed. 1988); Post, *supra* note 3, at 1715–16; Geoffrey R. Stone, *Content-Neutral Restrictions*, 54 U. CHI. L. REV. 46, 93 (1987); Keith Werhan, *The Supreme Court’s Public Forum Doctrine and the Return of Formalism*, 7 CARDOZO L. REV. 335, 341 (1986); C. Thomas Dienes, *The Trashing of the Public Forum: Problems in First Amendment Analysis*, 55 GEO. WASH. L. REV. 109, 110 (1986); Daniel A. Farber & John E. Nowak, *The Misleading Nature of Public Forum Analysis: Content and Context in First Amendment Adjudication*, 70 VA. L. REV. 1219, 1234–35 (1984); Ronald A. Cass, *First Amendment Access to Government Facilities*, 65 VA. L. REV. 1287, 1308–09 (1979); David Goldberger, *Judicial Scrutiny in Public Forum Cases: Misplaced Trust in the Judgment of Public Officials*, 32 BUFF. L. REV. 175, 178–79 (1983); Kenneth L. Karst, *Public Enterprise and the Public Forum: A Comment on Southeastern Promotions, Ltd. v. Conrad*, 37 OHIO ST. L.J. 247 (1976).

¹¹³ But see BeVier, *supra* note 83, at 121 (seeking to justify and defend the categorical approach).

¹¹⁴ See *id.* at 100 (observing that the “public forum doctrine is now riddled with uncertainty” given the variety of approaches Justices have taken to defining public fora); see also sources cited *supra* note 112.

¹¹⁵ See, e.g., Stone, *supra* note 112, at 93; Massey, *supra* note 110, at 310.

¹¹⁶ Stone, *supra* note 112, at 93.

¹¹⁷ Massey, *supra* note 110, at 310.

¹¹⁸ See BeVier, *supra* note 83, at 102–12 (explaining forum categories as consistent with the Distortion model of the First Amendment); Post, *supra* note 3, at 1833 (positing that a “line between governance and management corresponds to the distinction between the public and nonpublic forum”).

clarification of the forum categories the Court has chosen. They do not, however, even endeavor to provide any theoretical foundation for or unique conception of "place." The accounts do not engage the concept of "place" as anything other than the nonexpressive *res* the Court says it is.

Nor have revisionist scholarly accounts served to blunt, much less answer, the second primary criticism of forum doctrine; whatever animates the categories, most agree that they distract "attention from the first amendment values at stake in a given case."¹¹⁹ First Amendment issues involving spatiality are treated as issues of property rather than expression. The categories do so much work that courts spend the bulk of their time and energy on the categorization exercise itself. Forum cases thus discuss at length the character of the property, the government's intention with respect to it, and the property's traditional functions or uses.¹²⁰ Courts do so without ever connecting the place under consideration to the substantive speech interests at stake.¹²¹ One is therefore left with the rather distinct impression that place is, at most, only tangentially related to the exercise of expressive and associative rights.

The third primary criticism is that forum doctrine grants unduly broad discretion to government officials to prohibit access to public spaces and to prevent new, modern spaces from being opened up to expression and association.¹²² This criticism is at least in part a function of the normative bias most scholars have in favor of an Enhancement model of the First Amendment.¹²³ Bias aside, there is merit to the critique. It is difficult to read the path of the forum doctrine as anything other than "a declaration of deference to forum administrators" with regard to public spaces.¹²⁴ Moreover, if narrow functional "tradition" is to be the benchmark for place, then new expressive spaces are not likely ever to come into existence. Scholars and certain Justices have proposed that the Court return to some form of the "compatibility" standard, which would result in a presumption that expression was appropriate absent proof that it would unduly interfere with the ordinary functioning of the property.¹²⁵ There does not, however, seem to be any movement toward this approach on the current Court.

Far less judicial and scholarly attention has been devoted to the time, place, and manner doctrine. The usual criticism for those who have engaged it has been that time, place, and manner doctrine fails to live up to the scru-

¹¹⁹ Farber & Nowak, *supra* note 112, at 1224.

¹²⁰ See, e.g., *Int'l Soc'y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 678–83 (1992) (discussing airport terminal properties).

¹²¹ See Werhan, *supra* note 112, at 341 (contending that the doctrine "produces incoherent results untouched by the interplay of considerations that should inform . . . decisionmaking under the first amendment").

¹²² See Gey, *supra* note 47, at 1536–37 (noting the rigidity of forum analysis).

¹²³ Most critics of public forum doctrine seem to support some version of the flexible "compatibility" standard. See *supra* note 112; *supra* notes 22–27 and accompanying text.

¹²⁴ Massey, *supra* note 110, at 319.

¹²⁵ See, e.g., Gey, *supra* note 47, at 1577 (advocating a "strong interference analysis"); see also *Lee*, 505 U.S. at 698 (Kennedy, J., concurring) (positing that if expressive activity is "appropriate and compatible" with prior uses, the property is a public forum).

tiny that it promises.¹²⁶ According to one commentator, the test “has developed . . . into a fairly clear and fairly lenient standard. 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.”¹²⁷

The First Amendment doctrine of place—the combination of public forum and time, place, and manner—is generally derided for failing to capture the essence of place, or its importance to expressive rights. Yet despite the substantial criticism leveled at the doctrine of place, it remains today what it was sixty years ago; namely, a doctrine of property. Those who have proposed changes have done so within the place-as-property paradigm; their efforts have not altered the basic manner in which issues of speech and spatiality are conceptualized, evaluated, or adjudicated.

II. A Theory of Expressive Place

Despite the nearly universal dissatisfaction with the current doctrine of place, there have been no efforts to systematically rethink it. One thing is clear: it is impossible to propose any meaningful change unless one engages the core conception of place-as-res. If place is only property, then it is justifiable to treat it as secondary to expression, indeed wholly separate from it. If it is a mere resource, like air or water, then the Court is correct to treat it as an inert, nonexpressive backdrop. And if there is little complexity to place, then it makes sense to continue to treat it as simplistic and binary, consisting essentially of only “public” and “non-public” fora.

This Part contends that place is, in fact, none of these things. To demonstrate that this proposition is so requires moving beyond the narrow legal conception of place. Fortunately, scholars in a range of disciplines, including human and critical geography, sociology, anthropology, and philosophy, have been systematically studying place. This Part engages in some “conceptual borrowing.” That is, it borrows from the work of scholars in other disciplines to fashion a concept of “place” for the purposes of First Amendment jurisprudence. This theory or conception of place is called “expressive place.” Expressive place treats public space as a primary rather than secondary expressive concern; as a construct rather than a given or brute fact; as dynamic or communicative rather than inert; and, as variable rather than simply binary.

Refashioning place by means of conceptual borrowing will accomplish two broad goals. First, it will fill the theoretical void that has plagued “place” since the Supreme Court first encountered it some sixty years ago.¹²⁸ Second, it will provide a foundation for the Article’s principal revisions to place; namely, the replotting of the expressive topography in Part III and the new approach to evaluating “place” elaborated in Part IV.

¹²⁶ See, e.g., Williams, *supra* note 6, at 644; William E. Lee, *Lonely Pamphleteers, Little People, and the Supreme Court: The Doctrine of Time, Place, and Manner Regulations of Expression*, 54 GEO. WASH. L. REV. 757, 758 (1986) (arguing that doctrine provides too little scrutiny of spatial regulations).

¹²⁷ Williams, *supra* note 6, at 644.

¹²⁸ See *Hague v. Comm. for Indus. Org.*, 307 U.S. 496 (1939).

A. *Spatial Primacy and "Topophilia"*

"Nothing we do is unplaced."¹²⁹ This maxim includes expressive and associative activity, for we speak and gather in places. As Thomas Hobbes observed in *Leviathan*: "No man [] can conceive anything, but he must conceive it in some place."¹³⁰

Place, then, is not merely some background principle; it is no mere backdrop for human activity. As phenomenologists have argued, place is a critical aspect of our being-in-the-world. "To be at all—to exist in any way—is to be somewhere, and to be somewhere is to be in some kind of place."¹³¹ Human geographers have long recognized that literally everything we do is fundamentally affected by the places we occupy.¹³² In many ways, place dictates how we experience the world around us.¹³³

In terms of communicative behavior, place is as critical to expressive experience as voice, sight, and auditory function. We should at this point distinguish "space" from "place."¹³⁴ A space is an undifferentiated, abstract, homogenous mass.¹³⁵ As demonstrated by the discussion above, the current expressive topography is filled with these sorts of voids: blank spaces, "non-public" fora where expression may not or does not occur. The mere provision of an undifferentiated mass of space will not sustain a robust expressive freedom. It is, rather, the existence of *place*—in the sense of spaces that come to have particular meaning to speakers and listeners—that is crucial.¹³⁶

Speech doctrine treats locale as a function of categorizing "fora." Fora are not lived experiences; they are abstractions—they are more like spaces than places. Speech, however, does not occur in the abstract, in spaces. If it did, it would make no difference to the speaker where she was when she delivered her message. Speakers, however, often fight for access to specific places because speech *there* is qualitatively and quantitatively different from speech *elsewhere*. They *choose* place intentionally. Speakers also form special attachments to a place, something akin to what the human geographer Tuan calls "topophilia," by speaking and assembling there.¹³⁷ This fundamental attachment to place explains the outcry that occurs when officials seek to alter access to or close certain public places as to which serious and meaningful attachments have formed. For example, when New York City officials recently decided to close or alter portions of Central Park and Wash-

¹²⁹ EDWARD S. CASEY, *THE FATE OF PLACE: A PHILOSOPHICAL HISTORY* ix (1997).

¹³⁰ THOMAS HOBBS, *LEVIATHAN* 23 (Oxford Univ. Press 1967) (1651).

¹³¹ CASEY, *supra* note 129, at ix.

¹³² See EDWARD RELPH, *PLACE AND PLACELESSNESS* (1976) (noting the significance of place in our everyday lives).

¹³³ See generally YI-FU TUAN, *TOPOPHILIA* (1974) (discussing our social connection to places).

¹³⁴ See generally YI-FU TUAN, *SPACE AND PLACE: THE PERSPECTIVE OF EXPERIENCE* (1977).

¹³⁵ See TIM CRESSWELL, *PLACE: A SHORT INTRODUCTION* 8 (2004) ("Space is a more abstract concept than place.").

¹³⁶ See *id.* at 6 ("What begins as undifferentiated space becomes place as we get to know it better and endow it with value."); see also CRESSWELL, *supra* note 135, at 8–10 (distinguishing "space" from "place").

¹³⁷ See TUAN, *supra* note 133, at 4 (describing bond between people and place).

ington Square Park, there were sharply critical, even emotional, public responses.¹³⁸

When one considers the social aspect of place, the intersection of speech and spatiality there, it is apparent that the shape of the expressive topography matters critically to expression and association. We must therefore be attentive to both the ontology of place—what actually exists—and the phenomenology of place—the manner in which place is experienced and in turn influences our experiences. In particular, when considering the primacy of place to expression and association, special attention must be paid to the *adequacy* of the places purportedly relied upon to support a robust marketplace of ideas. The character of a particular place substantially affects the lived experiences of expression and association. The physical and other properties of place can thus have a profound impact on the substance of First Amendment rights.

Serious scholars of place know this phenomenon as a fundamental truth. Sociologists, for example, have long recognized that the specific *qualities* of a place condition the possibilities of social interaction within it. Georg Simmel, in his seminal article, *The Sociology of Space*, noted the many ways in which spatial conditions affect social interaction.¹³⁹ In particular, things like proximity to others, visibility, and mobility can substantially affect one's experience of place.¹⁴⁰ Urban planners are mindful of this principle as well. The manner in which a public place is designed dictates to a large extent what can and will happen there. Architects, geographers, and anthropologists have also echoed this insight.¹⁴¹ They have highlighted the influence of spatial characteristics on such disparate things as the quality of urban living, the nature of local cultures, and even citizens' feelings with regard to their nationality.¹⁴²

Place ought not occupy a secondary or background position in discussions of freedom of expression and association. Just as other behaviors and experiences are affected by place, speech and spatiality are fundamentally and intimately connected to one another. Further, it is not sufficient to merely clear some generic space for speech; the specific architectures of places—the shapes they take—are critical to expressive and associative connections to place.

¹³⁸ See 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"); Steven Kurutz, *The Site of Many a Protest Incites One Itself*, N.Y. TIMES, Oct. 3, 2004, at CY5 (describing plans to alter Union Square Park and criticism of them).

¹³⁹ See Georg Simmel, *The Sociology of Space*, in SIMMEL ON CULTURE: SELECTED WRITINGS 137, 138 (David Patrick Frisby & Mike Featherstone eds., 1997). For a general discussion of Simmel's sociological examination of space, see John Allen, *On Georg Simmel: Proximity, Distance and Movement*, in THINKING SPACE 54 (Mike Crang & Nigel Thrift eds., 2000).

¹⁴⁰ See David Frisby, *Introduction to the Texts*, in SIMMEL ON CULTURE: SELECTED WRITINGS, *supra* note 139, at 1, 11.

¹⁴¹ See generally Low & Lawrence-Zuniga, *supra* note 9, at 16, 19–20, 34–35.

¹⁴² *Id.* at 28–29, 31.

B. Spatial Construction

The property paradigm treats space and place as brute facts, structures, and locales that simply *exist* in the world. A “forum” is thus a given part of the topography or landscape; it is a public resource, like air or water. The doctrine of place further creates the impression that the resource of space, like purportedly analogous public goods, is nearly always being neutrally distributed by government. The Distortion model is applied in order to ensure such neutrality.¹⁴³ Spatial distribution is thus treated as a function of the property’s “tradition” and various *objective* indicators of governmental intent.¹⁴⁴

This conception leaves out something critical: the *process* of place. As geographers and anthropologists have observed, places do not simply exist in the world; they are, in terms of both materiality and meaning, produced in the sense that the raw material of space *becomes* place as speakers inhabit it.¹⁴⁵ The National Mall, for example, is a gathering space. As people gather there, they experience this space *as place*; they derive meaning from this experience, a meaning often shared with others who have gathered there for the same purpose. The Mall thus becomes part of our national culture. The public streets are not mere asphalt and brick; they are also social and political constructs. These spaces derive meaning as they are inhabited, as they “happen.”¹⁴⁶ A weblog, to take a seemingly very different example, consists merely of bits and bytes until contributors and commentators make it a place of interaction.

“Place,” unlike “forum,” is an experienced event. It is created and lived, not given. The amount of space provided, the number of participants allowed, and specific structures and architectures constructed there can all substantially affect how place is experienced, and thus the meanings that can or will be attributed to it. Treating place as property, and only property, ignores not merely the primacy of place to expression, but also the process by which space becomes place. This process of spatial construction is more critical for some places than others. It matters more in terms of understanding *the* Mall than, say, in understanding *a* mall. It is important, however, in seeking to reconnect speech and spatiality, to recognize that places do not merely *appear* on the expressive topography. If they arise, it is because they have been plotted there by a variety of forces.

A critical strain within the field of human geography has provided the important additional insight that places are often created and controlled by some class of people with more power than others.¹⁴⁷ Power elites decide

¹⁴³ See *supra* note 94 and accompanying text.

¹⁴⁴ See *supra* note 94 and accompanying text.

¹⁴⁵ See MICHEL DE CERTEAU, *THE PRACTICE OF EVERYDAY LIFE* 117 (1984) (emphasizing the manner in which human activity makes places); see also Low & Lawrence-Zuniga, *supra* note 9, at 15 (“[P]laces are socially constructed by the people who live in them and know them.” (quotation omitted)).

¹⁴⁶ See Low & Lawrence-Zuniga, *supra* note 9, at 20 (defining social construction of space as “the processes responsible for the material creation of space as they combine social, economic, ideological, and technological factors”).

¹⁴⁷ For a critical account of the social construction of space, see generally HENRI LE-

what is inappropriate, or "out of place," in society.¹⁴⁸ They impose their power by organizing, controlling, and disciplining place. Social movements can thus be understood as a response to particular spatial regimes.

We need not view all space in this critical light. It is, however, especially important in analyzing the intersection of speech and spatiality to keep in mind that many public spaces are contests involving political and social forces. For instance, as noted above, New York City officials recently decided to close a portion of Central Park to gatherings of a certain size, including protests and demonstrations.¹⁴⁹ This action was taken, at least ostensibly, to spare the lawn from overuse.¹⁵⁰ But to some residents of the city, the proposed closure poses the fundamental question of who *owns* this space, whether it is in fact truly *public*.¹⁵¹ For some, this place forms part of their identity.¹⁵² Contests over access to public places like airports, military bases, homes, and streets also represent more than the distribution of spatial resources.¹⁵³ These are contests over power, knowledge, privacy, and ideology as well.

We must, as two scholars have recently posited, move "away from a sense of space as a practico-inert container of action towards space as a socially produced set of manifolds."¹⁵⁴ Place is part of our social practice, fabric, and culture. The process of social construction "defines the experience of space through which peoples' social exchanges, memories, images and daily use of the material setting transform it and give it meaning."¹⁵⁵ This conception of place as a social construct is not an empty vessel or mere backdrop; rather, place is a repository and manifestation of social exchange, memories, images, uses, and *meaning*. The power to define which spaces are open to expression, and just how open they will be, is ultimately the power to affect not only expression, but also a great deal more.¹⁵⁶

C. Spatial Dynamism

Social constructionists posit that place is not an inert container; it actually means something to those who occupy and use it. As the following discussion demonstrates, the insights of philosophers, anthropologists, and geographers allow us to go even further, characterizing place as *dynamic*.

FEBVRE, *THE PRODUCTION OF SPACE* 26 (Donald Nicholson-Smith trans., Blackwell Publishers 1991) ("[S]pace . . . is also a means of control, and hence of domination, of power . . .").

¹⁴⁸ See CRESSWELL, *supra* note 135, at 27.

¹⁴⁹ See *supra* note 138.

¹⁵⁰ *Id.*

¹⁵¹ Williams, *supra* note 138 ("In Manhattan, nearly every square foot is covered with buildings, so the Park is the town common, where people have assembled for generations. Now the Bloomberg administration is seeking to maintain it as a lawn museum.").

¹⁵² See *supra* note 138.

¹⁵³ See *supra* note 59 and accompanying text.

¹⁵⁴ See *Introduction* to THINKING SPACE, *supra* note 139, at 2.

¹⁵⁵ Low & Lawrence-Zuniga, *supra* note 9, at 20 (quotation omitted).

¹⁵⁶ See Margaret C. Rodman, *Empowering Place: Multilocality and Multivocality*, in *THE ANTHROPOLOGY OF SPACE AND PLACE: LOCATING CULTURE*, *supra* note 9, at 205 ("Places have multiple meanings that are constructed spatially.").

Place is itself an event, a “happening.”¹⁵⁷ More specifically, we must begin to understand that places often *express* or *communicate* something.

There are two distinct aspects to the principle of spatial dynamism. First, simply by making room for activities, places become part of an event or happening. Jacques Derrida opined “that a building is more of a happening than a thing.”¹⁵⁸ When Derrida looked at a place, he thus saw raw material integrated with human activity and behavior. In this way, as in others, spatiality and activity are intricately linked and combined. As another philosopher of place stated, a place “is a happening not just in the sense of the event of construction—significant and necessary as this is—but in that, even as already constructed, it *continues to occur*.”¹⁵⁹ Architecture, then, is “a mode of spacing that makes a place for the event.”¹⁶⁰ Streets and parks are dynamic in this respect; they represent the *possibility* or expectation of expressive activity. The vast fora of cyberspace have multiplied these possibilities exponentially, providing an entirely new dynamic medium of expression. When these possibilities materialize, these places too may become happenings or events.

Another aspect of the principle of spatial dynamism relates more closely to speech concerns. Dynamism posits that places can themselves be considered expressive or communicative. As one anthropologist put it, places often act as “condensed symbols.”¹⁶¹ They represent ideas, and some places, like those mentioned in the opening paragraph of this Article,¹⁶² can conjure specific memories and intense emotions. One anthropologist has suggested that places are “multivocal; they *bespeak* people’s practices, their history, their conflicts, [and] their accomplishments. . . . [T]here is a condensation of values in particular sites [as well], and transactions that constitute the totality of social life may be spatially mapped with specific sites expressing relatively durable structured interests and related values.”¹⁶³ Places, in other words, generally speak to subjects as disparate as wealth, politics, power, and culture. As they happen, places speak.

Spatial dynamism conveys the “idea, well established in the study of geography, that places produce meaning and that meaning can be grounded in place.”¹⁶⁴ That is, places do not merely contain speech and conduct; they communicate in furtherance of the speaker’s message. One cannot say this about properties or “fora.”

¹⁵⁷ CASEY, *supra* note 129, at 313.

¹⁵⁸ *Id.* (quoting Jacques Derrida, *Point de Folie—Maintenant L’Architecture*, translated in AA FILES, Summer 1986, at 65).

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ Hilda Kuper, *The Language of Sites in the Politics of Space*, in THE ANTHROPOLOGY OF SPACE AND PLACE: LOCATING CULTURE, *supra* note 9, at 247.

¹⁶² Ground Zero, the White House, the National Mall, Tiananmen Square, and Auschwitz.

¹⁶³ Rodman, *supra* note 156, at 214 (emphasis added) (quotation omitted). As another anthropologist suggested: “In describing ‘political events,’ sites such as a courtroom, a Red Square, Whitehall, the White House can be interpreted as giving an emotional effect, comparable to the power of rhetoric, to the voice of authority” Kuper, *supra* note 161, at 258.

¹⁶⁴ Rodman, *supra* note 156, at 207.

D. Spatial Variability

The current conception of the expressive topography consists of just two basic spatial types: “public” and “non-public” fora. The binary forum topography arose during a period of increasing claims for access to an ever-expanding variety of spaces.¹⁶⁵ It was specifically intended to aid the classification, and hence simplification, of place.¹⁶⁶ As the preceding discussion demonstrates, however, place is a concept that resists such simplification. The binary topography might well be workable if all that was at stake was locale or background; but place encompasses far more. Place is, as scholars in disciplines outside the law have observed, “as complex as voice.”¹⁶⁷

Spatial complexity manifests itself not only in what place is, but also in what types of places actually exist. The idea that streets and parks are one type of place and everything else another should strike us as fanciful, or at least radically incomplete. As sociologists, anthropologists, geographers, and other scholars have observed, place mediates human behavior in a variety of ways.¹⁶⁸ The issue may be one of *personal space*; or it may involve access to places deemed *sacred*. Authorities may be using place *tactically*, to control and discipline behavior; or they may be denying access to a place that is itself the object of a heated political or social *contest*. The principle of spatial variability recognizes that place enters social discourse and cultural activity at different stages, and in a host of different ways.

In First Amendment terms, the variability principle holds that place mediates the cultural activities associated with *expression* and *association* in various ways and to varying degrees. A binary topography cannot account for this spatial variability. Analysis of expressive rights must account for the fact that the intersection of speech and spatiality differs depending upon whether one is on the street, in a “free speech zone,” “in” cyberspace, in someone else’s “space,” or someplace else.

If place is to be properly valued and appreciated, we must not only reconceptualize place; we must also reconceptualize the expressive topography. The new topography should do two things: it should accurately describe the places that recur in First Amendment controversies regarding speech and spatiality, and it should assist courts and scholars in systematically thinking through the implications of the various intersections of speech and spatiality.

With these goals in mind, the next Part remaps the expressive topography in a manner that highlights the intersection of speech and spatiality across various speech contexts. Part IV will then discuss the prescriptive implications of the combination of the new conception of “expressive place” and the revised expressive topography.

¹⁶⁵ See Post, *supra* note 3, at 1724–45 (discussing evolution of public forum doctrine).

¹⁶⁶ See *supra* notes 27–31 and accompanying text (describing the appeal and utility of the forum doctrine to the Court).

¹⁶⁷ Rodman, *supra* note 156, at 205.

¹⁶⁸ See Low & Lawrence-Zuniga, *supra* note 9, at 1–38 (describing a variety of places and their reflection on behavior).

III. A New Expressive Topography

In this Part, this Article sketches a new expressive topography, one that builds upon the idea of “expressive place” and specifically accounts for spatial variability. This map is not intended to describe every conceivable place, but it will be comprehensive enough to encompass the most common spatial types and the First Amendment controversies that they typically generate. Like the theory of expressive place, the new topography is a product of some conceptual borrowing. Although it is grounded upon the theory of expressive place, both the labels and general contours of the various spatial types are drawn from the work of scholars in a variety of other disciplines. To produce an “expressive” topography, their insights are then related to specific First Amendment contexts.

There are two general things to note about the proposed new expressive topography. First, as will become clear in Part IV, the idea is not simply to provide new labels for places or to anchor an alternative formalistic treatment of place. It is, rather, to form the basis for a fundamentally different approach to place, one sensitive to the many ways that place mediates expression. Second, the spatial types discussed below are not necessarily mutually exclusive. Although it will often be clear which spatial type is implicated in a dispute, a single place might exhibit the characteristics of more than one spatial type. The implications of this spatial overlap are discussed in Part IV.

A. Embodied Places

We will begin with the most local idea of place, the one commonly or colloquially referred to as “personal space.” Sociologists and anthropologists sometimes refer to this as “embodied space.”¹⁶⁹

The anthropologist Edward T. Hall pioneered the study of what he called “proxemics,” or people’s use of space as an agent of culture.¹⁷⁰ In terms that resonate in several current First Amendment contexts, Hall conceptualized personal space “as a *bubble* surrounding each individual.”¹⁷¹ According to Hall, embodied place was a “mobile spatial field”—“a culturally defined, corporeal-sensual field stretching out from the body at a given locale or moving through locales.”¹⁷² The idea of embodied space, then, is “a model for understanding the creation of place through spatial orientation, movement, and language.”¹⁷³ It is part of the social construction of place discussed in Part II.

Hall’s science was somewhat crude,¹⁷⁴ but his original insight has had a lasting influence on those who continue to study the space man seeks to

¹⁶⁹ See *id.* at 2–7 (discussing “embodied spaces”).

¹⁷⁰ See generally EDWARD T. HALL, *THE HIDDEN DIMENSION* (1966).

¹⁷¹ Low & Lawrence-Zuniga, *supra* note 9, at 2 (emphasis added).

¹⁷² *Id.* at 5.

¹⁷³ *Id.*

¹⁷⁴ Hall’s theory of proxemic behavior was based primarily upon animal theories. He theorized that man’s basic need for personal space mirrored the animal’s territoriality. See HALL, *supra* note 170, at ix–x. Many of Hall’s observations were based upon simple observation and anecdote; they thus lacked the rigor of sophisticated empirical inquiry. See *id.* at 109–10 (admitting observations were a “first approximation”).

maintain between himself and others.¹⁷⁵ One of Hall's most intriguing observations was that man appeared to associate different activities and relationships with different degrees of space or distance.¹⁷⁶ Hall identified various "distance zones" used by man in his relations with others.¹⁷⁷ Although by Hall's own admission this construct was "only a first approximation," his modeling of space nevertheless merits consideration¹⁷⁸ because it bears specifically on some basic aspects of free expression.

Hall conceptualized four distances, based primarily upon observed vocal and visual shifts.¹⁷⁹ These were called "intimate," "personal," "social," and "public."¹⁸⁰ Hall focused in particular on what could be said and done from these various distances, what sort of communication and interaction was possible.¹⁸¹ These distances have "close" and "far" phases, each of which was measured by Hall.¹⁸² The close phase of *intimate* distance, for example, is "the distance of love-making" and comforting.¹⁸³ Its far phase (six to eighteen inches) is characterized by low voice level and distorted visual perception.¹⁸⁴ This distance is the one a person maintains on a crowded subway, for example.¹⁸⁵ *Personal* distance is "the distance consistently separating the members of non-contact species."¹⁸⁶ Hall described this distance as a "small protective sphere or bubble that an organism maintains between itself and others."¹⁸⁷ In its close phase (one-and-a-half to two-and-a-half feet), one can grab a person.¹⁸⁸ In its far phase (two-and-a-half to four feet), personal distance amounts to keeping a person "at arm's length."¹⁸⁹ The voice level remains moderate at this distance, and "[s]ubjects of personal interest and involvement" can still be discussed.¹⁹⁰

When one reaches *social* distance, however, Hall concluded that personal communication becomes more strained and difficult. In its close phase (four to seven feet), only impersonal interaction is possible.¹⁹¹ In the far phase of social distance (seven to twelve feet), one must maintain visual contact in order to communicate effectively and the voice becomes noticeably

¹⁷⁵ See, e.g., O. MICHAEL WATSON, PROXEMIC BEHAVIOR: A CROSS-CULTURAL STUDY (1970); John R. Aiello, *Human Spatial Behavior*, in HANDBOOK OF ENVIRONMENTAL PSYCHOLOGY 359, 389 (Daniel Stokols & Irwin Altman eds., 1987); JUDEE K. BURGOON ET AL., NONVERBAL COMMUNICATION: THE UNSPOKEN DIALOGUE (1989).

¹⁷⁶ HALL, *supra* note 170, at 108.

¹⁷⁷ *Id.* at 110.

¹⁷⁸ *Id.* at 109.

¹⁷⁹ *Id.* at 107-08.

¹⁸⁰ *Id.* at 108.

¹⁸¹ *Id.* at 107-19.

¹⁸² *Id.*

¹⁸³ *Id.* at 110.

¹⁸⁴ *Id.* at 111.

¹⁸⁵ *Id.* at 111-12.

¹⁸⁶ *Id.* at 112.

¹⁸⁷ *Id.*

¹⁸⁸ *Id.*

¹⁸⁹ *Id.* at 113.

¹⁹⁰ *Id.*

¹⁹¹ *Id.* at 114.

louder.¹⁹² As Hall observed: "A proxemic feature of social distance (far phase) is that it can be used to insulate or screen people from each other."¹⁹³

Finally, when one reaches *public* distance, she is "well outside the circle of involvement."¹⁹⁴ In the close phase (twelve to fifteen feet), subjects can take evasive action and there may be a vestigial flight reaction; one cannot see a person clearly from this distance.¹⁹⁵ In the far phase (twenty-five feet and beyond), subtle shades of meaning are lost, as are the details of facial expressions.¹⁹⁶ This distance is the one, Hall maintained, at which people will remain strangers.¹⁹⁷

Although they have not been recognized and treated as such, the First Amendment's expressive topography has always contained embodied places. Indeed, this spatial type has a rich and respected constitutional pedigree. The Jehovah's Witnesses were among the first to claim a constitutional right to enter listeners' embodied places.¹⁹⁸ They relied, and still do rely, upon face-to-face communicating and proselytizing to carry their message to the public.¹⁹⁹ To use Hall's lexicon, they rely upon "personal" distance (close phase) to reach their audience. In several early cases, the Court strongly supported the ability of the Witnesses to communicate from personal distance, even though their communication could at times be upsetting or disturbing to others.²⁰⁰ The Court even extended the right to reach potentially willing listeners *in the home*, a place typically granted strong protection from invasion.²⁰¹ Although a resident could indicate in advance an unwillingness to receive solicitors, the government could thus not simply ban speakers from doorsteps. Even in the face of strong claims to residential privacy in the intimate place of the home, speakers were permitted to at least propose a face-to-face communication.²⁰² The right to enter embodied places was, as a result of these early cases, firmly embedded in First Amendment doctrine. In addition, the narrowing of speech categories like "fighting words"²⁰³ and

¹⁹² *Id.* at 115.

¹⁹³ *Id.* at 115–16.

¹⁹⁴ *Id.* at 116.

¹⁹⁵ *Id.*

¹⁹⁶ *Id.* at 117.

¹⁹⁷ *Id.* at 120.

¹⁹⁸ See *Kalven*, *supra* note 15, at 1 (discussing *Lovell v. Griffith*, 303 U.S. 444 (1938), and other early cases involving Jehovah's Witnesses, as laying the groundwork for free speech in civil rights cases of the 1960s).

¹⁹⁹ See *Watchtower Bible & Tract Soc'y of N.Y. v. Vill. of Stratton*, 536 U.S. 150, 160–64 (2002) (describing reliance of Jehovah's Witnesses on speech activity like door-to-door distribution of material).

²⁰⁰ See, e.g., *Cantwell v. Connecticut*, 310 U.S. 296, 311 (1940) (invalidating breach of peace conviction); see also *Watchtower Bible & Tract Soc'y of N.Y.*, 536 U.S. at 160–64 (collecting and describing cases).

²⁰¹ See *Martin v. Struthers*, 319 U.S. 141, 149 (1943) (invalidating ordinance banning distribution of handbills at residences).

²⁰² See *id.*

²⁰³ *Cohen v. California*, 403 U.S. 15, 20 (1971) (defining fighting words, which can generally be proscribed under the First Amendment, as "those personally abusive epithets which, when addressed to the ordinary citizen, are, as a matter of common knowledge, inherently likely to provoke violent reaction").

“true threats”²⁰⁴ ensured that even the close exchange of insults or other unpleasanties is generally protected.²⁰⁵ In sum, our expressive culture has traditionally contained a healthy notion of tolerance for speech at close range, in personal spaces, even if that speech upsets or disturbs the listener.

Like all places, embodied places are impacted by modern social conditions. Urbanization and increases in population, among other things, will necessarily impact notions of personal space. Social strife can also impact perceptions of appropriate access to embodied place. Modern references to “culture wars” are only one indication of this sort of strife.²⁰⁶ In addition, the events of September 11, 2001, have affected societal norms of privacy and security.²⁰⁷

For these and perhaps other reasons, embodied places have become less open to expressive activity. At abortion clinics, for example, the “bubble” concept has been invoked to protect clinic patrons from “sidewalk counselors.”²⁰⁸ Communication from personal distance is said to offend the “privacy” of the patrons and to negatively affect their psychological well-being.²⁰⁹ Hare Krishnas have also been prevented from engaging in personal, face-to-face communication in certain places.²¹⁰ Fears of solicitation fraud and “traffic flow” increasingly seem to outweigh the interest in communicating from close range.²¹¹ In the 1990s, many cities enacted restrictions on panhandling, a practice that threatens the “privacy” and repose of members of the public as they go about their daily business.²¹² Mayors and other public officials have been enclosed within “bubbles” to protect them from the protesting public.²¹³ Finally, the concept of the “free speech zone,” which, as discussed

²⁰⁴ *Virginia v. Black*, 538 U.S. 343, 359 (2003) (“True threats encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals.” (citation and quotation omitted)).

²⁰⁵ Doctrinally, “fighting words” were essentially limited to those inviting a brawl. JOHN HART ELY, *DEMOCRACY AND DISTRUST* 114 (1980).

²⁰⁶ See JAMES DAVISON HUNTER, *CULTURE WARS: THE STRUGGLE TO DEFINE AMERICA* (1992); see also *Romer v. Evans*, 517 U.S. 620, 652 (1996) (Scalia, J., dissenting) (accusing the Court of taking sides in the “culture wars”).

²⁰⁷ See generally Elec. Privacy Info. Ctr., EPIC Public Opinion and Privacy Page, <http://www.epic.org/privacy/survey/> (last visited Dec. 23, 2005) (collecting polling data on privacy issues that demonstrated greater concern for security after September 11, 2001, and less salience for privacy issues).

²⁰⁸ See *Hill v. Colorado*, 530 U.S. 703, 734–35 (2000) (upholding a statute containing an eight-foot buffer or bubble surrounding patients at health care facilities); *id.* at 740 (Souter, J., concurring) (specifically referring to this enforced distance as a “bubble”).

²⁰⁹ See *id.* at 718 n.25 (mentioning “emotional harm” that results from approaching clinic patrons at close range).

²¹⁰ See *Heffron v. Int’l Soc’y for Krishna Consciousness, Inc.*, 452 U.S. 640, 654 (1981) (upholding limitation on face-to-face fundraising at a state fair).

²¹¹ See *id.* at 650 (crediting state’s interests in order and crowd control).

²¹² See Charles Mitchell, Note, *Aggressive Panhandling Legislation and Free Speech Claims: Begging for Trouble*, 39 N.Y.L. SCH. L. REV. 697, 710 n.139 (1994) (listing various city ordinances restricting the ability of individuals to panhandle).

²¹³ See Julia Preston, *Court Backs Police Dept. in Curbs on Labor Tactics*, N.Y. TIMES, Aug. 26, 2004, at B7 (reporting on a court decision upholding a half-block bubble shielding New York City Mayor Michael Bloomberg from protesting union members).

below, actually creates a distinct type of place, substantially restricts the ability of protesters and demonstrators to enter embodied spaces.²¹⁴ The upshot is that speakers who rely upon what Hall called “personal” distance to discuss often intensely personal subjects like religion, politics, and abortion are commonly being forced to speak to others from broader “social” distances.

B. Contested Places

The principle of spatial primacy emphasizes that all expressive and associative activity occurs in some place. It often occurs there, rather than someplace else, for specific, intended, even strategic reasons. Anthropologists and human geographers have long recognized this fundamental principle of place.²¹⁵ As two of these scholars have observed: “In discussing any event, it is necessary to understand why particular actions took place on a particular site or sites and not elsewhere.”²¹⁶

Places are often chosen because they are the focus or subject of social, cultural, or political conflicts; the place actually represents or symbolizes the conflict.²¹⁷ Conflicts over place “principally center on the meanings invested in sites, or derive from their interpretation.”²¹⁸ These loci represent “contests of confrontation, opposition, subversion, and/or resistance.”²¹⁹ Part of the verbal imagery of such places consists in their giving material expression to “dominant cultural themes that find expression in myriad aspects of social life.”²²⁰ So these places are not merely occupied; they are themselves communicative.

Other loci become the focus of conflict when access is granted to some but denied to other segments of society. The denial of access, which is part of the construction and dynamism of place, communicates something about who is “out of place” in a community or society. The desire for access implicates more than a need to use or occupy a particular locale; access has meaning in light of the conflict the place represents. These places often “reveal broader social struggles over deeply held collective myths.”²²¹ They are, as anthropologists of place have noted, “geographic locations where conflicts in the form of opposition, confrontation, subversion, and/or resistance engage actors whose social positions are defined by differential control of resources and access to power.”²²² As have anthropologists, we can refer to places that are closely related to conflicts in the aforementioned ways as “contested.”²²³ Us-

²¹⁴ See Zick, *Speech and Spatial Tactics*, *supra* note 8 (discussing the use of free speech zones).

²¹⁵ See Low & Lawrence-Zuniga, *supra* note 9, at 18–25 (summarizing literature regarding “contested” places).

²¹⁶ Hilda Kuper, *The Language of Sites in the Politics of Space*, in *THE ANTHROPOLOGY OF SPACE AND PLACE: LOCATING CULTURE*, *supra* note 9, at 247, 258.

²¹⁷ See Low & Lawrence-Zuniga, *supra* note 9, at 18.

²¹⁸ *Id.*

²¹⁹ *THE ANTHROPOLOGY OF SPACE AND PLACE: LOCATING CULTURE*, *supra* note 9, at 245.

²²⁰ Low & Lawrence-Zuniga, *supra* note 9, at 18.

²²¹ *Id.*

²²² *Id.*; see also *id.* at 19 (noting that contestation of space “opposes parties of unequal power and resources, and serves to articulate identities that attach to social space”).

²²³ See, e.g., *id.* at 18–25 (using “contested” label to describe various places).

ing the broad notion of contest from their studies, we can readily locate contested places on the expressive topography.

For example, the library in *Brown v. Louisiana*,²²⁴ the jail in *Adderley v. Florida*,²²⁵ the courthouse in *Cox v. Louisiana*,²²⁶ and the school in *Grayned v. City of Rockford*²²⁷ were all specifically chosen by speakers because of their connection to an ongoing controversy. The library and school were symbols of racism and segregation,²²⁸ the jail held civil rights protesters,²²⁹ and the courthouse symbolized the injustice of law itself.²³⁰ These places were far more than mere buildings or locales; they were condensed symbols. The ability to protest there, or at least very near there, was critical to the intended message. As it happens, some of these places also communicated something by granting differential access based upon race. The library and school, for example, were symbols of racism. To effectively counter that message, protesters required access to these places.

Modern examples of contested place abound. For example, Cindy Sheehan, the mother of a soldier killed in the Iraq War, staked out a place on the roads near President Bush's residence in Crawford, Texas.²³¹ Protesters at the 2004 Democratic and Republican National Conventions sought access to places near these gathering sites to gain both access to delegates and a vehicle for expansive media coverage.²³²

Contested places exist in more generalized forms as well. In many circumstances, the streets themselves become contested spaces. Permit schemes and other limitations on expressive and associative activity are challenges by elites to the idea that citizens have unimpeded access to such spaces, have an "easement" with respect to them, or can "commandeer" them.²³³ Parades, protests, and demonstrations are, in this sense, akin to temporary appropriations of the streets. They express specific social and political messages and give public voice to sentiments about existing power relations.²³⁴

As well, certain zoning measures can be cast in a similar light. Efforts to displace "adult" establishments are not merely about the proper place for

²²⁴ *Brown v. Louisiana*, 383 U.S. 131 (1966).

²²⁵ *Adderley v. Florida*, 385 U.S. 39 (1966).

²²⁶ *Cox v. Louisiana*, 379 U.S. 536 (1965).

²²⁷ *Grayned v. City of Rockford*, 408 U.S. 104 (1972).

²²⁸ *Brown*, 383 U.S. at 135; *Grayned*, 408 U.S. at 105.

²²⁹ *Adderley*, 385 U.S. at 40.

²³⁰ *Cox*, 379 U.S. at 539.

²³¹ See Elizabeth Bumiller, *Bush and the Protester: Tale of 2 Summer Camps*, N.Y. TIMES, Aug. 22, 2005, at A9.

²³² See Michael Slackman & Diane Cardwell, *Tactics by Police Mute the Protesters, and Their Messages*, N.Y. TIMES, Sept. 2, 2004, at A1.

²³³ See Low & Lawrence-Zuniga, *supra* note 9, at 22; see also Paul Stoller, *Spaces, Places, and Fields: The Politics of West African Trading in New York City's Informal Economy*, 98 AM. ANTHROPOLOGIST 776, 776-88 (1996) (discussing the implications of limits placed upon street vendors).

²³⁴ See SUSAN DAVIS, *PARADES AND POWER: STREET THEATRE IN NINETEENTH CENTURY PHILADELPHIA* 6 (1986) ("Parades are public dramas of social relations, and in them performers define who can be a social actor and what subjects and ideas are available for communication and consideration."); see also *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Group*, 515 U.S. 557, 568 (1995) (discussing expressive nature of parades).

these sorts of uses; they are contests over the meaning of large public areas.²³⁵ The contest centers on the social construction of entire neighborhoods or communities.²³⁶ Local officials assert the power to concentrate adult clubs in “red light districts” or disperse them spatially in order to blunt their “secondary effects” on the surrounding communal space.²³⁷ First Amendment doctrine currently treats zoning measures that target adult establishments as raising questions of communicative content and governmental neutrality. These are, indeed, much larger contests over the meaning of place. The adult establishment is a spatial signifier. What it and other places like it signify is part of a social and political disagreement regarding whether any room at all should be made for this activity.

Contested places are not always obvious or easy to detect. A certain spatial sensitivity is sometimes required to recognize them. For example, the internal school mailbox in *Perry* was a discrete place.²³⁸ It was not as plainly communicative as the library in *Brown*²³⁹ or the jail in *Adderley*.²⁴⁰ At the same time, though, it was more than a mere abstraction or “forum.” The mailbox represented something to the rival union that sought access to it on equal terms with the incumbent union. It was a symbol of preferred status or power. Accessing this place was critical to the rival union’s message. The funding program in *Cornelius v. NAACP Legal Defense and Education Fund*²⁴¹ can be similarly conceptualized, as a contest over the proper “place” for the expression of particular social and political positions.²⁴² In this manner, the candidate debate in *Arkansas Educational Television Commission v. Forbes*²⁴³ was also a contest over which political positions or factions were sufficiently popular or newsworthy to be represented on stage.²⁴⁴ Categorizing the mail system, fund, stage, and debate in these cases as “non-public” fora obscures the contest, symbolism, and expression bound up with these places.

Contested places can be seen throughout the expressive topography. Indeed, at some level, all places to which speakers seek access relate to some contest or another. The foregoing discussion suggests that courts should be aware that certain places are intentionally chosen by speakers because they represent current social, cultural, or political contests. These places intersect with, and are connected to, specific speaker messages. The places themselves represent and help to convey ideas, messages, and emotions. Courts should

²³⁵ See, e.g., *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 429 (2002); *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 53 (1986).

²³⁶ See Albert Amateau, *City Wins Round in Court on Closing Holes in Porn Law*, THE VILLAGER, Apr. 20–26, 2005, at 14 (discussing a New York City neighborhood’s battle with porn shops), available at http://www.thevillager.com/villager_103/citywinsroundincourt.html.

²³⁷ See, e.g., *Playtime Theatres*, 475 U.S. at 54 (upholding targeted zoning ordinance).

²³⁸ *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 45–46 (1983).

²³⁹ *Brown v. Louisiana*, 383 U.S. 131 (1966).

²⁴⁰ *Adderley v. Florida*, 385 U.S. 39 (1966).

²⁴¹ *Cornelius v. NAACP Legal Def. & Educ. Fund*, 473 U.S. 788 (1985).

²⁴² See *id.* at 790 (limiting participation in charitable funding drive to charities operating within confines of existing social policy).

²⁴³ *Ark. Educ. Television Comm’n v. Forbes*, 523 U.S. 666 (1998).

²⁴⁴ *Id.* at 669.

also more broadly consider the connection between place and larger contests of social construction and power relations. Governmental decisions to deny access to some speakers but not others relate to these contests. Focusing solely upon the *physical* characteristics of properties and the government's "objective" intention with respect to the function of those properties ignores the dynamic relationship between speech and spatiality in all of these contested places.

C. Inscribed Places

The theory of expressive place incorporates the idea that people form meaningful attachments and connections to specific places—what the geographer Tuan refers to as "topophilia."²⁴⁵ As noted above, places are not mere framing devices, they can often be highly charged symbols. The White House is such an example,²⁴⁶ representing ideas of power and democracy. Places can evoke emotions as well as meanings; consider a monument like the Vietnam Wall,²⁴⁷ or a place like Auschwitz.

In their studies of place, anthropologists and geographers have acknowledged "the depth and complexity with which people construct meaningful relationships with their surroundings."²⁴⁸ Some scholars have referred to this phenomenon as "inscription," or the manner in which "people form meaningful relationships with the locales they occupy, how they attach meaning to space, and transform 'space' into 'place.'"²⁴⁹ There is now a rich literature, spanning several disciplines, concerning "how experience is embedded in place and how space holds memories that implicate people and events."²⁵⁰

The idea of inscription has both literal and experiential elements. Graffiti and signage, for example, are methods of literally *writing* one's presence and experience on spaces.²⁵¹ Experientially, inscription refers to what might be called *sacred* places. Anthropologists and geographers have observed that certain places serve as "centers of human significance and emotional attachment."²⁵² These places are uniquely experienced, in that they often operate as mnemonics for recalling prior social events.

Inscribed place in its literal sense forms a relatively small but still significant portion of the expressive topography. As long as we continue to occupy real, physical places, speakers will rely upon the ability to communicate by writing directly on these places. So spatial restrictions on where signs may be

²⁴⁵ See TUAN, *supra* note 133.

²⁴⁶ See *White House Vigil for the ERA Comm. v. Clark*, 746 F.2d 1518, 1534–38 (D.C. Cir. 1984) (upholding a ban on the display of signs in front of the White House).

²⁴⁷ See *Henderson v. Lujan*, 964 F.2d 1179, 1184–85 (D.C. Cir. 1992) (invalidating a restriction on distribution of literature in the vicinity of the Vietnam Veterans Memorial on ground that the restriction was not narrowly tailored).

²⁴⁸ Low & Lawrence-Zuniga, *supra* note 9, at 18.

²⁴⁹ *Id.* at 13.

²⁵⁰ *Id.*

²⁵¹ *Id.*

²⁵² *Id.*; see, e.g., CHRISTOPHER TILLEY, A PHENOMENOLOGY OF LANDSCAPE: PLACES, PATHS AND MONUMENTS (1994); Eric Hirsch, *Introduction* to THE ANTHROPOLOGY OF LANDSCAPE: PERSPECTIVES ON PLACE AND SPACE (Eric Hirsch & Michael O'Hanlon eds., 1995).

posted, as in *Members of City Council v. Taxpayers for Vincent*,²⁵³ affect inscribed place. These restrictions are often justified as necessary to prevent visual blight.²⁵⁴ Moreover, modes of communication like outdoor billboards, which also write upon existing public space, are commonly used to catch listeners' increasingly fragmented attention.²⁵⁵ We should not lose sight of the fact that these restrictions eliminate cheap and efficient methods of *writing* in spaces frequented by the public. In particular, courts should be especially mindful that restrictions on the posting of signs and literature in literally inscribed places will generally fall more heavily on those with little power and fewer resources.

Distinguish these literally inscribed places with inscription in a more *sacred* sense. Sacred places, although relatively few in number, serve as cultural repositories for expressive and associative memories. Unlike contested places, they may, but do not necessarily, communicate specific messages or symbolize a particular social or political conflict. Sacred places represent our expressive culture in a more general sense than their literal cousins. Many places have come, over time, to be associated with a commitment to expressive and associative freedom.

The National Mall is an example of a sacred, inscribed place. The Mall is a mnemonic for the civil rights movement and other demonstrations that have occurred in that space throughout history. For many people, this place evokes memories of Martin Luther King, Jr.'s *I Have a Dream* address; for others, antiwar, abortion, or social justice demonstrations are deeply inscribed there.²⁵⁶

Central Park in New York City is another example. There, too, demonstrators and protesters have gathered to present a variety of social and political grievances. More local spaces can also be characterized as inscribed. For example, Union Square Park in New York City has been the venue for public parades, demonstrations, and other gatherings since the late nineteenth century.²⁵⁷ These events have included the first Labor Day parade, held in 1882, and a rally for Sacco and Vanzetti that took place in 1927.²⁵⁸ Communists rallied there in the 1930s, political activists in the 1960s and in more recent times.²⁵⁹ As with the Mall and Central Park, sacred places inscribe significant moments in history. As "written" places, they evoke emotions and memories.

Conflicts regarding access to inscribed, sacred places symbolize something beyond the specific issue of the day, whether it is homelessness, war, or

²⁵³ *Members of the City Council v. Taxpayers for Vincent*, 466 U.S. 789, 817 (1984) (upholding prohibition on posting of signs on utility poles).

²⁵⁴ *See id.* at 805 (affirming state's interest in aesthetic values).

²⁵⁵ *See Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 508 (1981) (upholding prohibition on display of certain billboards).

²⁵⁶ *See Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 303 (1984) (Marshall, J., dissenting) ("Missing from the majority's description is any inkling that Lafayette Park and the Mall have served as the sites for some of the most rousing political demonstrations in the Nation's history.").

²⁵⁷ *See Kurutz, supra* note 138.

²⁵⁸ *Id.*

²⁵⁹ *Id.*

civil rights. These conflicts are manifestations of the health of the entire expressive culture. Courts have not engaged sacred places in this manner. In *Clark v. Community for Creative Non-Violence*,²⁶⁰ for example, the Supreme Court upheld a National Parks Service regulation prohibiting camping on the National Mall.²⁶¹ The basic rationale for the decision was that camping would harm the lawn, or at least that the Parks Service was entitled to so conclude.²⁶² Little if any consideration was given to the cultural significance of the National Mall.²⁶³ More recently, New York City officials successfully argued that large-scale protests and demonstrations should be prohibited in portions of Central Park in order to preserve the lawn there.²⁶⁴

In sum, inscribed places appear in two forms on the expressive topography. Spaces can be literally written or inscribed, or they can be sacred places: public spaces upon which memories and expressive histories have been “written” or inscribed. Like contested places, inscribed places strongly implicate critical theories of social construction. Restrictions on speech inscribed upon utility poles and billboards seek to define not only norms of community aesthetics, but proper communicative methods as well. As anthropologists have observed, battles over access to or transformation of sacred landscapes and monuments tend to pit political and social elites against less-powerful residents who wish to retain the original features of these spaces and access to them.²⁶⁵ Thus, a great deal more than the visual aesthetic of a well-manicured lawn is at stake.

D. Tactical Places

Governments and other authorities have always relied upon space as an organizing principle.²⁶⁶ They have purposefully manipulated space to control and discipline individual and group behaviors.²⁶⁷ This manipulation of place

²⁶⁰ *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288 (1984).

²⁶¹ *Id.* at 298–99.

²⁶² *Id.* at 299.

²⁶³ *Id.* at 290 (describing the Mall, its monuments and landscape, and its importance to residents and tourists).

²⁶⁴ See *Nat'l Council of Arab Ams. v. City of New York*, 331 F. Supp. 2d 258, 260 (S.D.N.Y. 2004) (denying motion for preliminary injunction directing the New York Parks Department to allow a demonstration on Great Lawn in Central Park); Williams, *supra* note 138 (reporting that the 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”).

²⁶⁵ See generally SETHA M. LOW, *ON THE PLAZA: THE POLITICS OF PUBLIC SPACE AND CULTURE* (2000) (describing the conflict surrounding renovation of the Parque Central, one of the oldest places in San Jose, Costa Rica).

²⁶⁶ See MICHEL FOUCAULT, *DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON* 195 (Alan Sheridan trans., Vintage Books 2d ed. 1995) (describing seventeenth-century order relying upon “strict spatial partitioning” to combat the plague).

²⁶⁷ See *id.* at 199 (describing the rise of power via spatial divisions in, among other places, asylums and penitentiaries).

will be referred to generally as “spatial tactics.”²⁶⁸ The products of these spatial tactics, the places they give rise to, will be called “tactical” places.²⁶⁹

Michel Foucault is the theorist most closely associated with the idea of spatial tactics.²⁷⁰ Foucault focused on the ability of architecture to “perfect the exercise of power.”²⁷¹ He observed, for instance, how officials used space to separate ailing communities from healthy ones, the sane from the insane, and men of higher ranks from those of lower ranks.²⁷² Indeed, Foucault recognized that tactical places were a ubiquitous societal presence. Among other places, military camps, schools (which Foucault referred to as “pedagogical machines”), prisons, factories, and asylums were based upon spatial tactics.²⁷³ Foucault noted the degree of control made possible by the spatial characteristics of these and other places.²⁷⁴ He referred to the architecture of the tactical place as “a political ‘technology’ for working out the concerns of government—that is, control and power over individuals—through the spatial ‘canalization’ of everyday life.”²⁷⁵ In sum, Foucault recognized the substantial power in space and place.

In *Discipline and Punish*,²⁷⁶ Foucault’s examination of the history of the modern prison, he observed that the spatial characteristics of the prison were designed to create a “docile body” through “enclosure and the organization of individuals in space.”²⁷⁷ In addition to rendering bodies docile, tactical places like asylums and schools made it easier for the state to observe subjects and quickly intercede to correct behaviors.²⁷⁸ Foucault noted the “progressive objectification and the ever more subtle partitioning of individual behaviour”; the “innumerable petty mechanisms” of control and surveillance built into the architectures he examined.²⁷⁹ He also observed that spatial tactics operate with a subtlety that obscures their substantial influence on behavior: “The disciplinary institutions secreted a machinery of control that functioned like a microscope of conduct; the fine, analytical divisions that

²⁶⁸ See Low & Lawrence-Zuniga, *supra* note 9, at 30–36 (discussing the anthropological version of “spatial tactics”).

²⁶⁹ See generally Zick, *Speech and Spatial Tactics*, *supra* note 8 (examining spatial tactics and the resulting tactical places).

²⁷⁰ See also MICHEL DE CERTEAU, *THE PRACTICES OF EVERYDAY LIFE* xiv–xv (Univ. of Cal. Press 1984) (discussing “tactics” used by groups to counter governmental spatial tactics).

²⁷¹ FOUCAULT, *supra* note 266, at 206.

²⁷² See *id.* at 199. For additional discussion of Foucault’s theory of spatial tactics and power, see generally MICHEL FOUCAULT, *MADNESS AND CIVILIZATION* (1967); MICHEL FOUCAULT, *THE BIRTH OF THE CLINIC* (1976).

²⁷³ See, e.g., FOUCAULT, *supra* note 266, at 171–74 (discussing spatial tactics of military camps, schools or “pedagogical machines,” hospitals, and factories).

²⁷⁴ See Low & Lawrence-Zuniga, *supra* note 9, at 30.

²⁷⁵ *Id.* (quoting FOUCAULT, *supra* note 266, at 198).

²⁷⁶ FOUCAULT, *supra* note 266.

²⁷⁷ *Id.* at 198.

²⁷⁸ Foucault drew heavily upon Jeremy Bentham’s “Panopticon” as a paradigmatic example of the tactical use of space. *Id.* at 201–09. The Panopticon was the ultimate disciplinary architecture. Its unique architectural feature consisted of an arrangement of cell-like spaces, each of which could be seen only by a supervising authority, without the knowledge of the person being observed. *Id.* at 201. Foucault referred to the Panopticon as a “cruel, rather ingenious cage.” *Id.* at 205.

²⁷⁹ *Id.* at 173.

they created formed around men an apparatus of observation, recording and training.”²⁸⁰

Through this geometric precision, this exercise of raw power through place, officials discovered an effective technique for what Foucault referred to as “binary division and branding.”²⁸¹ This mode served to separate populations: the mad from the sane, the dangerous from the harmless, and the normal from the abnormal.²⁸² In this fashion, space or place simultaneously communicated something about dangers or threats to the community and pragmatically addressed them. Foucault emphasized that these functions were accomplished not by any specific person or institution but by “a certain concerted distribution of bodies, surfaces, lights, gazes; in an arrangement whose internal mechanisms produce the relation in which individuals are caught up.”²⁸³ No force or violence was necessary; control was exercised through “the laws of optics and mechanics, according to a whole play of spaces, lines, screens, beams, [and] degrees.”²⁸⁴ Discipline was achieved, in other words, *spatially*.

Foucault noted that the power of place could be used to serve the first need of government; namely, to maintain order. Through the power of place, the state could impose “an exact geometry” upon disorder and dissent.²⁸⁵ This power is an especially important one for governments faced with mass phenomena like protests and demonstrations. Foucault observed that space could be ordered to “neutralize the effects of counter-power,” to rebuff “agitations, revolts, spontaneous organizations, [and] coalitions.”²⁸⁶

In his studies of space and place, Foucault lamented that a “Benthamite physics of power” was being used to create what he called the “disciplinary society.”²⁸⁷ Anthropologists and human geographers have also pursued this line of thought. They have examined structures like gated residential communities, which are a response to increased crime and overcrowding.²⁸⁸ These tactical places are designed to further interests in power, control, and separation; scholars have thus posited that there is meaning in these architectures. As one anthropologist suggested, “adding walls, gates, and guards produces a landscape that encodes class relations and residential (race/class/ethnic/gender) segregation more permanently in the built environment.”²⁸⁹ Other scholars have noted the rise of the “fortress city” in places like Los Angeles, where architecture is used “as a strategy for controlling and patrolling the urban poor, which is made up of predominantly ethnic—Latino and

²⁸⁰ *Id.*

²⁸¹ *Id.* at 199.

²⁸² *Id.*

²⁸³ *Id.* at 202.

²⁸⁴ *Id.* at 177.

²⁸⁵ *Id.* at 174.

²⁸⁶ *Id.* at 219 (“That is why discipline fixes; it arrests or regulates movements; it clears up confusion; it dissipates compact groupings of individuals wandering about the country in unpredictable ways; it establishes calculated distributions.”).

²⁸⁷ *Id.* at 209.

²⁸⁸ See Setha M. Low, *The Edge and the Center: Communities and the Discourse of Urban Fear*, 103 AM. ANTHROPOLOGIST 45, 45 (2001).

²⁸⁹ *Id.*

Black—minorities.”²⁹⁰ These architectures, like all tactical places, “facilitate avoidance, separation, and surveillance.”²⁹¹

The author has examined elsewhere the impact of certain tactical places on First Amendment rights.²⁹² These places are proliferating on the expressive topography, in part because governments have become far more aggressive in manipulating space to control expressive and associative activities. Authorities, for example, constructed a “cage” for demonstrators at the 2004 Democratic National Convention in Boston.²⁹³ The architectural features of this space included, among other things, a double-mesh covering, jersey barriers, and razor wire.²⁹⁴ The United States Court of Appeals for the First Circuit upheld this “Demonstration Zone” as a valid time, place, and manner regulation.²⁹⁵ “Free speech zones” and “speech-free zones” have become common methods for controlling expressive and associative activity.²⁹⁶ In line with Foucault’s observations, these places create docile speakers, enable ready governmental surveillance of speech, and brand those within as somehow dangerous or at least outside the “mainstream.”²⁹⁷ These tactical places can now be found at political conventions, inaugurations, public protests, abortion clinics, and on university campuses.²⁹⁸

Although this type is the most prevalent form of tactical place, there are other locales on the expressive topography that ought to be considered examples of tactical place as well. In particular, as noted, Foucault saw schools as “pedagogical machines.”²⁹⁹ Public elementary and secondary schools feature prominently in the topography of the First Amendment, as expressive controversy thrives in these places. The Supreme Court has sent conflicting signals regarding the scope of expressive freedom in schools. In *Tinker v. Des Moines Independent Community School District*,³⁰⁰ the Court strongly affirmed the principle that students do not “shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.”³⁰¹ Schools, the Court said, “may not be enclaves of totalitarianism” in which students recite only officially approved ideas.³⁰² So long as the speaker was not disruptive, this principle applied in all of the spaces in the school, including the classroom, the cafeteria, and the playground.³⁰³ As the Court said: “Freedom of expression would not truly exist if the right could be exercised only in an area that a benevolent government has provided as a safe haven for crackpots.”³⁰⁴

²⁹⁰ *Id.* at 46; see Mike Davis, *Fortress Los Angeles: The Militarization of Urban Space*, in *VARIATION ON A THEME PARK* 154, 154–80 (Michael Sorkin ed., 1992).

²⁹¹ Low & Lawrence-Zuniga, *supra* note 9, at 391.

²⁹² See generally Zick, *Speech and Spatial Tactics*, *supra* note 8.

²⁹³ See *Bl(a)ck Tea Soc’y v. City of Boston*, 378 F.3d 8, 10 (1st Cir. 2004).

²⁹⁴ See *id.* at 11.

²⁹⁵ *Id.* at 14.

²⁹⁶ See Zick, *supra* note 8 at 589–606 (discussing speech zones).

²⁹⁷ See *id.*

²⁹⁸ See *id.*

²⁹⁹ See *supra* note 273.

³⁰⁰ *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969).

³⁰¹ *Id.* at 506.

³⁰² *Id.* at 511.

³⁰³ *Id.* at 512–13.

³⁰⁴ *Id.* at 513.

The balance in more recent cases has tipped decidedly in the opposite direction. The Supreme Court now ostensibly favors school authorities' interests in inculcating values, maintaining decorum, and disassociating themselves from all manner of student expression.³⁰⁵ It has held that neither school assemblies, nor activities like school newspapers, are free from governmental restraint.³⁰⁶ The school assembly, the Court said, may be subject to rules of decorum, just as the *Manual of Parliamentary Practice* limits debate in the halls of Congress.³⁰⁷ The school newspaper, the Court held, was a non-public forum, effectively extinguishing the students' expressive rights there.³⁰⁸ Accordingly, recent precedents indicate a resurgence of the "pedagogical machine." This is not to say that schools are becoming spaces of totalitarianism; given the recent precedents, however, neither are they likely to be places of expressive culture, as *Tinker* seemed to promise.³⁰⁹

In sum, just as there are two types of inscribed place, two basic types of tactical place are exhibited on the expressive topography. Governmental zones mark boundaries within which expressive and associative activity is permitted.³¹⁰ These places separate speakers from listeners. They discipline expression by prohibiting movement, restricting assembly, and enabling official surveillance. Schools, which feature prominently in contemporary expressive conflicts, are also tactical places.³¹¹ Like speech zones, they are built to render subjects docile and to enable official surveillance. They too limit behavior, including expression, through the manipulation of place.

E. Non-Places

As noted, scholars tend to treat "space" and "place" as distinct.³¹² Space is often considered an undifferentiated mass.³¹³ It *becomes* place when people form attachments to it.³¹⁴ This circumstance gives rise to the possibility that for one reason or another certain spaces may *never* acquire the cultural significance of place. They will instead remain mere space.

Some scholars, among them the anthropologist Marc Augé, refer to these spaces as "non-places."³¹⁵ Augé compares "place" and "non-place" in this manner: "If a place can be defined as relational, historical and concerned

³⁰⁵ See *Bethel Sch. Dist. v. Fraser*, 478 U.S. 675, 684–86 (1986) (upholding sanctions on a student for indecent speech to student assembly); *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 271–72 (1988) (upholding restrictions on student speech in school newspaper).

³⁰⁶ *Hazelwood*, 484 U.S. at 271–72.

³⁰⁷ *Fraser*, 478 U.S. at 681–82.

³⁰⁸ *Hazelwood*, 484 U.S. at 270.

³⁰⁹ *Tinker*, 393 U.S. at 513.

³¹⁰ See *supra* notes 293–98 and accompanying text.

³¹¹ See *supra* notes 299–309 and accompanying text.

³¹² See *supra* notes 135–36 and accompanying text.

³¹³ See, e.g., CRESSWELL, *supra* note 135, at 8 (treating "space" as a broader concept than "place").

³¹⁴ See, e.g., TUAN, *supra* note 133 (discussing the concept of "topophilia," or connection to place); *supra* Part III.C.

³¹⁵ See MARC AUGÉ, *NON-PLACES: INTRODUCTION TO AN ANTHROPOLOGY OF SUPERMODERNITY* (1995). Some scholars have noted the similar phenomenon of "placelessness." See generally EDWARD RELPH, *PLACE AND PLACELESSNESS* (1976).

with identity, then a space which cannot be defined as relational, or historical, or concerned with identity will be a non-place."³¹⁶ Augé traces what he views as the proliferation of non-places to the conditions of "supermodernity," by which he generally means urban concentration, globalization, technological advancement, and the disappearance of spatial boundaries.³¹⁷

Paradoxically, as the planet has been shrinking, space has become a more prominent feature of our landscape. As examples, Augé and other anthropologists of place note that modernity has given rise to spaces like railway terminals, subway stations, airports, hotel chains, and great commercial centers like shopping malls.³¹⁸ Increased mobility is made possible by means of transport—trains, airports, and subway cars—that also constitute potential new places.³¹⁹ Today, people spend substantial and increasing amounts of time in these spaces, but there is no meaningful connection between these spaces and the people who occupy them. There is no history there, no relation between people and space, and no development of what might be considered "culture."³²⁰ There is only, as Augé notes, a "solitary contractuality."³²¹ Individuals in these spaces interact with *texts*—directions, instructions given by machines, their daily newspaper—rather than with each other.³²² Naturally, the principle of spatial dynamism does not apply in spaces where conversations are with texts and machines rather than people. As Augé states: "The space of non-place creates neither singular identity nor relations; only solitude, and similitude."³²³

The expressive topography is replete with non-places. Indeed, this type may be the fastest-growing spatial form. In First Amendment jurisprudence, spaces like airports,³²⁴ bus terminals,³²⁵ train terminals,³²⁶ interstate rest areas,³²⁷ supermarkets, buses,³²⁸ trains, subways,³²⁹ and malls all constitute not only non-public fora, but non-places on the expressive topography. The First Amendment either does not apply in these spaces, or applies in such minimal fashion that these spaces provide severely limited opportunities for expressive activity.

The public forum doctrine has created the conditions under which non-places have flourished on the expressive topography. Speakers first were

³¹⁶ AUGÉ, *supra* note 315, at 77–78.

³¹⁷ *Id.* at 31.

³¹⁸ *Id.* at 34.

³¹⁹ *Id.*; *see also id.* at 79.

³²⁰ *See id.* at 111–12 (noting that a non-place "does not contain any organic society").

³²¹ *Id.* at 94.

³²² *Id.* at 96.

³²³ *Id.* at 103.

³²⁴ *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).

³²⁵ *See id.*

³²⁶ *Id.*

³²⁷ *See Jacobsen v. Bonine*, 123 F.3d 1272, 1274 (9th Cir. 1997) (noting that interstate rest areas are "modern creations" and thus not public fora).

³²⁸ *See Lehman v. City of Shaker Heights*, 418 U.S. 298, 301–03 (1974) (finding that neither bus nor advertising space on the bus is a public forum).

³²⁹ *See Gannett Satellite Info. Network, Inc. v. Metro. Transp. Auth.*, 745 F.2d 767, 772–73 (2d Cir. 1984) (holding that a subway is not a public forum).

pushed from malls, public places where listeners gathered and could readily be found.³³⁰ Next, the Court, focusing as always on the original function of a property, its tradition, has held that modern places, like airports, cannot by definition constitute “quintessential” public fora.³³¹ Finally, and more broadly, the Court’s requirement of clear and unambiguous governmental intent to open a forum to expression or, stated differently, its presumption that public property is not intended to serve expressive functions, more or less ensures that other non-places will be created.³³²

The current presumption is that modern places will not serve as expressive locales. They will thus remain, insofar as public expressive activity is concerned, undifferentiated space on the expressive topography. Citizens will feel no “topophilia” or special connection to these spaces. If they connect with these spaces at all, it is merely on a pragmatic and functional level. Non-places serve functions relating to commerce or travel, not the public expression or discussion of ideas.

F. Cyber-Places

No discussion of the current expressive topography would be complete absent some consideration of what is colloquially referred to as “cyberspace.” An extended and thorough discussion of cyberspace is obviously beyond the scope of this Article. This section modestly seeks to relate what might be called “cyber-places” to the theory of expressive place and to at least tentatively locate them on the expressive topography.³³³

There is an important and ongoing debate regarding whether cyber-places are in fact “places” at all.³³⁴ After all, we do not actually *go* anywhere when we visit cyberspace. Although it may be true that we do not physically *go* anywhere when we visit websites and the like, the conclusion that these are separate, bounded *spaces* and at least potential *places* seems inescapable. We seek these spaces out, “link” to them, and “return” to them. We may still be physically before our screens, but mentally we are *in*, or at least *at*, some of these sites. This acknowledgement does not mean the metaphor of

³³⁰ See *Hudgens v. NLRB*, 424 U.S. 507 (1976) (holding that labor picketers had no right to demonstrate at 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 shopping center).

³³¹ See *Lee*, 505 U.S. at 680 (noting “the lateness with which the modern air terminal has made its appearance”); see also *supra* notes 39–42 and accompanying text (discussing concept of property “tradition”).

³³² See *supra* notes 43–45 and accompanying text.

³³³ The Article does not discuss other metaphysical fora or places. It is concerned primarily with mapping the places where people interact and examining the sociolegal implications of place to these interactions. Cyber-place falls more readily into this category of concern than, for example, a student fund that the Court chooses to treat as a “forum.” See *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 830 (1995) (“The [Student Activity Fund] is a forum more in a metaphysical than in a spatial or geographic sense, but the same principles are applicable.”); see also *Cornelius v. NAACP Legal Def. & Educ. Fund*, 473 U.S. 788 (1985) (treating a charitable campaign as a “forum” for First Amendment purposes).

³³⁴ See, e.g., Julie Cohen, *Cyberspace As/And Space* (Mar. 27, 2006) (unpublished manuscript, on file with author) (discussing cyberspace-as-place metaphor); Mark A. Lemley, *Place and Cyberspace*, 91 CAL. L. REV. 521, 525–26 (2003) (discussing ways in which cyber-place differs from real place).

"place" should control all legal treatments of cyberspace, including those relating to First Amendment concerns. It does, however, mean that it makes sense generally to speak in terms of "cyber-places," and to assimilate these places onto the expressive topography.

We can at least say that cyber-places can be characterized as *expressive* places according to the principles of the theory set forth in Part II.³³⁵ There is little question that they are currently of primary importance to expression, so much so that there is a real concern over the "digital divide" separating those with modems and other communications technology from those without access to them.³³⁶ Many cyber-places are socially constructed by those who frequent them. The spaces devoted to virtual reality games and other simulations, where participants recreate physical place analogs, illustrate this point. Places like weblogs, whose meanings are produced daily by those individuals who contribute to and comment on them, are also representative. Further, a cyber-place is quintessentially dynamic, in that it exists to make abundant room for expression. It is a happening or event—one that changes rapidly and constantly. Websites, weblogs, and other cyber-places may not yet communicate memories and meaning in the same fashion as inscribed and other real places, but we can at least say that they have meaning for those who frequent them.

Indeed, much of our daily discourse now occurs in these places. More accurately, this discourse occurs in the *multiple* places that together constitute "cyberspace." Entire "communities" have risen from the bits and bytes of chat rooms, e-mail programs, hypertext, and weblogs. Nearly every "real" space seems to have some sort of cyber-analog; there are cyber-malls, cyber-libraries, even cyber-public squares.³³⁷ Indeed, it may be that cyberspace will ultimately give rise to an expressive topography all its own. This mass of "cyber" space may someday consist of analogs of real-space contested, inscribed, tactical, and even "embodied" places.

As is true with respect to spatial jurisprudence generally, the question of "what" is being regulated has been the principal focus thus far in First Amendment considerations of cyber-places. Most notably, the Supreme Court has invalidated a number of federal laws enacted to deal with "indecent" and pornographic expression in cyberspace.³³⁸ In these contexts, the Court has signaled its commitment to ensuring that communication on the Internet remains robust and wide open. It has characterized "cyberspace" as a vast, nonscarce, diverse forum for low-cost communication.³³⁹ Thus far, at least, the Court appears to accept the conclusion that computer code, rather than legal code, will be the principal means of regulating the Internet.³⁴⁰

³³⁵ See *supra* Part II.

³³⁶ See, e.g., RANETA LAWSON MACK, *THE DIGITAL DIVIDE: STANDING AT THE INTERSECTION OF RACE AND TECHNOLOGY* (2001).

³³⁷ See Cohen, *supra* note 334.

³³⁸ See *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 234 (2002) (Child Pornography Prevention Act); *Reno v. ACLU*, 521 U.S. 844, 844 (1997) (Communications Decency Act).

³³⁹ See *Reno v. ACLU*, 521 U.S. at 850–52 (describing the Internet).

³⁴⁰ See LAWRENCE LESSIG, *CODE AND OTHER LAWS OF CYBERSPACE* (1999).

Scholars and courts have grappled with the propriety of applying existing legal models to cyberspace. Perhaps for the same reasons of comfort that have led them to see real place as legal *res*, courts have begun to gravitate in this direction in their cyberspace decisions as well. In the First Amendment context, the Court has refused to modify the level of scrutiny it applies to content-based regulations in cyberspace,³⁴¹ and has applied the overbreadth doctrine and the “community standards” concept to cyberspace.³⁴² Most important, the Supreme Court has implicitly applied principles of the public forum doctrine to cyberspace.³⁴³ In intellectual property and other contexts, courts have similarly treated cyber-place as *res* or property.³⁴⁴ It would seem, then, that courts are inclined to treat cyber-places as places, and more specifically as *properties*.

In terms of the expressive topography, the pressing challenge for courts is to recognize that however neatly or comfortably some legal analogies and models seem to fit, cyber-places are not in all respects like their supposed real-space analogs. As expression continues to migrate online, it is especially important that courts grasp the unique intersection of speech and spatiality there.

Here, as elsewhere, insights from other disciplines can supplement the intuitions and observations of legal scholars and judges. Sociologists, social psychologists, and anthropologists have all begun to study online places and behaviors.³⁴⁵ As they have observed, the dynamics of interaction on the Internet, the “psychological features” of communication there, are quite different from encounters in physical places.³⁴⁶ This fact affects the manner in which place itself and others located “in” cyber-places are experienced. “Environmental presence,” or the realization that we are actually “in” a place, depends upon such things as sensory stimulation and interactivity.³⁴⁷ Some websites have these attributes to varying degrees, but many do not—at least not yet. Interpersonal presence, the manner in which we experience the presence of others, also differs in marked respects in cyber-places.³⁴⁸ There may be some vague sense that others are present, but we cannot see, feel, or

³⁴¹ *Reno v. ACLU*, 521 U.S. at 870 (finding no basis for qualifying the level of scrutiny).

³⁴² See *id.* at 877 (discussing the overbreadth of the Communications Decency Act); *Ashcroft v. ACLU*, 535 U.S. 564, 577 (2002) (stating that the community standards concept applies to the Internet).

³⁴³ See Dan Hunter, *Cyberspace as Place and the Tragedy of the Digital Anticommons*, 91 CAL. L. REV. 439, 491 (2003) (noting that in *Reno v. ACLU*, “members of the Court appeared to assume that cyberspace has public forum characteristics”). For a good general discussion of the role of the public forum doctrine in cyberspace, see Noah D. Zatz, *Sidewalks in Cyberspace: Making Space for Public Forums in the Electronic Environment*, 12 HARV. J.L. & TECH. 149 (1998).

³⁴⁴ See Lemley, *supra* note 334, at 527–29 (discussing trespass cases).

³⁴⁵ See, e.g., THE SOCIAL NET: UNDERSTANDING HUMAN BEHAVIOR IN CYBERSPACE (Yair Amichai-Hamburger ed., 2005); CHUNGLIANG AL HUANG, SOCIOLOGY OF CYBERSPACE (2004); CYBERPSYCHOLOGY (Angel J. Gordo-Lopez & Ian Parker eds., 1999); LIFE ONLINE: RESEARCHING REAL EXPERIENCE IN VIRTUAL SPACE (Annette N. Markham et al. eds., 1998).

³⁴⁶ See JOHN SULER, *Presence in Cyberspace*, in THE PSYCHOLOGY OF CYBERSPACE (1996), <http://www.rider.edu/suler/psyber/presence.html>.

³⁴⁷ See *id.*

³⁴⁸ See *id.*

touch people there. When we communicate, we often do so anonymously, and we do so primarily through text. At this point, we generally do not see or “sense” others in cyber-places.³⁴⁹ As one legal commentator put it: “In cyberspace . . . there is no ‘next door.’ Nor is there a public street or sidewalk from which one might observe behavior that occurs in a particular Internet space.”³⁵⁰ This observation has important implications for, among other things, expressive activities such as online “protests” and “demonstrations.”

These unique psychological and other features of cyber-place highlight the critical importance of differentiating places on the expressive topography. Specifically, there is a tendency to view cyber-place as capable of supplanting or replacing real place. As will be discussed later, this tendency poses a particular problem when courts assess the availability and adequacy of alternative places for expressive activity.³⁵¹ There is no question that an abundance of speech takes place in these new places; but courts must recognize that this speech is qualitatively and, quite often, quantitatively different from speech in real places. While *cyberspace* is abundant, *cyber-place* is currently far less so. We connect with these places through modems rather than senses. Activity, including expression and association, is uniquely limited by the space itself, and by its architectures. Demonstration, protest, and other speech activity is different there. It is important, then, to look upon cyber-places not as *replacements* for existing places, but perhaps rather, at least for now, as *supplements* to other places on the expressive topography.³⁵²

Legal scholars, including First Amendment scholars, have been acutely aware of and examining cyber-place as the Internet has developed.³⁵³ There is no need, then, to sensitize judges and scholars to the presence or potential importance of cyber-places. But in considering cyber-places as actual places, and as discrete locations on the expressive topography, it will be important to recognize both the similarities and the substantial differences between these places and their real-space topographical neighbors.

IV. *Rethinking Place: Theoretical and Doctrinal Implications*

Parts II and III presented a new theoretical perspective regarding place and a revised expressive topography. This Part examines the theoretical and doctrinal benefits of refining the judicial approach to place. It begins with some general observations regarding modernity, speech, and spatiality. The Part then sketches an approach to judicial review of place that draws on the various observations and proposals in this Article. The approach will improve the manner in which place is understood and valued in applications of the public forum and time, place, and manner doctrines.

³⁴⁹ See JOHN SULER, *The Basic Psychological Features of Cyberspace*, in THE PSYCHOLOGY OF CYBERSPACE, *supra* note 346, <http://www.rider.edu/suler/psycyber/basicfeat.html>.

³⁵⁰ Lemley, *supra* note 334, at 526.

³⁵¹ See *infra* notes 400–07 and accompanying text.

³⁵² See *Hodgkins v. Peterson*, 355 F.3d 1048, 1063 (7th Cir. 2004) (“There is no internet connection, no telephone call, no television coverage that can compare to attending a political rally in person . . .”).

³⁵³ See LESSIG, *supra* note 340.

A. Speech and the Spatial Paradox

Some geographers and anthropologists have noted the following paradox: “[T]he excess of *space* is correlative with the shrinking of the planet.”³⁵⁴ Owing to technology and mobility, we are less and less confined to, or by, physical places. We are increasingly mobile. We travel. We do not stay “in place.” This mobility does not mean that place is no longer important. To the contrary, the conditions of modernity, including mass urbanization, mobility, and technological advancement, ought to, if anything, heighten our resolve to maintain meaningful connections to places. Place anchors cultures, including expressive ones.

The spatial paradox has special salience for First Amendment concerns. Technology, especially the Internet, has made communication cheaper and faster; erasing boundaries and facilitating communication with almost anyone, almost any time, regardless of speaker or listener location. But at the same time, speakers are having less and less success accessing and using public places for expressive and associative purposes. As noted above, the number of places set aside for or devoted to expressive and associative activities is diminishing. In First Amendment terms, the category of “traditional” public fora has remained static, while “non-public” and “limited” public fora have burgeoned onto the expressive topography. Even in fora traditionally thought to be set aside for expressive activity, zoning and other seemingly neutral manipulations have fundamentally affected our relationship with spaces that might otherwise have become expressive places.³⁵⁵ Simply stated, the public forum doctrine has produced an expansion of nonexpressive place. Moreover, as we have become physically closer to one another, courts have begun to reactively expand embodied place.³⁵⁶ In today’s social and political climate, courts are more inclined to protect the personal space of the “unwilling listener,” even in traditionally public places.³⁵⁷

There has been surprisingly little in the way of public alarm in response to the proliferation of tactical and non-places, the constraints in accessing embodied places, and the closing of inscribed places in the name of such things as landscape aesthetics. We seem conditioned to view place as insignificant to expression. By contrast, viewing place as distinctly “expressive” highlights its human and cultural aspects. It provides a sense of what we stand to lose when the expressive topography fills with spaces rather than places. Plotting a new topography demonstrates not only that place is critical to expression, but more importantly *why* this fact is so. It reveals the variety of ways in which speech and spatiality combine, collide, and intersect.

One of the significant benefits of rethinking place is a heightened sensitivity to the spatial paradox. Some might respond that judges and scholars are already sensitized to this fact. But there is little evidence that this assertion is true. Few scholars devote serious attention to place.³⁵⁸ Those that do

³⁵⁴ AUGE, *supra* note 315, at 31 (emphasis added).

³⁵⁵ See *supra* Part I.B.2 (discussing the expressive microtopography).

³⁵⁶ See *supra* Part III.A (discussing “embodied” place).

³⁵⁷ See *id.*

³⁵⁸ Most of the serious treatments of the forum doctrine are cited *supra* at notes 111–12.

have either issued revisionist explanations for the much-criticized public forum doctrine or suggested minor tweaks to it.³⁵⁹ Similarly, judicial concern for space and place has always been mostly superficial. Space and place appear metaphorically in First Amendment jurisprudence. The Court has said, for example, that expressive freedom requires a robust marketplace of ideas.³⁶⁰ It has emphasized that there must be adequate “breathing space” for expression.³⁶¹ And it has stressed that debate on public issues should be “uninhibited, robust, and wide-open.”³⁶²

These propositions suggest a commitment to making physical room for speech. The spatial references, however, are to speech doctrine that, the Court says, should encourage robust discussion and advance the search for truth. This purpose may indeed underlie, say, the present doctrine of libel.³⁶³ The rules of libel are designed to make room for some most unpleasant expression. That protection is certainly not true, however, of the doctrine of place. As the discussion in Part I demonstrated, there is presently little if any commitment to ensuring adequate physical space for speech. So long as the government maintains facial “neutrality,” it is largely unconstrained in plotting the expressive topography.³⁶⁴ Given the complex intersection of speech and spatiality, it should be obvious that a marketplace without adequate physical space cannot be truly “wide open” and “robust.”³⁶⁵

Some of the judicial and scholarly complacency with regard to the current state of the expressive topography is no doubt attributable to the popularity and availability of the Internet and other communications technologies. Judges and scholars are as prone as everyone else to assume that “cyberspace” and the now-ubiquitous media are an adequate cure for the free speech concerns associated with the spatial paradox. But this reality is precisely why an accurate expressive topography must differentiate places. As marvelous as they are, the Internet and other communication technologies cannot provide the attachment to, or “topophilia” for, inscribed places. They cannot compensate for the experience of being at or near a contested place, nor can cyber-places reproduce the emotive and confrontational aspects of embodied place. Perhaps this truth is why, even in technologically advanced countries like our own, people still take to the streets to protest and demonstrate; they insist on gathering in physical places—contested, inscribed, embodied, and tactical—to convey their messages. Gathering *there* remains a critical part of the expressive culture. Courts should be aware of such things as they address matters of spatiality.

Finally, in general terms, rethinking “place” will make judges more aware of their special role as cartographers of the expressive topography.

³⁵⁹ See *supra* note 111.

³⁶⁰ See *FCC v. Pacifica Found.*, 438 U.S. 726, 745–46 (1978) (“For it is a central tenet of the First Amendment that the government must remain neutral in the marketplace of ideas.”).

³⁶¹ *NAACP v. Button*, 371 U.S. 415, 433 (1963) (emphasis added).

³⁶² *N.Y. Times v. Sullivan*, 376 U.S. 254, 270 (1964) (emphasis added).

³⁶³ See *id.* at 279–80 (setting forth a constitutional rule for libel that includes the “actual malice” requirement).

³⁶⁴ See *supra* notes 71–72 and accompanying text.

³⁶⁵ See *Sullivan*, 376 U.S. at 270.

The breadth of deference to public officials under the current doctrine of place leaves the impression that the shape of the expressive topography is primarily the result of administrative decisions regarding public resource management. In truth, it is *judges* who have decided to regard place as analogous to other public goods, like air and water. The look and feel of the expressive topography is the product of judicial decisions to treat place as property and governments as its owners or proprietors.³⁶⁶ It is the product, as well, of an anemic scrutiny of spatial claims.³⁶⁷ Judges, in short, bear substantial responsibility for the contours of the current expressive topography; they are among the officials who map or plot place.

B. Judicial Review of Place

How, then, should issues of speech and spatiality be approached? How can we put the principles of expressive place and a holistic expressive topography to work? One thing is certain: place is far more complex than current doctrine indicates. This complexity does not necessarily mean that the public forum and time, place, and manner doctrines must be wholly abandoned. We can, however, vastly improve upon the manner in which place is addressed under the First Amendment. In general terms, improvement entails highlighting and establishing the expressive aspects of place. The governmental stake in place is already doctrinally valued. Indeed, owing to the misperception that place is merely public property under governmental management, this interest is markedly overvalued. Speakers' interests with regard to place, by contrast, are both misunderstood and devalued. Fixing that imbalance would be a significant step forward in consideration of speech and spatiality. Much of what follows is designed specifically to address this imbalance.

This section sketches a roadmap for judicial review of spatial issues. The roadmap is set forth as a series of analytic steps, which are merely broad guidelines for approaching issues relating to speech and spatiality. First, an effort should be made to locate the place in question on the expressive topography. This exercise is not one in formal categorization, but a matter of spatial orientation. It does not end, but merely begins, the inquiry. Second, the court should consider which theoretical perspective, Distortion or Enhancement,³⁶⁸ is more appropriate in light of the spatial issues it is confronting. The proposal thus rejects the one-theory-fits-all-places approach. Third, with these basic orienting steps completed, the court should endeavor to "read" or interpret place. Fundamentally, this entails thinking "place" rather than property or "forum." Place must be approached as *expressive*, not inanimate and mute. The court must focus not on the property per se, but on the unique intersection of speech and spatiality. Instead of *pragmatic* functionality, courts should be assessing the *expressive* functionality of places. Instead of *property* traditions, they should be assessing the *expressive* traditions of

³⁶⁶ See *supra* Part I.A (discussing place as property).

³⁶⁷ See *supra* Part I.B (describing the limitations of the current doctrines of place in First Amendment jurisprudence).

³⁶⁸ See BeVier, *supra* note 83; *supra* Part I.C (examining Professor BeVier's theories of the Distortion and Enhancement models of spatial dynamism).

places. Finally, when courts are called upon to analyze spatial regulations under the time, place, and manner doctrine, this section proposes a far more skeptical review of the critical elements of spatial neutrality, tailoring, and adequacy. This approach will lead to more places being open to expressive activity. It will demand more of government when it uses place to discipline and control expression.

1. *Locating Place*

Owing especially to the rigid formalism of the public forum doctrine, courts currently expend very little effort locating and analyzing place. At this point, as they survey the expressive topography, courts see only two general categories of place—public and non-public fora. Fora, of course, are not places, but legal abstractions designed to simplify the expressive topography. If place is to be taken seriously, courts must begin to think in terms of the places on the expressive topography.

Getting courts to see, recognize, and locate particular places, rather than categories of fora, is a critical first step in modifying judicial review of place. In this regard, note that “place” can be conceptualized at three basic levels of generality. First, at the most specific level, a court might focus on the actual place in question, whether it is a park, a mailbox, a school, or what have you. Second, a court might simply categorize together places that share the same basic characteristics (all parks, for example). All remaining space would be designated as expressive only if the government so intends or the property appears to have been primarily used to convey expression. Finally, as this Article proposes, a court might alternatively identify various spatial types with reference to the intersection of speech and spatiality *within* places. This approach lies somewhere between the site-specific and overly generalized categorical approaches. It generalizes spatial types, while insisting upon a close inspection of the specific place in question.

Forum doctrine, by contrast, generally approaches place only from the most generalized perspective, the one that categorizes together all places that share common characteristics. All properties that are “parks” are treated the same, as are all properties that are “airports.” Parks are treated categorically as “traditional” public fora.³⁶⁹ All airport terminals, by contrast, are now “non-public” places.³⁷⁰ Under forum analysis, then, there are classes of properties.

The forum labels actually tell us very little about the particular place in question, much less about how or why speech is being regulated there. For example, it is reasonably well established that speech cannot be completely prohibited in a public park.³⁷¹ Under prevailing rules, however, spatial regulations of various stripes, including many that may substantially interfere with expressive and associative rights, are permitted so long as they do not appear to have been conceived with regard to expressive content.³⁷² The very rea-

³⁶⁹ *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983).

³⁷⁰ *See Int'l Soc'y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672 (1992).

³⁷¹ *See Hague v. Comm. for Indus. Org.*, 307 U.S. 496, 515–16 (1939); *Perry*, 460 U.S. at 45.

³⁷² *See Ward v. Rock Against Racism*, 491 U.S. 781 (1989).

sons why the park is considered a “quintessential” public forum for expression can be lost in this analysis. Similarly, one would never guess based upon discussions of forum doctrine that in light of things like modernity and the spatial paradox, labeling all airport terminals non-public fora substantially affects the expressive topography. The label makes non-places of these public spaces. By treating places as classes of properties, courts are missing their connection to expression.

Indeed, forum doctrine generally causes courts to bypass place as a discrete subject of analysis. Depending upon how space is actually being used or regulated, the same public park may exhibit characteristics of embodied, inscribed, tactical, or some combination of these spatial types. A regulation prohibiting speakers from coming within a certain distance of listeners, for example, would implicate concerns associated with embodied place. A regulation closing portions of the particular park altogether, or limiting the posting of signs or banners, would raise concerns associated with inscribed place. A regulation designating a specific place for expressive activity within the park (a “free speech zone”) would create a tactical place. A regulation of speech in airport terminals may simultaneously raise concerns associated with embodied place and, more generally, create a non-place.

Locating place will assist courts in addressing the actual place at issue, rather than some abstraction or category of property. Protective bubbles at abortion clinics, to take one example, actually implicate embodied places, not sidewalks.³⁷³ Speakers there are not concerned with access to the sidewalk itself; they want access to the listeners’ personal spaces in order to deliver their message. To say that a regulatory bubble affects a “public forum” does virtually nothing to advance the First Amendment inquiry. Locating the bubble as an embodied place, by contrast, leads the court directly to the intersection of speech and spatiality in such a place. Consider as well the Boston speech cage.³⁷⁴ Identifying the public street as the appropriate “forum” added nothing to the analysis in that case, to say nothing of the outcome. By contrast, locating a tactical place in that instance certainly would have altered the analysis, if not the outcome itself.

As explained in more detail below, it is imperative that courts locate place carefully because the different spatial types in the foregoing examples require distinct judicial orientations and approaches. “Reading” or interpreting these places will entail reliance upon different factual and jurisprudential perspectives. The dynamics of these places, and the manner in which they intersect with expression, are in fact distinct. So are the values, First Amendment and otherwise, that these places implicate. Closing a large portion of a public park is very different, as a sociolegal event, from creating a free-speech zone within that same park. Constructing a tactical place there raises still other distinct concerns. An accurate reading of place requires that courts recognize, or locate, all of the relevant places in issue.

³⁷³ See *Hill v. Colorado*, 530 U.S. 703, 734–35 (2000); *supra* notes 208–09 and accompanying text.

³⁷⁴ See *Bl(a)ck Tea Soc’y v. City of Boston*, 378 F.3d 8, 10 (1st Cir. 2004); *supra* notes 293–95 and accompanying text.

Finally, locating place will remedy the forum doctrine's failure to consider the *specific* place in question. Under forum doctrine, for example, all parks are regarded as the same. Depending upon the nature of the spatial regulation, however, some specific knowledge may be required to accurately assess what impact the regulation will have on expressive topography and culture. For example, regulations of expressive activity on the National Mall, or in Central Park, must be considered in light of the expressive histories of those particular inscribed places.³⁷⁵ A complete ethnographic history of place need not be written in such cases. But local history, particularly expressive history that is closely linked to a place, is surely a relevant factor to be considered in the spatial analysis. So locating place does not entail mere reliance on the labels of the spatial types. Courts must ultimately locate place at a more specific level as well.

Locating place can be a complicated undertaking, particularly where multiple spatial types are in play. But generally speaking, it will be clear which type of place a spatial regulation impacts. Once place is located, a court can then examine more carefully the intersection of speech and spatiality.

2. *Theorizing Place*

Locating place can assist courts with choosing an appropriate theory of the First Amendment with which to assess a given spatial context. Recall that the negative Distortion model is the foundation for both the public forum and time, place, and manner doctrines.³⁷⁶ This model requires only that the government avoid distributing the resource of public space on the basis of expressive content.³⁷⁷ Some scholars, by contrast, have argued that the Enhancement model should be applied to determine the distribution of space.³⁷⁸ They typically prefer something like the "compatibility" test the Court briefly flirted with in the 1960s.³⁷⁹ A compatibility standard presumes that public properties are open to expressive activity; it is thus consistent with the notion that government has an affirmative obligation to facilitate speech by making space for it.

The inherent assumption shared by both Distortion and Enhancement advocates is that a single theoretical approach must be chosen to govern all places. But the choice between Distortion and Enhancement, neutrality and compatibility, is a false one. Like forum doctrine itself, the Court's reliance on the Distortion model arose from the desire to simplify place. Once place has been reconceptualized and the expressive topography remapped, however, the complexity of place becomes apparent. Given the variability and complexity of place, it should not be surprising that different theoretical lenses may be appropriate depending upon how space and place are actually being used. Accordingly, subsequent to locating a place on the expressive

³⁷⁵ See *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 288 (1984) (upholding prohibition on overnight camping on the National Mall).

³⁷⁶ See *supra* notes 83–109 and accompanying text.

³⁷⁷ *Id.*

³⁷⁸ See *supra* note 112.

³⁷⁹ See *supra* notes 23–27 and accompanying text.

topography, but prior to addressing the substance of any issue of speech and spatiality, a court should pause to consider which theory or approach constitutes the more appropriate perspective.

As a rough guide, three spatial types on the new expressive topography—*embodied*, *tactical*, and *cyber-places*—seem to primarily raise governmental-neutrality concerns. This is not to say that these places raise *only* neutrality concerns, or that courts should not be concerned with ensuring some degree of access to them. It is, rather, to suggest that message distortion is generally the more pronounced danger in these types of places.

This conclusion follows from the unique character of these places. In embodied places, for example, officials often must choose between competing individual interests or rights. The right of the putative listener to maintain separation, or “privacy,” is generally balanced against the right of the speaker to convey a message at close range. As it happens, embodied space has become a constitutional issue primarily near and around abortion clinics.³⁸⁰ It is used there, as elsewhere, as a buffer or bubble to protect persons from certain types of speech, like abortion counseling. However it may be justified, the bubble is deemed necessary, in part, because the listener finds the *content* of the expression offensive or disturbing. Courts should thus be wary of claims that government is parceling place neutrally in such contexts.

Similarly, as I have argued at length elsewhere, tactical places raise the possibility that place is being used to distort or discriminate against unpopular views and speakers.³⁸¹ Those who routinely find themselves caged, penned, and otherwise tactically constrained tend to bear messages of protest and dissent.³⁸² Caged and zoned speakers are typically demonstrating against and challenging the status quo. Those outside tactical places are being shielded from these speakers and their messages. Meanwhile, those on the inside are separated from the general public and branded as disruptive, perhaps even dangerous. Place and speech content are thus at least arguably related, or “correlated,” in these places.

Finally, at least to present, content distortion has been the principal concern with regard to cyber-places. Congress, in particular, has sought on several occasions to regulate obscene, indecent, and other sexually explicit information in these places. The principal challenge to these efforts is the nature of the vast space itself, which does not presently contain the sorts of boundaries and borders that facilitate the segregation of content. Although more long-term concerns will likely center on the architecture of, and facilitation of access to, “places” on the Internet, the principal issue for now seems to be expressive distortion. Courts should thus remain vigilant of content-restrictive regulations in cyber-places.

Inscribed, *contested*, and *non-places* can also raise neutrality issues, but given their character, these places often implicate broader spatial concerns of access and facilitation. Indeed, these three spatial types lie at the heart of the spatial paradox. The future of our expressive culture depends, to a large ex-

³⁸⁰ See *Hill v. Colorado*, 530 U.S. 703, 734–35 (2000).

³⁸¹ See generally Zick, *Speech and Spatial Tactics*, *supra* note 8.

³⁸² See *id.* (citing many examples).

tent, on facilitating speech in these places, or at least lowering the barriers to expression there. A narrow focus on governmental neutrality is not a very useful default or benchmark for analyzing the expressive significance of these places.

This Article is not the place to present a detailed argument in favor of enhancement or facilitation, as opposed to distortion or neutrality. Let it suffice to say that the First Amendment offers protection not only for speech, but for “assembly” and “petition” as well. In many cases, these are precisely the activities at stake in inscribed, contested, and non-places. Especially when coupled with the idea of expressive place, this textual fact provides ample reason to consider facilitative issues in at least some contexts.

As more and more space creeps onto the expressive topography and more activities seemingly occur “outside” place, maintaining the ability to “write” or inscribe places with memories and messages will be crucial. This openness to expression is powerfully symbolic; it is a measure of our commitment to expressive and associative freedoms. But the danger in closing inscribed places goes beyond limiting the literal inscription of public places. Sacred places like Central Park and the National Mall raise much larger concerns. Given the present shape of the expressive topography, large public gatherings will occur in these sorts of places, or they will cease to occur. This sort of insight places the balance of interests—the public’s interest in preserving access to a critical gathering place, and the government’s interest in, for instance, preserving the lawn—in a far more accurate perspective than does merely assessing the content-neutrality of such restrictions.

Similarly, given the special connection between place and speech in contested places, restrictions on access there raise substantial “Enhancement” concerns. Speakers’ messages depend to some degree on proximity to *these* places, not the ability to speak in “adequate” alternative places. The contests themselves often center on the meaning of *these* places. Thus, without access to them, speakers’ messages are not only diminished and diluted; they may be suppressed altogether. A court should thus think in terms of facilitation rather than neutrality where speech and spatiality intersect in this manner.

Finally, non-places strongly implicate the Enhancement model of the First Amendment. They exist precisely because officials are not now under any serious obligation to make room for expression in public spaces. Non-places are quintessential manifestations of the spatial paradox. Neutrality is not the appropriate perspective insofar as these places are concerned. The very issue is that *no one* is currently permitted to address matters of public concern to even willing listeners in these places. Without some facilitation, this will likely remain the case.³⁸³

In sum, “place” is not susceptible to a one-size-fits-all First Amendment theory. Like the forum doctrine, a covering theory of expressive distortion fails to account for the expressive topography’s spatial differentiation. Some places are more closely associated with content distortion, others with en-

³⁸³ Although the focus in this Article has been on federal constitutional law, malls and other “private” places might be spared the fate of non-place through interpretations of state constitutional free speech guarantees.

hancement concerns. There is no mechanical formula for choosing a First Amendment theory for place. In order to choose the appropriate perspective or theory, the judge must appreciate and understand the variability and complexity of the expressive topography; she must recognize where a place “fits” on that topography.

3. “Reading” Place

A judge who has come this far is now prepared to analyze the particular spatial regulation at issue. In a word, she is ready to “read” place. To read place is to engage in an exercise that is part legal analysis, part jurisprudential history, and part ethnographic consideration. This approach entails obviously a great deal more work than categorizing properties, but the payoff will be substantial. At the macrogeographic level, where courts make first-order access decisions, courts will be forced to engage places rather than properties or fora. They will, for example, not be able to simply label large portions of the expressive topography “non-public” on the ground that the government intends that they be such. As discussed below, some of the benefit will spill over into analyses of microgeographic or second-order spatial restrictions, where access to place is often finally determined. Ultimately, the product will be a comprehensive, systematic consideration of the expressive and public interests associated with “place.”

In general terms, the proposal advanced at this stage of the analysis presumes that a court has adopted the substance of the theory of expressive place set forth in Part II. In terms of reading place itself, a court must locate and theorize place as described immediately above. The actual process of reading place requires that the court focus on the intersection of speech and spatiality on the expressive topography, and attend to the expressive qualities of the particular place in question.

In more specific terms, “reading” place entails substantial alterations to two aspects of the typical forum analysis. First, there will be far less reliance on the functional aspects of property, and far greater attention to the expressive aspects of place. In making first-order access or “forum” determinations, courts currently consider the functional characteristics of a property, mostly in terms of the practical things it was built to accomplish. They also attend specifically to the tradition or history of the property. What was the property, as originally constructed, designed to do? What functions has it served thus far? These are relevant considerations, particularly for addressing properties. They do not, however, allow for a comprehensive interpretation of spatial context. The *expressive* characteristics of places must be considered along with their physical properties. These expressive characteristics are, after all, what distinguish “places” from properties or fora.

Second, reading place requires adopting a different perspective on “tradition.” Right now, courts make access determinations by assessing the prior tradition of a property, in terms of what it was originally constructed for, and what government has permitted to occur there in the past.³⁸⁴ Courts must

³⁸⁴ See, e.g., *Int’l Soc’y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 681–82 (1992) (discussing the “tradition” of airport terminals).

recognize that places have not only functional traditions, but *expressive* ones as well. Locating place can assist courts in identifying and appreciating this tradition. With regard to modern places in particular, it is not appropriate for courts to merely look backward to prior uses and traditions of property; the expressive histories and traditions of these places have in a sense yet to be written. The question thus ought to be whether a tradition shall be allowed to develop there in the first place. To make that determination, courts must take a holistic view of the expressive topography.

Some examples drawn from the revised expressive topography will demonstrate the process for and implications of “reading” place rather than categorizing fora and properties. Consider a “free speech zone” on a public street. This is currently analyzed as a generic time, place, and manner regulation within a traditional public forum.³⁸⁵ A court reading place would recognize that there is, in fact, nothing generic about this regulation. In the first place, the court would see that the *street* is not actually the appropriate object of analysis; rather, the zone creates a distinct “tactical” place. The issue is whether speakers should be confined there, rather than permitted access to some other expressive place.

Having located the particular place, a court, mindful of the specter of expressive distortion there, would then carefully consider its distinct expressive features. These features would include the government’s use of spatial tactics to control and discipline expression in the specific context, the impact of place on expressive and associative messages, the dynamic manner in which the place itself “speaks,” the alternative places purportedly available to the speakers, and the impact of the place on the larger expressive culture. These are the *expressive* characteristics of a place, like the Boston speech cage, that is built to contain dissent.³⁸⁶ Note that the influence of reading place will spill over to the microgeographic level, when courts examine things like spatial tailoring and the availability of alternative places. This is part of the benefit of reading place; it forces courts to look at “place” holistically, rather than as a series of categorical distinctions.

In terms of this holistic approach, courts should consider not only the expressive characteristics of places like the speech cage, but also the *expressive tradition* that is implicated by such places. Public political protest and dissent have a long history, one that reaches back to and connects with the civil rights demonstrations and protests of the 1960s. These movements were successful, in part, because they were able to use public places to convey their messages and to publicize social and political conflicts. That, indeed, is part of the “tradition” that defines a “traditional” public forum. There is little recognition, explicitly or implicitly, of this expressive history in forum discussions. There is no recognition that tactical places threaten a distinct expressive history, no real accounting of their potential impact on our expressive culture. A comprehensive analysis of place requires some consideration of these matters.

³⁸⁵ See, e.g., *Bl(a)ck Tea Soc’y v. City of Boston*, 378 F.3d 8 (1st Cir. 2004) (upholding designated speech zone).

³⁸⁶ See *id.*

Similar observations can be made with regard to the increasing limitations on access to embodied places. Again, the fundamental problem lies in initially locating place. Public forum doctrine treats a protective bubble that operates on the sidewalk near an abortion clinic as a presumptively content-neutral regulation of place in a public forum.³⁸⁷ The initial categorization of the forum leads directly to the time, place, and manner doctrine. The locale in the example under consideration is a traditional public forum. Even so, the result in the hypothetical is nearly foreordained; so long as the government posits a legitimate reason for the bubble, say “privacy” or “order,” it will likely be upheld.

Reading place would shift the focus from the generic category of “sidewalk” to the expressive characteristics and tradition of embodied place. In the example, access to the sidewalk is secondary; it is access to the listener’s personal space that is primary. In deciding whether speakers should have access to these places, courts would be forced to consider the acute need of the speaker for access to the personal spaces occupied by undecided and perhaps unwilling listeners. This requires, for instance, some understanding of the precise message the speaker intends to convey. In terms of the expressive characteristics of embodied place, the social distance that many “bubbles” enforce simply does not suffice where intimate matters like abortion counseling are concerned. This distance removes the very intimacy and immediacy the speaker relies upon to deliver an even marginally effective message.

Moreover, the sidewalk in the example has no particular expressive tradition, at least not one likely to garner judicial attention. It is, like all property, merely a backdrop for the expressive scene, one whose main purpose happens to be to facilitate the flow of pedestrian or patient traffic. As such, the street’s general tradition as a “forum” ordinarily receives only the briefest consideration before the court moves on to analyze the microspatial context. If courts were conditioned to see, at the outset, an embodied place rather than a sidewalk where such is the real place in issue, a rich and venerable constitutional tradition would come into play. This expressive tradition includes, among other things, the pioneering efforts of the Jehovah’s Witnesses and other religious proselytizers.³⁸⁸ It embraces and protects proselytizers, beggars, political activists, and others who rely substantially upon face-to-face contact to convey their messages. To effectively read an embodied place, courts must be willing and able to factor this sort of jurisprudential history and expressive tradition into their spatial analyses.

Reading “place” can assist courts in dealing with critical expressive enhancement issues, as well. Most significantly, it may stem, or at least retard, the proliferation of non-places on the expressive topography. Consider the regulation of expression in airport terminals. The Supreme Court has held that airport terminals are “non-public” fora.³⁸⁹ According to the Court,

³⁸⁷ See *Hill v. Colorado*, 530 U.S. 703, 719–20 (2000); *Madsen v. Women’s Health Ctr.*, 512 U.S. 753, 762–64 (1994).

³⁸⁸ See *supra* notes 198–201 and accompanying text.

³⁸⁹ See *Lee*, 505 U.S. at 680.

neither the property characteristics of these places nor their functional tradition supported a finding that expression was to be permitted there.³⁹⁰

To accurately read an airport terminal as place, however, its expressive characteristics and tradition must also be taken into account. The Court concluded that, given their functional characteristics, airport terminals exist to facilitate traffic, not speech.³⁹¹ This is far too narrow a basis upon which to make access determinations. It treats the airport as a brute artifact, one without expressive possibilities. Even the streets would fail to satisfy this sort of standard. The simple fact is that there is nothing inherent in the structure of terminals that makes public expression impracticable there.

Indeed, the airport terminal is, in some sense, the successor to the public square. Here, again, an understanding of expressive tradition becomes critical. In making its determination that airports as a class are non-public fora, the Court gave not so much as a nod to the conditions of modernity or the spatial paradox. It did not consider that, where speakers used to have access to listeners on the streets, these listeners increasingly have moved to other spaces of modernity. It did not pause to consider that its own decisions removing protest and other public expression from the malls have made airports that much more critical to public expression.³⁹² The airport should actually be viewed as part of the expressive tradition of non-places. If the Court had approached the airport terminal from this perspective, as the culmination of a history of non-place, it would have been hard-pressed to label this class of property a non-public forum.

This raises a larger point about modern places. The Court has concluded that the class of properties to be labeled "traditional" or "quintessential" public fora is now effectively closed at public streets, parks, and sidewalks.³⁹³ The reason is straightforward enough. No modern property has the "tradition" of expressive use required by the Court. This is a dangerous approach to modern place. It threatens to carve a substantial swath of non-places where expression will be essentially ruled out of place. A court reading and thinking about "place" would be far more reluctant to categorically proclaim all airport terminals "non-public."

Similarly, reading "place" rather than "forum" will highlight what is truly at stake in most contested places. These places often form an integral part of speakers' intended messages. Their expressive characteristics include such things as the symbolic meaning inherent in the place itself, as well as speakers' and listeners' emotive attachment to the place. It is not merely that speech might be "compatible" with the property in question, its physical characteristics. It is, rather, critical to be *there*, as opposed to elsewhere. The place is itself symbolic of contest, strife, and discrimination.

³⁹⁰ *Id.*

³⁹¹ *Id.*

³⁹² See *Hudgens v. NLRB*, 424 U.S. 507 (1976) (holding that labor picketers had no right to demonstrate at 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 shopping center).

³⁹³ See *Lee*, 505 U.S. at 680 (relying on "the lateness with which the modern air terminal has made its appearance" in designating airports non-public fora).

The expressive histories of contested places include the history of the social or political conflict itself, governmental efforts to control the terms of a specific debate, and the broader sociopolitical environment in which the place is situated. In *Brown v. Louisiana*, civil rights protesters sought to silently demonstrate in the library specifically because the library had adopted segregation policies.³⁹⁴ Under current forum analysis, the library, like most contested places, would most likely be considered a “non-public” forum. This approach fails to place the library in local and more general historical perspective. Public places like lunch counters, buses, and libraries were historical sites of racial discrimination. This was the expressive history of the library in *Brown*.³⁹⁵

Conventional forum analysis does not adequately read or interpret inscribed or “written” places either. For example, the recent closure of portions of Central Park will likely be treated as an ordinary place regulation in a traditional public forum. So long as this closure affects all speakers alike, it is likely to be upheld as a reasonable means of preserving the park lawn, presumably a legitimate governmental concern. There is, however, nothing ordinary about this sort of regulation. To accurately read Central Park entails consideration of its expressive character, the function it serves as a social and political canvas. Central Park is no mere recreational locale. It is a “happening” that readily incorporates expressive activity. Its expressive history is rich and substantial. That history includes all of the protest, dissent, celebration, and other expressive and associative activity inscribed there. Upholding a significant prohibition on access to this place would have a substantial impact on the local expressive culture.

The real harm this sort of spatial restriction will inflict simply cannot be comprehended by a court that is thinking in terms of forum rather than place. Even at its presumably most speech-sensitive categorical level—the “traditional” or “quintessential”—the forum concept does not encompass any notion of “topophilia,” or connection to place. It does not appreciate that cultures and memories are “written” in such places. Focusing myopically on content-neutrality misses the larger and more important point in these contexts—that in making access determinations, speakers’ interests in preserving expressive cultures and distinct memories must be placed in the balance.

Judicial review of speech restrictions in cyber-places would actually not be much changed, at least in the short term, by the proposed approach. Right now, governmental efforts to control content there are generally set

³⁹⁴ *Brown v. Louisiana*, 383 U.S. 131, 141 (1966).

³⁹⁵ Taking a somewhat broader view, a more rigorous reading of contested places would likely result in substantially fewer “non-public” spaces being plotted on the expressive topography. Mailboxes, military bases, and jails might have to be opened to at least some limited expressive and associative activity. This fact does not mean that there can be no truly “non-public” spaces. In *Arkansas Educational Television Commission v. Forbes*, for example, it may well have been incompatible with the candidate debate format to permit all comers to share the stage. *Ark. Educ. Television Comm’n v. Forbes*, 523 U.S. 666, 676, 681 (1998). Actually *making* that determination, however, is a far cry from simply proclaiming that the government’s intent is dispositive of all access claims save those premised on established viewpoint discrimination. Like other places, the stage at the candidate debate has expressive features that deserve at least some consideration.

forth in statutes. They are thus far more transparent than, say, the construction of a tactical place on a public street. Cyber-places will not, however, retain their present character forever. When "place" becomes more defined in cyberspace, courts may be faced with the decision whether to apply the forum approach in that environment, as well. Indeed, some scholars have suggested that the concept of the "public forum" should be carried into cyberspace; that the paradigm of property or *res* also works there.³⁹⁶ Courts thinking "place" rather than "forum" will resist such easy property metaphors. They will educate themselves with regard to the expressive properties of cyber-places, and will seek to preserve the still-evolving expressive tradition of cyberspace.

Across a range of spatial contexts, then, reading place will provide a much richer context in which to analyze both first-order ("forum") access decisions and second-order (time, place, and manner) spatial restrictions. It will force courts to spend more time and energy contemplating the expressive values, meanings, and histories of places on the expressive topography. At the least, it does not permit the glossing over of place by resort to handy but ultimately unenlightening labels like "quintessential public forum." To read a place is to understand its character and tradition in a far deeper sense.

Before moving on to consider judicial review of second-order, microgeographic time, place, and manner restrictions, a comment regarding the most likely objection to actively reading place is in order. Defenders of categorization insist that rigidity and formalism are necessary because courts lack the competence to manage the resource of public space.³⁹⁷ Arguments from competency are based upon assumptions that (1) place is, like water or air, merely a public resource, and (2) other public officials are better positioned than are judges to manage these public resources. But if place is, as this Article argues, *expressive*, then the resource-management argument does not bear weight. Moreover, competency arguments expose one of the more pernicious effects of the forum doctrine; namely, that fundamental rights are being treated as if they are *secondary* to the problem of public resource management. Taken to its logical extreme, this argument would undermine many fundamental constitutional rights because governments are nearly always engaged in the management of public resources. The competency argument seems to hold sway in this particular context precisely because place is so misunderstood and undervalued. Judges are in fact in no worse position relative to other officials to study and appreciate the complex intersection of speech and spatiality. Indeed, given their relative neutrality with regard to access to public places, one might say they are in a better position in this regard. In any event, given the importance of the constitutional rights at stake, they have an obligation to engage place.

³⁹⁶ See, e.g., Gey, *supra* note 47, at 1611 (arguing that Internet should be characterized as a public forum).

³⁹⁷ See BeVier, *supra* note 83, at 113–19 (discussing institutional considerations associated with Enhancement model).

4. *Reviewing Microgeographic Spatial Regulations*

Reading or interpreting place provides a critical spatial orientation as courts begin to analyze an issue of speech and spatiality. But as mentioned, a substantial part of the payoff in terms of reading place will ultimately occur in connection with the time, place, and manner doctrine. Many of the most significant limitations on expressive and associative activity are a result of spatial restrictions operating at this second-order spatial level. It is thus not sufficient merely to rethink the approach to place at the “forum” level. There must also be changes to the way in which courts approach the time, place, and manner doctrine.

As discussed earlier, the principal criticism of time, place, and manner doctrine is that it does not deliver the heightened scrutiny its formulation appears to promise.³⁹⁸ The doctrine requires that the government have a content-neutral reason for displacing expression, that its regulation be “narrowly tailored” to meet that need, and that there be “ample” and “adequate” alternative places where the speaker’s message can be conveyed.³⁹⁹ As with the forum doctrine, the elements themselves are not generally problematic. The problem lies in interpreting and actually applying these standards, and doing so with respect to places rather than properties. Accordingly, an approach to the principal elements of neutrality, tailoring, and adequacy is sketched below. Generally, I will be advocating what I have elsewhere called “spatial skepticism” with respect to each of the elements.⁴⁰⁰

a. *Spatial Neutrality*

The difficulty in terms of assessing content-neutrality begins with locating place. The failure of courts to differentiate places confounds judicial efforts to discover expressive distortion, which can often lurk beneath the surface of spatial restrictions. Recognizing embodied and tactical places, for example, rather than mere sidewalks or streets, should generally cause courts to more skeptically approach spatial restrictions.

Governmental justifications for displacing expression and association vary rather widely. The principal problem is that, regardless of their formulation, these justifications are rarely questioned by courts with any seriousness, much less rigor. Whether the stated interest is security, tranquility, or mere aesthetics, courts do not typically require that governments *substantiate* interests or purposes in order to dictate the place of expression.

I have argued elsewhere that it is a fundamental mistake to simply presume that place is generally being administered to serve neutral purposes.⁴⁰¹ Place is the product of a constructive process that, as critical geographers have posited, is naturally skewed in favor of the interests and preferences of those in power.⁴⁰² This does not necessarily, but certainly might, include

³⁹⁸ See *supra* Part I.D.

³⁹⁹ See *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989).

⁴⁰⁰ See Zick, *Speech and Spatial Tactics*, *supra* note 8 at 639–46 (describing principle of spacial skepticism).

⁴⁰¹ See *id.*

⁴⁰² See *supra* Part II.B (discussing the social construction of place).

preferences with regard to the subject matter or viewpoint of speakers. Place is also dynamic. Unlike water, public places are not inert resources; they often stand for something beyond their physical properties. The distribution of space should thus not necessarily be treated as presumptively neutral.

In certain types of places, tactical and embodied ones in particular, place serves specific *disciplinary* functions. There is thus a strong possibility that government is displacing speech and speakers *there* because of what they are saying, or are intending to say. The eight-foot bubble in *Hill v. Colorado*,⁴⁰³ which was enforced against anyone within the vicinity of a health care facility who sought to engage in “oral protest, education or counseling,” is difficult to characterize as anything other than a nonneutral manipulation of place.⁴⁰⁴ Nevertheless, the Court held that it was indeed content-neutral.⁴⁰⁵ Similarly, free speech zones come dangerously close to targeting dissenting viewpoints; they typically cage and cabin protesters, demonstrators, and other social malcontents. Moreover, tactical places express something to those on the outside about those who are placed inside. These places communicate in negative terms, and are thus not technically neutral at all. Yet spatial tactics, which produce these tactical places, are also routinely considered content-neutral regulations of place. As are zoning provisions, even those that specifically target activities of “adult” establishments.

Following Justice Souter’s lead in the adult zoning cases, I have suggested elsewhere that these and similar spatial regulations ought to give rise to spatial skepticism because they are at least “content-correlated.”⁴⁰⁶ In specific terms, two things should be done to implement a more skeptical review of spatial neutrality. First, courts should not limit their examination of content-neutrality to the *face* of a spatial regulation. A regulation that prohibits all “protest” in a space may very well appear to be facially neutral, banning protest on all subjects. But when viewed against the backdrop of its particular history and specific applications, it may become evident that the regulation is being used to quell a specific protest and message. This is part of what is intended by “reading” place. It does not mean legislative or executive “motive” must be examined, only that courts should not turn a blind eye to the effects of spatial restrictions “on the ground,” as they are implemented in particular contexts.

Second, in many cases it will be possible for the government to present some evidence to substantiate its purported justifications, whether these are “secondary effects”—as in the context of adult establishments—safety, or something else. Where practicable, courts should insist that governments make at least a minimal showing of both the existence of purportedly neutral purposes and the manner in which the challenged spatial regulation will serve those purposes.

⁴⁰³ *Hill v. Colorado*, 530 U.S. 703 (2000).

⁴⁰⁴ *Id.* at 707.

⁴⁰⁵ *Id.* at 725–26.

⁴⁰⁶ See Zick, *Speech and Spatial Tactics*, *supra* note 8 at 638–39 (discussing notion of content correlation); see also *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 457 (2002) (Souter, J., dissenting).

Not all microgeographic spatial regulations are as closely correlated with content as the above examples. A regulation concerning the place where signs or banners may be held, for example, does not generally raise these concerns. In such cases, the aesthetic interest is more or less obvious, or at least can be readily confirmed. As we move deeper into an era when social conflict is especially heated, however, where “culture wars” abound, and “security” is bandied about as a justification for a new spatial regime, it is incumbent upon courts to more rigorously scrutinize governmental justifications for spatial regulations. In those cases, at least, the presumption of neutrality that currently attaches to regulations of place ought to be abandoned.

b. Spatial Tailoring

Time, place, and manner regulations are supposed to be “narrowly” tailored. As the Supreme Court has emphasized, however, this merely means that the restriction should not displace substantially more speech than is necessary to serve governmental interests.⁴⁰⁷ This formulation has resulted in the validation of spatial tailoring that is relatively loose, at least by any standard bearing the label “heightened” scrutiny.

The very concept of expressive place counsels much closer scrutiny of spatial tailoring. This follows, in particular, from the proposition that place is *primary* to expression. Tailoring is perhaps the most important element of spatial analysis. Loosely applied, tailoring can have the effect of suppressing a message entirely. In addition, courts must recognize that the specific architecture of a place substantially affects its communicative potential. Again, tactical places like zones, pens, and cages demonstrate this most clearly. Violence by some protesters has produced an expressive topography dotted with geometric spheres in which speech either must occur (“free speech zones”) or is not permitted to occur (“speech-free zones”). These places may result in the suppression of a message, as was the case with the speech cage used at the 2004 Democratic National Convention. The features of this “free speech zone” included, among other things, fencing, jersey barriers, and two layers of mesh that essentially made it impossible for protesters to be seen or heard by their intended audience of delegates.⁴⁰⁸ More generally, zones of this sort typically squeeze protesters into cramped and unfriendly spaces. They are designed such that they do not facilitate interaction and communication between speakers and listeners.

Moreover, broad spatial restrictions, even those that ultimately permit some speech, can substantially distort and even suppress messages. They can make it far more difficult for some groups, particularly protesters and others whose views challenge the status quo, to convey their messages to intended audiences. For example, the United States Court of Appeals for the Ninth Circuit recently upheld as a valid time, place, and manner regulation an “emergency order” that closed a twenty-five-square-block portion of down-

⁴⁰⁷ See *Ward v. Rock Against Racism*, 491 U.S. 781, 799 (1989) (finding that the tailoring requirement is satisfied “so long as the . . . regulation promotes a substantial government interest that would be achieved less effectively absent the regulation”).

⁴⁰⁸ *Bl(a)ck Tea Soc’y v. City of Boston*, 378 F.3d 8, 11 (1st Cir. 2004).

town Seattle to protesters seeking to demonstrate against the World Trade Organization meetings in that city.⁴⁰⁹

If draconian speech cages and multi-block zones are “narrowly tailored” spatial regulations, it is hard to imagine what would not satisfy that standard. Courts are plainly reluctant, particularly in light of invocations of “security,” to second-guess the boundaries and dimensions of these spatial zones.⁴¹⁰ Loose spatial tailoring is, however, transforming even “quintessential” public fora like streets into confining tactical places; it is separating speakers from even *willing* listeners. Without a more demanding standard, or at least a more rigorous application of the “narrowly tailored” standard that purportedly applies, the expressive topography will continue to exhibit more and more of these highly restrictive places.

The problem lies, at some level, with the standard, or rather the Court’s clarification of it. The time, place, and manner doctrine requires that a regulation not suppress or distort *substantially* more speech than necessary to serve stated governmental interests.⁴¹¹ Given the intersection of speech and spatiality, however, the government should be required to draw spatial boundaries that inhibit or suppress *no more expressive or associative activity than necessary* to serve its purposes. This approach will require that courts have a much clearer understanding of the government’s goals, which might be aided by the aforementioned evidentiary showing with regard to purpose. It will also require that courts have a working knowledge of the expressive topography and the manner in which speech and spatiality interact in the various places there. For example, a court could not accurately assess the tailoring of a fifteen-foot protective bubble without understanding both the government’s purported interest and the importance, from the speaker’s perspective, of maintaining not social but a more personal distance. The bubble would preserve listener “privacy,” to be sure, but how much expression does it actually suppress or distort? A court cannot meaningfully assess this question without understanding the dynamics of embodied place.

“Security” concerns deserve special mention, particularly after September 11. Despite the very real concerns posed in situations where “security” is the proposed justification for a spatial regulation, the government should still be forced to demonstrate that the prophylactic use of space was a *necessary* response to anticipated violence. It should have to convince the court that ensuring an adequate police presence and arresting only violent demonstrators would not have been an adequate response, and that it was thus necessary to cordon off entire city blocks or to place protesters in cages or pens. These proposals will obviously burden governmental efforts to use place tactically, and they will place burdens on courts that they may not be entirely comfortable with, at least at the outset. But tailoring has become altogether too loose to be considered a viable check on official spatial manipulation.

⁴⁰⁹ See *Menotti v. City of Seattle*, 409 F.3d 1113, 1156 (9th Cir. 2005).

⁴¹⁰ See, e.g., *id.* at 1137 (“Our role here is not to inject ourselves into the methods of policing, and we do not do so here” (citing *United States v. Albertini*, 472 U.S. 675, 689 (1985))).

⁴¹¹ See *supra* note 407 and accompanying text.

Courts should take care that repetition of the mantra of “security” not cause any further erosion of public discourse.

In sum, to draw an analogy, courts should approach spatial tailoring as a form of expressive gerrymandering.⁴¹² The size and shape of bubbles and spatial zones should be carefully scrutinized for their fit with stated, and preferably substantiated, governmental purposes. Any speech-free zone that bans *all* protesting within its borders should be treated as presumptively invalid, as should any free speech zone that makes it impossible, or nearly so, for the intended audience to see or hear speakers. Beyond these rather clear situations, spatial restrictions should not be upheld unless they are necessary and inhibit or suppress no more speech than necessary to serve official interests. This should be so regardless of the government’s stated interest.

c. *Spatial Adequacy*

Finally, the Supreme Court has been anything but clear with regard to the criterion that adequate alternative places must be available. It has held that a valid spatial regulation must leave open alternative channels of communication that are both “ample” and not “inadequate.”⁴¹³ The Court has also said, however, that a time, place, and manner regulation does not violate the First Amendment “simply because there is some imaginable alternative that might be less burdensome on speech.”⁴¹⁴ Then again, the Court has also indicated that an alternative place or method of communication may be constitutionally inadequate if the speaker’s “ability to communicate effectively is threatened.”⁴¹⁵ It has further said, however, that the government’s sole obligation in terms of alternative places is to refrain from “effectively denying” speakers a “reasonable opportunity” for communication.⁴¹⁶

As the above statements illustrate, there is a fair amount of confusion regarding just what “adequacy” entails or requires. There is, at least, justification in some of the above pronouncements for substantially more scrutiny of spatial adequacy than currently takes place. The problem is that there is little guidance or clarity with regard to how to go about assessing the adequacy of alternative places. Courts are in need of a more systematic method for analyzing issues of spatial abundance and adequacy. I will briefly sketch one here.

Spatial adequacy should be approached as presenting two distinct overarching concerns. The first concern is whether alternative *methods* of communication essentially make up for whatever speaker displacement is being effected. Here, courts confront speaker choices between, for example, participating in large demonstrations versus media interviews, and between demonstrating in public versus conveying a message over the Internet or some other medium.

⁴¹² For the Supreme Court’s strict scrutiny approach to racial gerrymandering, see generally *Hunt v. Cromartie*, 526 U.S. 541, 546 (1999); *Shaw v. Hunt*, 517 U.S. 899, 904 (1996).

⁴¹³ See *Ward v. Rock Against Racism*, 491 U.S. 781, 802 (1989).

⁴¹⁴ *United States v. Albertini*, 472 U.S. 675, 688–89 (1985) (citation omitted).

⁴¹⁵ *Members of the City Council v. Taxpayers for Vincent*, 466 U.S. 789, 812 (1984).

⁴¹⁶ *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 54 (1986) (upholding an ordinance limiting locations for opening adult theaters within the city).

Courts have a tendency to treat these modes of communication as functional substitutes.⁴¹⁷ The “primacy” and “dynamism” principles of expressive place suggest that this is wrong.⁴¹⁸ A speaker may not be constitutionally entitled to the most effective means of communication available, but neither should courts discount the value of being in a place when assessing the adequacy of alternative methods. Gathering at a contested place, for example, is a part of the message that, to put the matter simply, cannot be duplicated by other means.

Nor should the now-ubiquitous media be deemed an answer to the problem of “alternative” places. The First Circuit, for example, concluded that protesters who were ultimately dissuaded from gathering in the designated protest cage at the Democratic National Convention could convey their message through the various media—television, the press, radio, the Internet—covering the event.⁴¹⁹ Even assuming sufficient media interest absent the demonstration itself, which is usually what the media are interested in covering in the first place, this conclusion wholly discounts the emotive, social, and other dynamic aspects of place.⁴²⁰

The second consideration relates to the abundance and adequacy of alternative *places*, as opposed to alternative *methods*, of communication. Here, courts should keep in mind that it is not merely the provision of space that is important to human interaction, but the character of that space as well. The “adequacy” inquiry should thus encompass review of the specific architectures of suggested alternative places, including their dimensions, distance from central events, limitations on modes of communication including signage and sound, and other features. Although spatial equivalency is not necessarily required, substantial spatial parity in terms of dimensions, access, and the rest should be required before a place is deemed an “adequate” alternative.

Courts should again be thinking in terms of the new expressive topography when assessing spatial adequacy. Places are *unique*. As said earlier in the discussion of cyber-places, technological places cannot simply be presumed to be adequate substitutes for real ones. Depending upon the speaker’s message, there may be no effective alternative to sharing listeners’ embodied space. Furthermore, denying access to contested places is a substantial restraint on messages targeting those places. In short, there is something to being *there* that makes other alternatives, however *ample*, still *inadequate* in light of the specific expressive interests at stake. It is a familiar First Amendment trope that “one is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised elsewhere.”⁴²¹ Nevertheless, this situation routinely occurs.

417 See, e.g., *Bl(a)ck Tea Soc’y v. City of Boston*, 378 F.3d 8, 14 (1st Cir. 2004) (concluding that protesters could convey their message through the media).

418 See *supra* Part II.A–C.

419 *Bl(a)ck Tea Soc’y*, 378 F.3d at 14.

420 See *Hodgkins v. Peterson*, 355 F.3d 1048, 1063 (7th Cir. 2004) (“There is no internet connection, no telephone call, no television coverage that can compare to attending a political rally in person . . .”).

421 *Schneider v. New Jersey*, 308 U.S. 147, 163 (1939).

Reconsidering, locating, engaging, and systematically reading places can produce not only a more robust and wide-open macrogeography, but a more speech-facilitative microgeography, as well. What has been lacking thus far is a theoretical foundation for justifying and implementing more rigorous spatial standards. Expressive place and a new and enhanced expressive topography provide such a foundation.

Conclusion

This Article has encouraged a fundamental reconsideration of “place” as a First Amendment concept. The concept of place as mere property, the presently anemic and binary “expressive topography,” and the constitutional doctrine of place are among the most criticized aspects of First Amendment jurisprudence. Lawyers and judges have the will to take place into account, but they lack the tools to fundamentally reconsider place as a concept, and thus to reconnect speech and spatiality. These tools exist in other disciplines. We should consider borrowing concepts and knowledge regarding “place” from scholars who have approached the concept from a rich variety of perspectives. Sociologists, human geographers, anthropologists, and philosophers all have devoted substantial time and energy to the study of place.

Based upon their work, this Article proposes both a theory of expressive place and a new conception of the expressive topography. The borrowing has not produced something mechanical, rigid, or formalistic. It will not solve the problem of place once and for all. If we have learned anything about place, it is that it is far more complex than conventional First Amendment accounts and treatment suggest. Merely recognizing this fact is a critical first step toward addressing the significant sociolegal problem of making sufficient space for speech.

In prescriptive terms, conceptual borrowing will alter the way scholars and, in particular, courts perceive, study, and adjudicate place. By a process of locating, theorizing, and ultimately “reading” place, we can systematically account for the intersection of speech and spatiality. We can alter the expressive topography by accounting for the expressive properties and histories of places, and by skeptically reviewing spatial neutrality, tailoring, and adequacy. We can, as a result, perhaps preserve a particular notion of public discourse, the discussion of matters of public concern in public places.