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Speech and Spatial Tactics

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As the Supreme Court has observed on many occasions, "First Amendment freedoms need *breathing space* to survive."[1] This is so in the quite literal sense that the exercise of expressive rights requires adequate physical space. Given its primacy, it is remarkable how little attention has been given to the concept of "place" in First Amendment doctrine and theory. Place has always occupied the background rather than the foreground in free speech jurisprudence. It has been treated as a locale for events, a marker for expressive rules and procedures, an inert container of speakers and speech, a thing, a *res*. Free speech jurisprudence treats place categorically, defining expressive rights in terms of the character of the property or forum involved. It is far more concerned with questions of "what" speech is being regulated and "why" than with questions of "where" speech occurs or how speech and spatiality are connected.

It is a serious mistake to view place as merely an inert container or a backdrop for expressive scenes. Place can be a powerful weapon of social and political control. Today speech, including core political speech, is being disciplined, controlled, and even suppressed through a variety of spatial techniques. Consider the following recent examples:

- the free speech cage, an architecture of mesh fabric, coiled razor wire, chain-link fences, and jersey barriers, constructed to contain protesters at the 2004 Democratic National Convention;[2]
- the "steel cocoon" that emerged within the District of Columbia prior to the 2005 presidential inauguration,[3] and the confinement of

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

2. Coal. to Protest the Democratic Nat'l Convention v. City of Boston, 327 F. Supp. 2d 61, 66–67 (D. Mass. 2004), *aff'd sub nom.* Bl(a)ck Tea Soc'y v. City of Boston, 378 F.3d 8 (1st Cir. 2004); Jonathan Saltzman, *Judge Deplores but OK's Site for Protesters*, BOSTON GLOBE, July 23, 2004, at A1.

3. *See* David Johnston & Michael Janofsky, *A Steel Cocoon Is Woven for the Capital's Big Party*, N.Y. TIMES, Jan. 19, 2005, at A16 (stating that, in the period leading up to President Bush's

protesters to spaces behind bleachers and fenced-in areas more than 100 feet from the inauguration parade route;[4]

- the 25 block "restricted zone" that prohibited all protests near the 1999 World Trade Organization meetings in Seattle;[5]
- the 1/2 block "frozen zone" or "bubble" used to shield New York City Mayor Michael Bloomberg from union members protesting at the 2004 Republican National Convention;[6]
- the use of metal barricades, or "pens," to confine and control those protesting the Iraq War;[7]
- statutory and injunctive "free speech" and "speech-free" zones erected around abortion clinics and various other public accommodations;[8]
- campus "free speech zones" that confine First Amendment activity to narrowly circumscribed places;[9] and
- recent laws in several states establishing protest zones for antiwar speech near funerals.[10]

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inauguration, Washington D.C. "seemed to disappear behind curtains of steel security fences and concrete barriers").

4. *Id.*; *First Lady Defends Inaugural Celebration*, ST. PETERSBURG TIMES, Jan. 15, 2005, *available at* http://www.sptimes.com/2005/01/15/Worldandnation/First_lady_defends_in.shtml ("The park service also has issued A.N.S.W.E.R. permits for protesters to stand in nine other smaller locations along Pennsylvania Ave. But the group says most of those areas are tiny pockets behind bleachers or in fenced-in areas more than 100 feet from the parade route.").

5. *See* Menotti v. City of Seattle, 409 F.3d 1113, 1124–26 (9th Cir. 2005) (describing Seattle's creation of the restricted zone and noting testimony that its purpose was "to exclude protestors"); *id.* at 1167 (Paez, J., concurring and dissenting) (observing that the restricted zone covered "25 square blocks of downtown Seattle"); *see also Countdown to Chaos in Seattle*, SEATTLE TIMES, Dec. 5, 1999, at B1 (relating that, on the third day of "WTO week," Seattle police announced that protests were prohibited within a "new restricted zone").

6. *See* Julia Preston, *Court Backs Police Department in Curbs on Labor Tactics*, N.Y. TIMES, Aug. 26, 2004, at B7 (reporting unions' unsuccessful challenges to "barricades, metal pens, and 'frozen zones'" that would restrain protesters who wanted to follow Bloomberg during the 2004 Republican National Convention).

7. *See, e.g.*, Corey Dade, *Election 2004: Democratic Show Set to Go; Protestors March, but Labor Feuds Settled*, ATLANTA J.-CONST., July 26, 2004, at A1 (reporting that protesters attending the Democratic National Convention, who "were demonstrating against Democratic acquiescence in the Iraq war," objected to "the 'pen' police ha[d] erected to contain demonstrations").

8. *See, e.g.*, New York *ex rel.* Spitzer v. Operation Rescue Nat'l, 273 F.3d 184, 203–10 (2d Cir. 2001) (holding that a preliminary injunction creating more extensive "buffer zones" at two abortion clinics in the Western District of New York violated protestors' free speech rights); *Ex parte* Tucci, 859 S.W.2d 1, 6–7 (Tex. 1993) (holding that a temporary restraining order's provision for a 100-foot speech-free zone surrounding a Planned Parenthood facility violates article I, section 8 of the Texas Constitution).

9. *See* Thomas J. Davis, Note, *Assessing Constitutional Challenges to University Free Speech Zones Under Public Forum Doctrine*, 79 IND. L.J. 267, 267–68 (2004) (describing occasions at various university campuses when students were arrested for protesting outside of designated free speech zones).

10. Associated Press, *Legislators Propose Bills Barring Protests at Funerals*, FIRST AMENDMENT CENTER, Nov. 14, 2005, http://www.firstamendmentcenter.org/news.aspx?id=16064 (describing recent legislation in Kansas, Missouri, Oklahoma, Indiana, and Tennessee).

Under current First Amendment doctrine, restrictions on the place where expression may occur are routinely upheld.[11] The First Amendment nominally requires that these sorts of restrictions, like content-neutral restrictions on the time and manner of expression, satisfy an "intermediate" level of scrutiny.[12] But in truth this standard is little more than a weak strain of rationality review.[13] Courts generally tend to view spatial restrictions as unrelated to expressive content. They are treated as inarguably rational means of serving governmental interests such as maintaining order and security.[14] And, indeed, some such regulations are necessary to preserve a minimal degree of order. Parade routes, for instance, must sometimes be altered to account for such realities as traffic and pedestrian flow. The First Amendment is not a license to speak wherever one pleases. But this basic principle does not afford the state plenary authority to suppress speech on matters of political and social import by significantly displacing or confining it. Purportedly neutral restrictions on place can and do cancel expressive and associative rights. One need look no further than the aforementioned Boston speech cage for affirmation of this.[15]

This Article does not dispute that the state must sometimes control the place of expression. Space, after all, is a limited resource. My right to speak in a certain place often will impact others' enjoyment of that place. The constitutional doctrine of place initially sought to deal with just this sort of rudimentary conflict.[16] It held that the state could deny a speaker the ability

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11. *See* NORMAN REDLICH ET AL., CONSTITUTIONAL LAW 1211 (3d ed. 1996) (noting that, in order to protect the "concept of a public forum where some or all citizens have a right to speak, the Court has permitted government to place certain restrictions on this right"); Katharine McCarthy, Note, Conant v. Walters*: A Misapplication of Free Speech Rights in the Doctor–Patient Relationship*, 56 ME. L. REV. 447, 460 (2004) ("In fact, limitations on the manner, time and place of expression are generally upheld if the restrictions serve a significant government interest and if the restrictions themselves do not alter the message, ideas, or content of expression.").

12. *See, e.g.*, Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 771 (1976) (noting that time, place, and manner restrictions are valid if, in addition to being "justified without reference to the content of the regulated speech, . . . they serve a significant governmental interest, and . . . they leave open ample alternative channels for communication of the information"); *see also* Watchtower Bible & Tract Soc'y of N.Y. v. Vill. of Stratton, 536 U.S. 150, 175–76 (2002) (Rehnquist, C.J., dissenting) (observing that intermediate scrutiny "applies to content-neutral time, place, or manner restrictions on speech in public forums").

13. Traditionally, the rational basis test requires only that state action "be permissible, rationally related to a legitimate government interest, and not impose an irrational burden on individuals." Zalewska v. County of Sullivan, N.Y., 316 F.3d 314, 322 (2d Cir. 2003).

14. *See, e.g.*, Hill v. Colorado, 530 U.S. 703 (2000) (holding that the governmental interest in protecting the public from harassment justified a "bubble zone" around a health care facility).

15. *See* Saltzman, *supra* note 2, at A1 (relating that, leading up to the 2004 Democratic National Convention in Boston, "several activists insisted that they [were] so disgusted with the designated protest zone that they ha[d] no intention of using it").

16. *See* REDLICH ET AL., *supra* note 11, at 1211 ("[I]f a number of speakers want to use the same public forum at the same time, they will drown each other out and no speaker could convey her particular message. Thus, . . . the Court has permitted government to place certain restrictions on this right [to speak].").

to express herself in the middle of a busy intersection.[17] But the sorts of cages, zones, and pens that have appeared of late involve an altogether different strain of spatial restriction. Here the state has moved from *regulating* place to actually, in some cases, *creating* places for the express purpose of controlling and disciplining protest and dissent. This sort of spatial sophistication is a recent phenomenon. It represents a new generation of spatial regulations. Governments have learned to manipulate geography in a manner that now seriously threatens basic First Amendment principles. This is a substantial extension of the principle that the state may regulate the time, place, and manner of expressive activity. It is an extension that deserves far more scholarly and judicial attention than it has received.

The law can be a blunt instrument for assessing a concept as complex as place. To assist in highlighting the significance of place to expressive and associative rights and to put the recent spatial trend in context, this Article borrows from the work of scholars who have for many years been actively engaged in the systematic study of place. In disciplines such as anthropology, sociology, and philosophy, the techniques of concern in this Article are sometimes referred to as "spatial tactics."[18] Spatial tactics represent the "use of space as a strategy and/or technique of power and social control."[19] When scholars in these various fields study spatial tactics, they examine the architectures of places such as prisons, planned towns, gated communities, and tourist villages.[20] The design of these places is purposeful; it is specifically intended to control environments, activities, even entire populations.

Similarly, spatial tactics are giving rise to places that are intended to control expression. This Article will refer to cages, zones, and pens as "tactical places." Tactical places impact expressive and associative rights in a variety of ways. By design, these places mute and even suppress messages, depress participation in social and political protests, and send negative signals to those on the outside regarding those confined within. Social and political movements often require disruption and a degree of confrontation

17. *See* Cox v. New Hampshire, 312 U.S. 569, 574 (1941) ("One would not be justified in ignoring the familiar red traffic light because he . . . sought by that means to direct public attention to an announcement of his opinions.").

18. *See* Setha M. Low & Denise Lawrence-Zúñiga, *Locating Culture*, *in* THE ANTHROPOLOGY OF SPACE AND PLACE: LOCATING CULTURE 1, 30–32 (Setha M. Low & Denise Lawrence-Zúñiga eds., 2003) (discussing spatial tactics).

19. *Id.* at 30 (noting "the way space is used to obscure" power relations and distributions).

20. *See, e.g.*, Michael Herzfeld, *After Authenticity at an American Heritage Site*, *in* THE ANTHROPOLOGY OF SPACE AND PLACE: LOCATING CULTURE, *supra* note 18, at 370 (examining a tourist village); Setha M. Low, *The Edge and the Center: Gated Communities and the Discourse of Urban Fear*, *in* THE ANTHROPOLOGY OF SPACE AND PLACE: LOCATING CULTURE, *supra* note 18, at 387 (discussing gated communities); Paul Rabinow, *Ordonnance, Discipline, Regulation: Some Reflections on Urbanism*, *in* THE ANTHROPOLOGY OF SPACE AND PLACE: LOCATING CULTURE, *supra* note 18, at 353 (exploring disciplinary space).

with authority in order to be even marginally effective.[21] Protests in tactical places are docile; they are tightly scripted and ineffectual imitations of past social and political movements. In one sense, the very purpose of agitation and protest is to contest the status quo, to disrupt it. Passively filing into cages, zones, and other tactical places is an utter capitulation to that status quo. The spatial tactics examined in this Article, the ones that produce tactical places, represent a movement toward a perfect geometry of control over just the sort of speech the First Amendment ought to protect—that which challenges authority, offends sensibilities, or otherwise "disturb[s] the complacent."[22] Geometric precision is being utilized to marginalize dissent, to capture and confine it. Freedom (of speech) is being measured in feet, partitioned based upon Euclidean principles.

Two societal phenomena seem to have moved us in this direction. The events of September 11, 2001, have created a climate in which dissent and divisive expression, and speakers associated with this sort of activity, are viewed as dangerous.[23] The government has moved aggressively to segregate what it sees as potentially threatening dissension and agitation.[24] In addition, the "culture wars" have heightened sensitivity to certain strains of particularly disturbing and upsetting speech, such as pro-life protests and "hate speech."[25] Governments have begun to rely on place as a means of

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21. *See generally* Dieter Rucht, *The Changing Role of Political Protest Movements*, W. EUR. POL., Oct. 2003, at 153, 171 ("Following the student revolts of the 1960s, left-libertarians have helped to create a more active, more liberal, more democratic and more participatory political culture in Germany.... [W]ithout the tenacious left-libertarian mobilisation it has experienced, Germany would most likely retain much more of the authoritarian heritage that characterised the Adenauer era."); Michael Specter, *The Extremist: The Woman Behind the Most Successful Radical Group in America*, NEW YORKER, Apr. 14, 2003, at 52 (illustrating, through the example of People for the Ethical Treatment of Animals, how social movements use radicalism that alienates the mainstream in order to achieve moderate progress).

22. Martin v. City of Struthers, 319 U.S. 141, 143 (1943).

23. *See, e.g.*, Kris Axtman, *Political Dissent Can Bring Federal Agents to Door*, CHRISTIAN SCI. MONITOR, Jan. 8, 2002, at 1 (noting that federal authorities have been questioning Americans who criticize the government, the President, or the war on terrorism); *see also* AM. CIVIL LIBERTIES UNION, FREEDOM UNDER FIRE: DISSENT IN POST-9/11 AMERICA (May 2003), http://www.aclu.org/FilesPDFs/dissent_report.pdf (describing restrietions on mass protests and rallies, symbolic expression, and other expressions of dissent in the period following September 11, 2001).

24. This phenomenon is not limited to governments. Private employers and other private actors, unconstrained by First Amendment concerns, have suppressed expression in the spaces under their control as well. *See* Gregory P. Magarian, *The First Amendment, the Public–Private Distinction, and Nongovernmental Suppression of Wartime Political Debate*, 73 GEO. WASH. L. REV. 101, 103–04 (2004) (noting the trend of nongovernmental suppression of speech and arguing that the First Amendment should reach some such private acts).

25. *See* Steven J. Heyman, *Ideological Conflict and the First Amendment*, 78 CHI.-KENT L. REV. 531, 532–33 (2003) ("In the ongoing culture wars, few battlegrounds are more contested than freedom of expression. In recent decades, the First Amendment has been at the heart of controversies over antiwar demonstrations, pornography, hate speech, flag burning, abortion counseling, anti-abortion protests, and the National Endowment for the Arts."); *cf.* Romer v. Evans, 517 U.S. 620, 652–53 (1996) (Scalia, J., dissenting) (accusing the Court of choosing sides in a

controlling this sort of speech. There are tactical reasons for such reliance on place as a speech-control mechanism. As mentioned, the "intermediate" scrutiny applied to place regulations is quite forgiving and flexible. It has become even more so in light of heightened security concerns. More generally, place is perceived as a "neutral" mass capable of effecting a fair and value-free segmentation of speakers.

Courts and scholars are responsible for this presumption of spatial neutrality. Place in general, and the use of spatial tactics in particular, have not received concentrated attention from First Amendment scholars. There are, of course, many critiques of the Supreme Court's "public forum" doctrine, which categorizes places as either open or closed to expression—"public" or "nonpublic" forums in the Court's parlance.[26] These critiques are well deserved, not least because public forum doctrine makes it possible for the state to manipulate place. But there is a larger failure in the doctrine of place. Place as a concept has not been considered worthy of independent scholarly analysis. Nor has it been deemed worthy of serious judicial thought. As others have noted, the Court has never provided much in the way of any theoretical justification for its public forum doctrine,[27] and it continues to treat place restrictions as if they raise no serious First Amendment issues. Indeed, place is currently so undervalued that scholars, along with the rest of the public, seemed barely to notice when courts sanctioned the construction of the speech cage at the Democratic National Convention in Boston.[28] Even this tactical place, an architecture the district court described as an "internment camp" and an "affront to the role of free expression,"[29] was permitted to stand under the doctrine of place.[30]

"culture war" by striking down a state law that prohibited ordinances designed to protect homosexuals).

26. *See, e.g.*, Harry Kalven, Jr., *The Concept of the Public Forum:* Cox v. Louisiana, 1965 SUP. CT. REV. 1, 26–27 (arguing that rather than simply banning speech in a forum, courts should reach a mutually satisfactory arrangement that accommodates both free speech interests and the interests in the forum's other uses, such as a street's travel use); Calvin Massey, *Public Fora, Neutral Governments, and the Prism of Property*, 50 HASTINGS L.J. 309, 309–11 (1999) (asserting that the Supreme Court has never adequately addressed the "public forum problem" and suggesting that the ideal solution rests in adopting a free speech doctrine analogous to common law nuisance principles); Richard B. Saphire, *Reconsidering the Public Forum Doctrine*, 59 U. CIN. L. REV. 739, 741–42 (1991) (discussing widespread criticism of the public forum doctrine for tending to rely on easy labels rather than substantive analysis of First Amendment issues).

27. *See* Robert C. Post, *Between Governance and Management: The History and Theory of the Public Forum*, 34 UCLA L. REV. 1713, 1760–64 (1987) (arguing that the Court relies on tradition for its public forum doctrine and that even this is "unfounded and incomplete").

28. *See* Coal. to Protest the Democratic Nat'l Convention v. City of Boston, 327 F. Supp. 2d 61, 74–76 (D. Mass. 2004), *aff'd sub nom.* Bl(a)ck Tea Soc'y v. City of Boston, 378 F.3d 8 (1st Cir. 2004) (discussing the constitutionality of the "demonstration zone" at the 2004 Democratic National Convention).

29. *Id.* at 74–75.

30. *See id.* at 76 ("[G]iven the constraints present at the location and the [Boston Police Department]'s reasonable safety concerns, there is no injunctive relief that I could fashion that would vindicate plaintiffs' First Amendment rights without causing quite siguificant harm to the

The spatial tactics phenomenon strongly hints that something is seriously amiss in the doctrinal and theoretical treatment of place. Perhaps in an era of rapid technological advances, many view concern over protesters' access to streets, sidewalks, and other public venues as quaint or unnecessary. Perhaps the presumed neutrality of place accounts for this general complacency. Or perhaps, in the collective mind, security of place now simply outweighs liberty of place. Whatever the reason for the societal (and this, as will become clear, most certainly includes judicial) complacence, this kind of manipulation of place should give us pause. We are rightly proud of our country's expressive tradition, including its tolerance of public displays of dissent. But while here, in the United States, spatial tactics are neutering political dissent, protesters in countries deemed far less friendly to dissent are discovering the power that comes with the ability to access, even commandeer, public spaces.[31]

This Article advocates a spatial turn in First Amendment jurisprudence. The turn has two basic components. First, this Article seeks to reconceptualize place, to get us thinking about the idea of place in a fundamentally different way. Current judicial thinking's permissive stance toward place can be traced to the concept that place is nothing more than property, or *res*. This Article aims to correct that misconception of place, to demonstrate that speech and spatiality are critically related and intersect in a variety of ways that a conception of place-as-*res* cannot appreciate. The rise of tactical places demonstrates that *res* is an insufficient concept for place. Second, the spatial turn entails a reexamination of the standards currently applied in reviewing spatial tactics and modern tactical places. In general, the proposal is to sharpen the so-called intermediate standard that applies to spatial restrictions such that a knowledgeably skeptical form of scrutiny is applied when the state uses spatial tactics. The spatial turn's two elements are thus related. Doctrinal changes—including sharpening the so-called intermediate standard—will materialize only if and when courts more fully understand the dynamic relationship between speech and spatiality, dispensing with current conceptions of place as merely *res*.

Part I describes four recent examples of spatial tactics in expressive contexts: the utilization of pens, cages, and other architectural tactics to (dis)place political dissent; statutory and injunctive "buffer zones" used to

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City, the delegates, and the public interest . . . ."); *see also* Bl(a)ck Tea Soc'y v. City of Boston, 378 F.3d 8, 12–14 (1st Cir. 2004) (noting that it was "a close and difficult case" but finding reasonable the district court's conclusion that the demonstration zone satisfied the "intermediate scrutiny" of time, place, and manner restrictions on speech in public fora), *aff'g* Coal. to Protest the Democratic Nat'l Convention v. City of Boston, 327 F. Supp. 2d 61 (D. Mass. 2004).

31. *See* Supara Janchitfah, *Landless Find Strength in Numbers: A Network of Landless Farmers Is Challenging the Government's Inaction on Long-Promised Land Reform*, BANGKOK POST, Feb. 15, 2004, *available at* 2004 WLNR 9936756 (reporting on increased protests by poor rural farmers in southern Thailand who are seeking to convince the Thai government to distribute public land with expired leases to the poor).

control expression at abortion clinics; campus "free speech zones"; and the use of "free speech" and "speech-free" zones at various other public accommodations. When viewed in isolation, some of these examples may not seem seriously troubling. But when properly considered collectively, as part of a trend, it is apparent that these geometries are fundamentally altering the manner in which protest and dissent are conveyed in public places. Spatial tactics are carefully arranging the separation of speakers and listeners. They are facilitating listener avoidance of speech that offends and irritates.

To explain why spatial tactics are currently viewed with little skepticism or alarm, Part II situates place in First Amendment jurisprudence. Spatial tactics are currently viewed as neutral because that is generally how courts and commentators view place itself—as an inert, neutral element of the expressive background. Through the nonsystematic inventions of the public forum and "time, place, and manner" doctrines, place ultimately became mere *res*. The primary assumptions underlying the place-as-*res* concept are that speech and spatiality are entirely separate and distinct, that place is merely a background or context for expression, and that place is presumptively partitioned without regard to the content of expression.

These assumptions are all false. Their persistence is not merely a function of the infirmities, well articulated by others, of the Court's public forum doctrine. The cause runs deeper than this, to the absence of any real conceptual understanding of place at all. To understand why spatial tactics and their associated tactical places are constitutionally troubling, place must be reconceptualized. Drawing on the work of scholars of place from a variety of other disciplines, including geography, sociology, anthropology, and philosophy, Part III offers a different theoretical perspective on place. It proposes an interdisciplinary concept, "expressive place," that views place as variable rather than merely binary; primary rather than secondary to expression; constructed or created rather than objectively given; and dynamic rather than inert. Place, in other words, is not merely an inert *res*. It is an expression of power, message, and meaning. Speakers and listeners do not merely occupy places; they connect with and speak through them.

Finally, Part IV returns to spatial tactics and tactical places, examining them in light of place's conceptual repositioning. Viewing spatial tactics through the conceptual lens of expressive place, Part IV contends that spatial tactics deserve a far more faithful application of the intermediate standard of review articulated by the Court. There are several doctrinal implications here. First, at the outset, courts should actively question the premise that tactical places are neutral with regard to subject matter and viewpoint. This Article suggests that for many reasons it is more faithful to First Amendment principles to treat such places as at least "content-correlated," a phrase some

on the Court have applied to zoning restrictions for adult entertainment.[32] Although this does not lead to strict judicial scrutiny, it can and should lead to much sharper judicial scrutiny of spatial tactics than current practice entails. This means, in turn, that the state should bear the burden of justifying the use of spatial tactics by providing specific evidence of supposed threats to community, order, or safety. The state should be required, when it constructs tactical places, to tailor lines that facilitate speaker access to potential listeners and that restrict only as much expression as is truly necessary to serve the state's demonstrated purposes. Finally, courts should view with far greater skepticism than they currently do the argument that spatial tactics leave open ample and adequate alternative space for expressive activity. They should, in short, take far more seriously the notion 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."[33]

I. Spatial Tactics

This Part describes the modern-day spatial tactics and tactical places with which this Article is concerned. Not all spatial restrictions are or should be constitutionally suspect. A restriction on where signs or banners may be placed, for example, does not ordinarily raise substantial constitutional questions. Under prevailing standards, so long as such restrictions are minimally tailored and leave open ample alternative outlets for the speaker to communicate his or her message, the state may regulate place to serve aesthetic or other important public interests.[34] When, however, the state uses geometric and other spatial techniques to physically construct cages, zones, pens, and other architectures to control and discipline expression, basic First Amendment principles are threatened in a more direct and serious manner. The spatial tactics of the sort described below should be viewed with greater skepticism than run mine place restrictions that minimally burden expression.

A. The (Dis)placing of Political Protest

The most noticeable and disturbing recent trend has been the segmentation of place to control and displace mass protests, demonstrations, and other political and social agitation.[35] Political dissent has become spatial

32. *See* City of Los Angeles v. Alameda Books, Inc., 535 U.S. 425, 457–60 (2002) (Souter, J., dissenting) (discussing content-correlated zoning restrictions as lower scrutiny alternatives to content-based regulations).

33. Schneider v. State, 308 U.S. 147, 163 (1939).

34. Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 293 (1984) (holding that location restrictions on protests "are valid provided that they are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant government interest, and that they leave open ample alternative channels for communication of the information").

35. As the district court in the case involving the free speech cage at the 2004 Democratic National Convention noted, the use of demonstration zones "is a relatively recent innovation," one that "apparently [became] routine at large political events ever since the 1999 World Trade

tactics' principal casualty.[36] Indeed, the act of mounting a political protest has been fundamentally altered by spatial tactics.

Within existing First Amendment doctrine, the government has a variety of spatial tactics at its disposal to control mass movements and expressions of public dissent. It can, so long as there are clear and objective standards, require speakers and demonstrators to obtain permits prior to events.[37] It can alter parade and demonstration routes to ensure that order is maintained.[38] These are, at least in a broad sense, spatial tactics. But again, the state is generally permitted to use these sorts of restrictions, so long as there is no proof that the government is manipulating parade routes to suppress a particular message[39] or exercising "unfettered discretion" in licensing access to places.[40]

But governments have begun to implement more specific control mechanisms with regard to protests and other mass events. A more local and more precise geometry of place has begun to fashion an expressive topography that limits, confines, and controls protest and dissent. Just as military commanders partition and segment their battlefields, governments have begun to partition and segment expressive venues.[41] The state, through

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Organization meeting in Seattle." *Coal. to Protest the Democratic Nat'l Convention*, 327 F. Supp. 2d at 73. For a discussion of some of the recent tactics officials have used to control protests, see Mary M. Cheh, *Demonstrations, Security Zones, and First Amendment Protection of Special Places*, 8 UDC/DCSL L. REV. 53, 53–61 (2004).

36. Ken Paulson, *Marches at a Standstill: The New Limits on Assembly*, FIRST AMENDMENT CENTER, Feb. 23, 2003, http://www.firstamendmentcenter.org/commentary.aspx?id=6340 ("America's cities appear increasingly reluctant to allow protest marches, citing security and cost concerns.").

37. *See* Cox v. New Hampshire, 312 U.S. 569, 570–76 (1941) (affirming the constitutionality of a state statute "prohibiting a 'parade or procession' upon a public street without a special license").

38. *See id.* at 574 ("The authority of a municipality to impose regulations . . . in the use of public highways has never been regarded as inconsistent with civil liberties but rather as one of the means of safe-guarding the good order upon which they ultimately depend. The control of travel on the streets of cities is the most familiar illustration of this recognition of social need."); *cf.* United for Peace & Justice v. City of New York, 243 F. Supp. 2d 19, 25, 29 (S.D.N.Y. 2003) (holding that New York City's denial of the plaintiff's application for a permit to march past the United Nations building did not violate the First Amendment because of the "siguificant governmental interest" in "the peace and security of the United Nations Headquarters and the U.S. Mission" and because the City had "offered as an alternative a stationary rally"), *aff'd*, 323 F.3d 175 (2d Cir. 2003).

39. *Cf. United for Peace & Justice*, 243 F. Supp. 2d at 25 (noting the absence of evidence that New York City's restriction on the plaintiff's ability to march past the United Nations building was "being applied or justified in any way because of the anti-war message of the marchers").

40. *See Cox*, 312 U.S. at 576 (affirming the constitutionality of a statute that required a license for parades, noting the state court's determination that "the licensing board was not vested with arbitrary power or an unfettered discretion"); Hague v. Comm. for Indus. Org., 307 U.S. 496, 516 (1939) (agreeing with the invalidation of an ordinance that authorized an official to deny permits based only on the official's "mere opinion" because the ordinance could "be made the instrument of arbitrary suppression of free expression . . .").

41. Although this phenomenon has become more and more common, the practice is not entirely new. *See, e.g.*, Concerned Jewish Youth v. McGuire, 621 F.2d 471, 472–73 (2d Cir. 1980) (upholding the use of a "bull pen," in which only twelve persons would be permitted to demonstrate, outside the Russian Mission in New York City).

spatial tactics, is actively *creating* distinct, tactical places for expressive activity. Spatial tactics are giving rise to what we might consider particular *architectures* of place. As we shall see, the battlefield analogy is particularly apt, for these architectures are generally being constructed in the name of post-September 11 security.

The tactical displacement of demonstrators and demonstrations is a phenomenon largely of the past decade or so and has become particularly prevalent in the past few years. "Zoning" of some sort or another has been applied to individual public officials, presidential inaugurations, and major conventions alike. For example, President Bush has been shielded from numerous organized protests during his campaigns and presidency.[42] The Secret Service visited locations ahead of time and established "free speech zones" or "protest zones" where those opposed to the President's policies were effectively quarantined.[43] Supporters of the President, on the other hand, were generally permitted much closer access to the candidate.[44] The zones were effective at keeping protesters at a substantial distance from the President.[45] They also separated protesters from the media covering the campaign.[46] At least on some occasions, media personnel were not permitted inside the protest zones, and protesters were confined to them once inside.[47]

Despite their names, the "protest zones" and "free speech zones" established during President Bush's 2004 campaign were hardly speech-facilitative. They were not designed to be such. In Pittsburgh, for example, local police established a "designated free speech zone" on a baseball field

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42. *See* James Bovard, *"Free-Speech Zone": The Administration Quarantines Dissent*, AM. CONSERVATIVE, Dec. 15, 2003, *available at* http://www.amconmag.com/2003/12_15_03/feature.html (describing how the Secret Service "routinely succeed[s] in keeping protesters out of presidential sight"); *see also* AM. CIVIL LIBERTIES UNION, *supra* note 23, at 11–13 (describing use of protest zones at campaign events); Jonathan M. Katz, *Thou Dost Protest Too Much*, SLATE, Sept. 24, 2004, http://www.slate.com/id/2107012/ (describing protester's conviction for refusing to demonstrate in the designated "free speech zone").

43. Bovard, *supra* note 42. Federal law prohibits entry into any designated "posted, cordoned off, or otherwise restricted area" where the President "is or will be temporarily visiting[.]" 18 U.S.C. 1752(a)(1)(ii). *See also* 18 U.S.C. § 1752(d)(2) (2000) (authorizing the Secretary of the Treasury "to prescribe regulations governing ingress or egress to such buildings and grounds and to posted, cordoned off, or otherwise restricted areas where the President or other person protected by the Secret Service is or will be temporarily visiting"); United States v. Bursey, 416 F.3d 301, 309 (4th Cir. 2005) (upholding the conviction of a campaign event protester based on his presence in a restricted presidential area).

44. This precise control of space and place was a hallmark of the Bush campaign. For example, at certain campaign events only those who were willing to sign a pledge of support for the President were permitted inside the campaign venue. G. Jeffrey MacDonald, *A Close Eye—And Tight Grip—On Campaign Protestors*, CHRISTIAN SCI. MONITOR, Sept. 27, 2004, at 11, *available at* http://www.csmonitor.com/2004/0927/p11s02-ussc.html.

45. Bovard, *supra* note 42.

46. *Id.* (stating that the protest zones set up by the Secret Service ahead of President Bush's visits often kept protesters "outside the view of media covering the event").

47. *See id.* (relating one protester's description of a protest zone's conditions during a 2003 visit by President Bush).

surrounded by a chain-link fence.[48] The site was a third of a mile from the President's scheduled speech location.[49] These zones were not suggested venues for expression and protest; they were intended to be and were utilized as somewhat coercive architectures of control.[50] Several protesters were in fact arrested for refusing to utilize these specially designated spaces.[51]

Speech at large campaign events, specifically national political conventions, has been hampered by tactical zones of greater scale. During the 2000 Democratic National Convention in Los Angeles, for example, government officials designated a "secured zone" around the stadium where the convention was to take place.[52] The zone covered—that is it cordoned off—approximately 185 acres of land surrounding the convention site,[53] and it was in effect 24 hours a day.[54] Ostensibly to accommodate expressive interests, officials designated an "Official Demonstration" area for protesters within this secured zone.[55] The zone effectively kept the protesters 260 yards from any participating delegate.[56] A district court enjoined the use of this zone, not because it was intended to suppress expression, but rather because its dimensions were so disproportionate to the state's interests as to be deemed insufficiently tailored even under the relatively lenient tailoring requirement applied to spatial regulations.[57]

One of the unique and, in terms of expressive freedoms, disturbing aspects of geometric techniques like zoning is that the geometry or physics can be refined, in effect making it a more perfect means of control. The "experts," which in the context of political conventions are generally law enforcement officials, essentially learn from prior mistakes. They devise new and more restrictive architectures.

Thus, at the 2004 Democratic National Convention in Boston, the government once again resorted to zoning to contain anticipated

48. Dave Lindorff, *Keeping Dissent Invisible: How the Secret Service and the White House Keep Protestors Safely out of Bush's Sight—And off TV*, SALON, Oct. 16, 2003, http://www.salon.com/news/feature/2003/10/16/secret_service/index.html.

49. Bovard, *supra* note 42.

50. *See* Lindorff, *supra* note 48 (likening the design of a free speech area to that of a concentration camp).

51. *Id.*; *see also* Katz, *supra* note 42.

52. Serv. Employee Int'l Union v. City of Los Angeles, 114 F. Supp. 2d 966, 968–69 (C.D. Cal. 2000).

53. *Id.* at 971.

54. *Id.*

55. *Id.* at 969.

56. *Id.* at 972.

57. *Id.* at 974–75. Other similarly situated security zones have been struck down as unconstitutional for the same reason. *See, e.g.*, United States v. Baugh, 187 F.3d 1037, 1044 (9th Cir. 1999) (invalidating a 175-foot "safety zone"); Bay Area Peace Navy v. United States, 914 F.2d 1224, 1229 (9th Cir. 1990) (invalidating a 75-yard "safety zone" between demonstrators and their intended audience).

demonstrators.[58] As in Los Angeles in 2000, there were two zones in Boston, a "hard security zone," which comprised the convention center and immediately adjacent areas, and a "soft security zone," which encompassed areas further removed from the convention site.[59]

The government constructed a "designated demonstration zone" (DZ) within the soft security zone.[60] The DZ was a "roughly rectangular space of approximately 26,000 to 28,000 square feet—very approximately 300 feet by 90 feet."[61] The "overall impression created by the DZ," the court noted, was that of "an internment camp."[62] The district court's description of the DZ merits emphasis:

> Most—at least two-thirds—of the DZ lies under unused Green Line tracks. The tracks create a space redolent of the sensibility conveyed in Piranesi's etchings published as *Fanciful Images of Prisons*. It is a grim, mean, and oppressive space whose ominous roof is supported by a forest of girders that obstruct sight lines throughout as the tracks slope downwards towards the southern end.
>
> . . .
>
> The DZ is surrounded by two rows of concrete jersey barriers. Atop each of the jersey barriers is an eight foot high chain link fence. A tightly woven mesh fabric, designed to prevent liquids and objects from being thrown through the fenee, covers the outer fence, limiting but not eliminating visibility. From the top of the outer fence to the train tracks overhead, at an angle of approximately forty-five degrees to horizontal, is a looser mesh netting, designed to prevent objects from being thrown at the delegates.
>
> On the overhead Green Line tracks themselves is looped razor wire, designed to prevent persons from climbing onto the tracks where armed police and National Guardsman [sic] will be located.[63]

Other "design elements" of this oppressive architecture limited the number of protesters to no more than 1,000 (despite the fact that the city had originally assured that at least 4,000 could be accommodated); severely restricted the use of signs, posters, and other visual material; and prohibited

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58. See Coal. to Protest the Democratic Nat'l Convention v. City of Boston, 327 F. Supp. 2d 61, 75 (D. Mass. 2004), *aff'd sub nom.* Bl(a)ck Tea Soc'y v. City of Boston, 378 F.3d 8 (1st Cir. 2004), for the district court's discussion of the reasonableness, in consideration of past incidents like those at the 2000 Democratic National Convention in Los Angeles, of certain characteristics of the Boston "demonstration zone." For example, the court noted that the demonstration zone's double fence was "reasonable in light of past experience in which demonstrators have pushed over a single fence." *Id.*

59. *Id.* at 65.

60. *Id.* at 66.

61. *Id.*

62. *Id.* at 74.

63. *Id.* at 67. The court prefaced its account by noting that "[a] written description cannot convey the ambience of the DZ site as experienced during the view." *Id.*

the passing of leaflets to delegates, even those who approached the DZ.[64] The space, the district court said, "convey[ed] the symbolic sense of a *holding pen* where potentially dangerous persons are separated from others."[65]

Nevertheless, following traditional First Amendment doctrine the district court upheld the DZ cage as a content-neutral regulation of the place of expression.[66] This "internment camp," which the district court referred to as a "symbolic affront to the role of free expression," was held to be entirely consistent with First Amendment standards relating to place.[67] This was so, the court said, for two reasons. First, the court concluded that there was no specific evidence that the government had intentionally constructed the DZ in order to suppress expression.[68] Second, the court relied upon "past experience" at other demonstrations, by which the court meant incidents of violent protest, to conclude that a substantial safety threat was present at this event as well.[69] The district judge also opined that "given the constraints of time, geography, and safety, I cannot say that the design itself is not narrowly tailored in light of other opportunities for communication available under the larger security plan."[70] This was so despite the fact that the DZ was "the only available location providing a direct interface between demonstrators and the area where delegates . . . entered and left" the convention site.[71]

The First Circuit affirmed.[72] In what can only be characterized as judicial understatement, the court acknowledged that the DZ's enclosed space was "far from a perfect solution."[73] Still, the court upheld the spatial tactic. It held that the DZ satisfied the First Amendment's intermediate scrutiny standard for content-neutral regulations of place.[74] The First Circuit reasoned that the DZ was "plainly content-neutral and there can be no doubting the substantial government interest in the maintenance of security at political conventions."[75] The court conceded that there was no "event-specific threat evidence," but declined to require it to validate the use of the

64. *Id.* at 67–68.

65. *Id.* at 74–75 (emphasis added).

66. *Id.* at 75–76.

67. *Id.* at 74–75.

68. *See id.* at 75–76 (treating the DZ as a content-neutral regulation of place); *see also* Bl(a)ck Tea Soc'y v. City of Boston, 378 F.3d 8, 12 (1st Cir. 2004) (stating that "the challenged security precautions are plainly content-neutral"), *aff'g* Coal. to Protest the Democratic Nat'l Convention v. City of Boston, 327 F. Supp. 2d 61 (D. Mass. 2004).

69. *See Coal. to Protest the Democratic Nat'l Convention*, 327 F. Supp. 2d at 75 & 75 n.2 (declining to rely upon an ex parte submission regarding actual threats and instead concluding that the DZ was "reasonable in light of past experience").

70. *Id.* at 75.

71. *Id.* at 74.

72. *Bl(a)ck Tea Soc'y*, 378 F.3d at 8.

73. *Id.* at 11.

74. *Id.* at 14.

75. *Id.* at 12.

DZ.[76] The First Circuit also acknowledged that the DZ "allowed no opportunity for physical interaction (such as the distribution of leaflets) and severely curtailed any chance for one-on-one conversation."[77] Further, it recognized that visual communication, as with signs or posters, was significantly hampered by the DZ's architectural design.[78] Nevertheless, the court found that adequate alternative channels of communication existed. It emphasized in particular that demonstrators could convey their messages at such "high profile" events as national political conventions through the mass media.[79]

Ultimately, not a single demonstrator utilized this "holding pen."[80] Had they done so, protesters would have been crowded into the DZ's narrow confines, unable to utilize visual techniques much less engage in face-to-face interactions with the convention delegates. They would have been under constant police surveillance.[81] There was even some concern, voiced by the district court, that protesters would not be safe in the cage.[82] The DZ, as it turned out, was a perfect geometry of control. Its architecture was so restrictive that dissent was entirely suppressed in the one place where it was most likely to have an impact.

The DZ is only one example of the increasing perfection of geometric control brought about by spatial tactics. Today, all protest assemblies are subjected to some sort of spatial tactics. Seattle took the extraordinary step in 1999 of suspending *all* assembly within a 25 block area surrounding the World Trade Organization conference.[83] Colorado Springs recently established a "security zone" around a hotel at which several defense ministers were gathered.[84] During George W. Bush's first and second

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76. *Id.* at 13–14.

77. *Id.* at 13.

78. *Id.* (noting that the use of signs was "hampered . . . by the cramped space and the mesh screening").

79. *Id.* at 14 (citing opportunities to communicate via "television, radio, the press, the internet, and other outlets").

80. *See, e.g.*, John Kifner, *Demonstrators Steer Clear of Their Designated Space*, N.Y. TIMES, July 26, 2004, at P3 ("The designated demonstration area, a dank place under abandoned elevated tracks, failed its first test Sunday when what will probably be the largest demonstration of the convention period simply walked right by it.").

81. *See* James Bovard, Editorial, *Protests Pre-empted*, BALT. SUN, Aug. 6, 2004, at 13A (stating that the ambience of the demonstration zone was "accentuated by the police helicopters patrolling overhead, by the omnipresent National Guardsmen in their camo outfits and by the state police occasionally prancing around in their black armor suits").

82. *See* Coal. to Protest the Democratic Nat'l Convention v. City of Boston, 327 F. Supp. 2d 61, 67 (D. Mass. 2004) (noting that the City would have to limit the capacity of the DZ because of safety questions the judge raised while inspecting the site), *aff'd sub nom.* Bl(a)ck Tea Soc'y v. City of Boston, 378 F.3d 8 (1st Cir. 2004).

83. *See* Menotti v. City of Seattle, 409 F.3d 1113, 1142 (9th Cir. 2005) (upholding the restricted zone as a valid time, place, and manner regulation).

84. *See* Citizens for Peace in Space v. City of Colorado Springs, No. Civ.A.04CV00464-RPM, 2005 WL 1769230 (D. Colo. July 25, 2005) (upholding a security zone that closed all public streets around the hotel).

inaugurations, protesters were issued permits to demonstrate only in designated areas or "free speech zones."[85] At the most recent inauguration, antiwar protesters were given some space along the inauguration parade route, but they were otherwise limited to "tiny spaces" behind bleachers and to "fenced-in areas more than 100 feet from the parade route."[86] There was thick irony in an inauguration devoted to the principles of liberty and freedom taking place within what journalists described as a "steel cocoon."[87]

As noted, one of the lessons of the DZ is that zoning techniques can be made progressively finer and more precise. When it comes to political dissent, designated speech zones and the building of specific architectures do not exhaust the government's arsenal of spatial tactics. In addition to zones and cages, the government has begun to use more localized architectures and tactics like pens, protective bubbles, and even nets to control and discipline dissent and dissenters.[88]

The use of metal barricades, or "pens," is a relatively recent law enforcement spatial tactic. As the name suggests, pens are closed, four-sided barricades used to contain protesters and essentially render them immobile.[89] The pens are difficult to climb over and impossible to crawl under.[90] Still, some courts have characterized these structures as speech-facilitative. For example, one judge described pens as "a practical device used by the police to protect those actively exercising their rights from those who would prevent its exercise."[91] At a February 2003 demonstration against the Iraq war,

85. *See, e.g.*, Jill Lawrence, *Protesters Plan to Turn Their Backs on Bush*, USA TODAY, Jan. 17, 2005, at 11A (explaining that authorities expected a similar level of protest to the first inauguration in which "two of six protest permits went to groups supportive of Bush, the rest to opponents"); Johanna Neuman, *Tamer Protests Expected for Second Inauguration*, L.A. TIMES, Jan. 14, 2005, at A12 ("During the Bush campaign, protesters were often given permits to demonstrate only in spaces far from event sites."); Paulson, *supra* note 36 (noting that during President George W. Bush's first inauguration "protesters were issued permits to demonstrate only in designated areas along the parade route").

86. Associated Press, *Protesters Get Prime Spot for Inauguration*, FIRST AMENDMENT CENTER, Jan. 13, 2005, http://www.firstamendmentcenter.org/news.aspx?id=14681&SearchString=inauguration.

87. *See* Johnston & Janofsky, *supra* note 3, at A16 (describing "curtains of steel security fences and concrete barriers" erected in Washington, D.C. in anticipation of the inauguration ceremony).

88. *See* Preston, *supra* note 6, at B7 (referring to "barricades, metal pens, and 'frozen zones'" used to shield New York Mayor Michael Bloomberg from protesters during the Republican National Convention in 2004).

89. *See* Julia Preston, *Searches of Convention Protesters Limited*, N.Y. TIMES, July 20, 2004, at B4 (discussing the efforts of the New York Civil Liberties Union to force the police to abandon the use of closed, four-sided pens, "which are set up with metal barriers that are hard to climb over and impossible to crawl under[,]" to contain the protesters).

90. *Id.*

91. Olivieri v. Ward, 801 F.2d 602, 607 (2d Cir. 1986) (describing "a barricaded enclosure for demonstrators and counterdemonstrators"). *But see* Stauber v. City of New York, No. 03 Civ. 9162(RWS), 03 Civ. 9163(RWS), 03 Civ. 9164(RWS), 2004 WL 1593870, at *29 (S.D.N.Y. July 16, 2004) (finding, based on the record, that a law enforcement policy of using pens was not narrowly tailored).

police used pens to create block-long, four-sided enclosures.[92] Once these pens were filled with protesters, those inside were barred from exiting for any reason.[93] A lawsuit brought prior to the 2004 Republican National Convention in New York City sought to bar the use of pens.[94] The district court did not bar the use of pens altogether or subject them to any form of heightened scrutiny; it merely required that the police policy dating to February 2003 be altered to provide improved ingress and egress from the pens.[95]

As the discussion of the campaign "free speech zones" above indicates, the space around public officials has also become far more tightly regulated in recent years. Presidents, national candidates, and other high-level officials travel inside security "bubbles" for obvious and understandable safety reasons.[96] But this spatial tactic is now routinely being used by public officials of various ranks and stations. To protest the fact that they did not yet have a labor contract, members of New York City police and firefighter unions recently attempted to trail Mayor Michael Bloomberg as he attended the 2004 Republican National Convention.[97] A federal district court upheld various security measures that the mayor's security detail and local police enforced against the unions and other protesters, including a half-block "bubble" or speech-free zone.[98] The court rejected the union members' request that they be permitted to come within fifteen feet of the mayor to convey their specific message.[99]

Finally, at an even finer level, the government has resorted to more physical spatial tactics to control dissent. On the final evening of the 2004 Republican National Convention, nearly 1,800 protesters were arrested on the streets.[100] In addition to pens and other barricades, the police unveiled a new spatial technique: officers used large orange *nets* to divide and capture protesters.[101] Police, for example, were able to thwart a protest mounted by

92. Preston, *supra* note 89, at B4.

93. *Id.*

94. *Stauber*, 2004 WL 1593870.

95. *Id.* at *29.

96. *See, e.g.*, Michael Settle, *Bush Fans Flame of Freedom*, HERALD (Glasgow), Jan. 21, 2005, at 1 (reporting that former presidents, leading politicians, judges, businessmen, family, and friends observed the inauguration from inside a security bubble); Wayne Washington, *NATO Plan Nears; Bush Courts Turks*, BOSTON GLOBE, June 28, 2004, at A1 (explaining that President Bush's security bubble kept him well away from protesters at the North American Treaty Organization summit in 2004); Rick Westhead et al., *Thousands Test Tight Security Bubble*, TORONTO STAR, Dec. 1, 2004, at A03 (describing the security zone around President Bush during a visit to Canada, which contained thousands of police and Secret Service agents).

97. Preston, *supra* note 6, at B7.

98. *Id.*

99. *Id.*

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

101. *Id.*

bicyclists by throwing a net across a public street.[102] Casting nets is not a finely tailored spatial technique. As might be expected, authorities snared a number of innocent bystanders.[103]

Beginning from a very sound premise, namely that a degree of order and safety must be maintained, authorities have effectively controlled and even suppressed core political dissent by designing and constructing tactical places for it. Cages, zones, pens, and even nets are the new weapons of choice in the clash between security and expressive freedom. Spatial tactics are fundamentally altering expressive and associative rights in public places.

B. Abortion Clinic "Buffer Zones" and "Bubbles"

The use of spatial tactics is not limited to political demonstrations. Social and political protest have also been geometrically confined and restrainecl in other situations. Indeed, spatial tactics first arose as a response to demonstrations outside abortion and other public health clinics. In this context, as in others, government has relied upon spatial tactics to confine and control speakers who wish to convey upsetting and offensive messages.

Demonstrators at abortion clinics have utilized provocative language, and sometimes even resorted to violence, to urge patients to reconsider their decision to have an abortion.[104] Incidents of physical violence or property destruction are, of course, subject to prosecution under the criminal laws. Officials have relied instead on prophylactic spatial tactics to defuse the environment around abortion clinics. Delivery of the protestors' message at or near these clinics has raised two distinct spatial problems. First, the space around the clinic must be generally free of obstructions, so that patrons can gain access to the property. Second, legislators and courts have sought to provide clinic visitors some minimal "personal space" or privacy as they seek to visit the clinics. There must bc, they havc reasoned, some line past which

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102. *Id.*

103. *Id.* (noting that police mistakes included "the arrest of several innocent bystanders and nonviolent protesters"). *See generally* Michael Slackman & Ann Farmer, *25,000 Abortion-Rights Advocates March to City Hall*, N.Y. TIMES, Aug. 29, 2004, at A27 (describing the ordeal cncountered by 264 people swept up by police nets, including one innocent bystander who spent sixteen hours in a holding cell); Greg B. Smith, *Lawsuits Likely to Sing Blues over NYPD Tactics*, N.Y. DAILY NEWS, Sept. 4, 2004, at 13 (stating that police officials had yct to address "complaints that dozens of innocent people were wrongfully arrested as they walked near protests when police used orange nets to sweep up everyone" during the GOP convention).

104. *E.g.*, *Ex parte* Tucci, 859 S.W.2d 1, 7 (Tex. 1993) ("Throughout the nation, peaceful anti-abortion picketing has given way to increasing incidents of violence, vandalism and trespass, as well as blockading of clinic entrances denying women their right to seek reproductive health services, including abortions."); *see, e.g.*, Schenk v. Pro-Choice Network of W.N.Y., 519 U.S. 357, 363 (1997) ("Counselors would walk alongside targeted women headed toward the clinics, handing them literature and talking to them in an attempt to persuade them not to get an abortion. Unfortunately, if the women continued toward the clinics and did not respond positively to the counselors, such peaceful efforts at persuasion often devolved into 'in your face' yelling, and sometimes into pushing, shoving, and grabbing.").

a protester cannot advance in order to make his case, an embodied space that ensures free physical movement and psychological repose.

Legislatures and courts have developed two distinct spatial tactics to address these issues. First, in the early 1990s, "buffer zones" became the chosen spatial technique for ensuring patients' access to clinic properties.[105] Federal and state legislatures instituted various lines or boundaries to control the spaces around abortion clinics.[106] Courts fashioned injunctive relief that also included specific spatial dimensions.[107]

Second, to protect patients' privacy and repose, the law developed what has come to be known as "the bubble." To illustrate, Colorado's law, enacted in 1993 and upheld in *Hill v. Colorado*,[108] required protesters to stay eight feet from anyone entering or leaving an abortion clinic, as long as the clinic visitor was within 100 feet of the entrance.[109] The Court characterized this statute as a content-neutral "regulation of the places where some speech may occur."[110]. The State's interests in protecting access to the clinics and women's right to privacy (on the public sidewalks) were deemed sufficiently important and unrelated to the suppression of any social or political message.[111] The 100-foot buffer zone, along with an 8-foot embodied bubble, were considered adequately tailored to serve the State's important interests.[112]

In *Madsen v. Women's Health Center*,[113] the Court upheld an injunctive "speech-free buffer zone" that prohibited all demonstrations within 36 feet of an abortion clinic.[114] This effectively displaced anti-abortion protesters. For

105. *See* Nat Hentoff, *Protesting Up-Close*, WASH. POST, Dec. 2, 1995, at A21 (noting that "[m]unicipal ordinances and court injunctions . . . have led to the establishment in a number of cities of buffer zones around abortion clinics"); *see also* George Flynn, *Permanent Order Limits Abortion Foes*, HOUS. CHRON., Dec. 6, 1994, at A13 (describing an injunction that established "permanent buffer zones against protests at [abortion] clinics and physicians' residences"); Jerry Gray, *Bill Shields Abortion Clinics from Protests*, N.Y. TIMES, Dec. 23, 1991, at B6 (describing an attempt in New Jersey to pass a law creating a 100-foot buffer zone around healthcare centers).

106. *See, e.g.*, Freedom of Access to Clinic Entrances Act, 18 U.S.C. § 248 (2000) (prohibiting intentionally injuring, intimidating, or physically interfering with any person seeking to obtain reproductive health services near a health care facility); COLO. REV. STAT. ANN. § 18-9-122(3) (West 2004) (barring any person within 100 feet of a health care facility, defined to include abortion clinics, from approaching another person within eight feet of that other person, with the purpose of passing out a leaflet or engaging in "oral protest").

107. *See, e.g.*, *Schenk*, 519 U.S. at 364 (holding that the district court's injunction provision banning demonstrations within fifteen feet of doorways or doorway entrances of abortion clinics was constitutional); United States v. Scott, 958 F. Supp. 761, 780–84 (D. Conn. 1997) (permanently enjoining an abortion protester from coming within fourteen feet of an abortion clinic's entrance), *aff'd in part, rev'd in part sub nom.* United States v. Vazquez, 145 F.3d 74 (2d Cir. 1998).

108. 530 U.S. 703 (2000).

109. COLO. REV. STAT. ANN. § 18-9-122 (West 2004).

110. *Hill*, 530 U.S. at 719.

111. *Id.* at 715–16, 720.

112. *Id.* at 730.

113. 512 U.S. 753 (1994).

114. *Id.* at 770.

instance, the buffer zone rendered the passing of information to prospective patients impossible. Notably, in *Madsen* the Court purported to impose a standard for injunctions that it described as "somewhat more stringent" than the usual time, place, and manner standard.[115] Ordinarily courts emphasize that with regard to spatial tailoring, place regulations need not be the least restrictive alternative available to the state.[116] But in *Madsen* the Court noted that in order to be tailored an injunction must "burden no more speech than necessary to serve a significant government interest."[117] According to the Court, this revised standard acknowledged that specific injunctive regulations of place raise greater content discrimination concerns than do generally applicable statutes.[118] Specifically, the Court observed that injunctions "carry greater risks of censorship and discriminatory application than do general ordinances."[119] Even under the revised standard, however, the Court had little difficulty concluding that the 36-foot buffer satisfied the First Amendment.[120]

Finally, the Court upheld another combination bubble–buffer zone in *Schenck v. Pro-Choice Network of Western New York*.[121] The injunction in *Schenck* prohibited anti-abortion demonstrators from demonstrating within 15 feet of abortion clinic entrances and driveways, and within 15 feet of vehicles and patients entering or leaving a clinic.[122] The former restriction was referred to as a "fixed" buffer zone, and the latter as a "floating" buffer zone.[123] The Court held that the fixed buffer zone satisfied the *Madsen* standard.[124] The 15-foot zone, the Court held, did not burden more speech than necessary to serve the government's interests in traffic flow, public safety, and preservation of women's freedom to seek abortion services.[125]

The floating buffer zone, however, was invalidated on overbreadth grounds.[126] Among other infirmities, the Court noted that the floating zone conceivably applied even to those who lined the sidewalks and curbs to

115. *Id.* at 765.

116. *See, e.g.*, *Hill*, 530 U.S. at 726 ("As we have emphasized on more than one occasion, when a content-neutral regulation does not entirely foreclose any means of communication, it may satisfy the tailoring requirement even though it is not the least restrictive or least intrusive means of serving the statutory goal."); Ward v. Rock Against Racism, 491 U.S. 781, 798 (1989) (reaffirming "that a regulation of the time, place, or manner of protected speech must be narrowly tailored to serve the government's legitimate, content-neutral interests but that it need not be the least restrictive or least intrusive means of doing so").

117. 512 U.S. at 765.

118. *Id.* at 764.

119. *Id.*

120. *Id.* at 770.

121. 519 U.S. 357 (1997).

122. *Id.* at 366 n.3.

123. *Id.* at 361.

124. *Id.* at 380–83.

125. *Id.* at 376.

126. *Id.* at 377.

chant, shout, or hold signs.[127] Moreover, the Court noted that it would have been nearly impossible to enforce such a floating zone.[128]

In this context, as in the larger political arena, officials have turned to spatial tactics to defuse a highly charged expressive environment. The areas near abortion clinics now resemble spatial grids. They are marked with buffer zones and protective listener bubbles. Spatial tactics substantially burden rights of association and expression near clinics. They confine speakers to fixed areas. They facilitate separation, avoidance, and surveillance of offensive speakers and speech. They rob speakers of proximity and immediacy that is critical to their message. They substantially burden, if they do not entirely prohibit, face-to-face speaker and listener interaction. And they do all of these things in what remain nominally *public* places.

C. University "Free Speech" Zones

Spatial tactics have also become a means of controlling and disciplining expression on university campuses. In the 1980s and 1990s, several universities adopted "speech codes" to combat sexual and racial harassment.[129] For a number of reasons, not least of which were the vagueness and overbreadth of the codes, as well as their sometimes evident purpose to suppress certain viewpoints, the codes were invalidated by courts.[130]

This, of course, did not eradicate the problem of harassing, disturbing, and racist expression on college campuses. University administrators, unwilling or unable to suppress these ideas outright, sought other means to limit and control such expression. Many universities, among them Texas Tech University, New Mexico State University, West Virginia University, the University of Mississippi, and Florida State University, turned to spatial tactics.[131] These institutions replaced their free speech codes with free speech zones. Here, in yet another charged context, the government sought to quell social and political unrest by turning to place.

Naturally, university officials, like other government officials, insist that free speech zones serve interests unrelated to the content of the expression—

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127. *Id.*

128. *Id.* at 378 n.9.

129. William Celis, *Universities Reconsidering Bans on Hate Speech*, N.Y. TIMES, June 24, 1992, at A13 (noting that an estimated "100 colleges and universities in the United States have adopted codes that prohibit discriminatory or threatening remarks . . . based on race, religion, ethnicity, gender or sexual orientation").

130. *See, e.g.*, Doe v. Univ. of Mich., 721 F. Supp. 852, 866 (E.D. Mich. 1989) (striking down the university's speech code as overbroad and vague); *see also* Charles R. Lawrence III, *If He Hollers, Let Him Go: Regulating Racist Speech on Campus*, 1990 DUKE L.J. 431, 477 (arguing that universities had drafted vague and overbroad regulations to appease "various, widely diverging political constituencies" and with "only passing concern for . . . free speech").

131. *See generally* Davis, *supra* note 9 (describing the use of campus speech zones).

interests like safety and pedagogical mission.[132] In many cases, however, the dimensions of the campus zones leave substantial room for doubt. At West Virginia University, for example, the original speech zone policy limited expressive activity to only two small zones on a very large campus.[133] Faculty members described these zones as being "roughly the size of a classroom."[134] Under pressure from students and faculty, the university expanded the number of zones from two to seven.[135] Still, the space encompassed within the expanded area of seven free speech zones amounted to no more than 5% of the total campus.[136] Ultimately, faced with litigation and, perhaps more importantly, negative publicity, the university relented and abandoned its speech zone policy.[137]

New Mexico State University similarly set aside three small free speech zones.[138] Plaintiffs alleged that two of those areas had virtually no pedestrian traffic at all.[139] Faced with bad publicity and community dissent, the university adopted a new policy that did not utilize speech zones.[140] This has been a relatively consistent pattern, as administrators first turn to tactical zoning only to later reverse their policies in the face of litigation and public pressure.[141] This does not mean that the zoning issue is not alive on campuses today. Unchallenged zoning policies, of course, remain in place.[142] And the temptation to turn to spatial tactics is certain to recur with each episode of campus agitation and unrest. Indeed, a lawsuit was recently filed challenging the University of Maryland's restrictions on outdoor public

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132. *See, e.g.*, Roberts v. Haragan, 346 F. Supp. 2d 853, 864 (N.D. Tex. 2004) (holding that, due to safety concerns, a university had a legitimate interest in restricting speech to certain areas); Auburn Alliance For Peace & Justice v. Martin, 684 F. Supp. 1072, 1076–78 (M.D. Ala. 1988) (noting that a university's student affairs office may restrict speech to certain facilities to avoid conflict with academic activities), *aff'd*, 853 F.2d 931 (11th Cir. 1988).

133. Davis, *supra* note 9, at 294–95.

134. *Id.* at 295.

135. *See* Josh Hafenbrack, *Protest Freedoms Reviewed; WVU President Calls Regulations 'Practical Necessity'*, CHARLESTON DAILY MAIL, June 14, 2002, at 1A (noting that under the university's new policy "[c]rowds larger than 15 are now confined to the areas near [the student union], like under the old [speech] policy, plus six additional spots").

136. *See* Tara Tuckwiller, *Bush Twins Talk at WVU; Protesters Nearby*, CHARLESTON GAZETTE, Sept. 23, 2004, at 1C, *available at* 2004 WLNR 1198611 ("And at WVU two years ago, protests were confined to 'free speech zones'—less than 5 percent of campus where university officials had decided people would be allowed to speak freely.").

137. Davis, *supra* note 9, at 294.

138. Randal C. Archibold, *Student Life; Boxing in Free Speech*, N.Y. TIMES, Apr. 8, 2001, at 4A.

139. David L. Hudson Jr., *Free Speech Zones*, FIRST AMENDMENT CENTER: FREE SPEECH ON PUBLIC COLLEGE CAMPUSES, http://www.firstamendmentcenter.org/speech/pubcollege/topic.aspx?topic=free-speech_zones.

140. Archibold, *supra* note 138, at 4A.

141. *See, e.g.*, Davis, *supra* note 9, at 296 (describing how California's Citrus Community College rescinded policies establishing speech zones in the face of a lawsuit).

142. *See* HARVEY A. SILVERGLATE ET AL., FIRE'S GUIDE TO FREE SPEECH ON CAMPUS 143 (2005) (noting the increasing prevalence of free speech zones on college campuses).

speaking and leafleting.[143] The university reportedly limited public speaking on its 1,500-acre campus to a single stage, while limiting the distribution of literature to certain designated sidewalk space.[144]

Although no court has specifically ruled on the constitutionality of campus free speech zones, university administrators have some reason to be confident of their validation. A federal district court recently examined the speech policy adopted by Texas Tech University Law School.[145] The policy included among its provisions the designation of a "free speech area."[146] The area, referred to as the "Gazebo," was a "free-standing structure of approximately 400 square feet adjaeent to the Student Union building."[147] The plaintiff was initially asked by the university to confine his expressive activities to this area, although he was eventually permitted to speak at a location approximately 20 feet from the one he had requested.[148] The plaintiff filed suit complaining that the policy violated his First Amendment rights.[149] Based upon the "character of a public university campus," the district court determined that the park areas, sidewalks, streets, and other "common areas . . . are public forums, at least for the University's students, irrespective of whether the University has so designated them or not."[150] In these areas, heightened scrutiny would apply to any content-based speech restrictions.[151] The court treated the "free speech area," the Gazebo, as a designated public forum subject to the usual standards for content-neutral place regulation.[152] However, it ignored the propriety of zoning itself and ultimately invalidated the university's policy, not because it zoned speech in this manner, but because its requirement that students obtain permission prior to speaking was overly burdensome.[153]

There have been few decisions specifically addressing the constitutionality of campus "free speech zones." Universities that have been challenged have thus far tended to capitulate to public and legal pressure to abandon the tactic. But the temptation to seek to discipline and control campus expression is real. Speech zones remain in place on a number of campuses today. Given courts' treatment of zoning generally, and tactical places specifically, there is no reason to believe that courts will treat these

143. *See* AM. CIVIL LIBERTIES UNION, *supra* note 23, at 6 (discussing protest restrictions on college campuses after September 11, 2001).

144. *Id.*

145. Roberts v. Haragan, 346 F. Supp. 2d 853 (N.D. Tex. 2004).

146. *Id.* at 856.

147. *Id.* at 866 n.18. Under a later, "interim" policy, this area was expanded to include other "forum areas" for expression. *Id.*

148. *Id.* at 856–57.

149. *Id.* at 857. After the suit was brought, the university amended its rules and adopted a new "interim policy," against which the plaintiff brought a facial challenge. *Id.*

150. *Id.* at 858, 861.

151. *Id.* at 862.

152. *Id.* at 862, 868.

153. *Id.* at 869–70.

speech zones as anything other than content-neutral regulations of the place of expression. Campus speech zones are, at least, far more likely to survive scrutiny than the campus speech codes they replaced.

D. "Free Speech" and "Speech-Free" Zones in Other Public Places

Increasingly, public places are being partitioned into free speech and speech-free zones. The upshot is that one makes a point in the designated places, or one does not make it at all.

Some type of zoning has been applied to, among other spaces, airports,[154] schools,[155] suburbs,[156] sports arenas,[157] military bases,[158] polling places,[159] churches,[160] courthouses,[161] and other common areas.[162] Spatial tactics are everywhere; even areas around cemeteries and funerals are now subject to spatial restrictions in several states.[163] Some of these spatial tactics are referred to as "free speech" zones.[164] The name certainly implies speech

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154. *See, e.g.*, ISKCON Miami, Inc. v. Metro. Dade County, 147 F.3d 1282, 1290–91 (11th Cir. 1998) (upholding the designation of eight "First Amendment zones" within an airport for the distribution of literature); Springfield v. San Diego Unified Port Dist., 950 F. Supp. 1482, 1485 (S.D. Cal. 1996) (examining an ordinance limiting expressive activity within an airport to a handful of 10-by-14 foot "Authorized Solicitation/Free Speech Zones").

155. *See, e.g.*, Police Dep't of Chi. v. Mosley, 408 U.S. 92, 101–02 (1972) (rejecting a 150-foot protest buffer zone around schools as unconstitutional).

156. *See, e.g.*, Kirkeby v. Furness, 92 F.3d 655, 658 (8th Cir. 1996) (examining a "[r]estricted picketing zone" that banned picketing within 200 feet of residences).

157. *See, e.g.*, Weinberg v. City of Chicago, 310 F.3d 1029, 1033–34 (7th Cir. 2002) (involving a First Amendment challenge brought by a bookseller to an ordinance prohibiting "peddling" of merchandise within 1,000 feet of the United Center, "home of the Chicago Blackhawks professional hockey team").

158. *See, e.g.*, United States v. Lowe, 654 F.2d 562, 567 (9th Cir. 1981) (upholding a probation term imposing a 250-foot buffer zone around a submarine base).

159. *See, e.g.*, United Food & Commercial Workers Local 1099 v. City of Sidney, 364 F.3d 738, 748 (6th Cir. 2004) (upholding a "campaign-free zone" within 100 feet of a polling place's entrance); Anderson v. Spear, 356 F.3d 651, 657 (6th Cir. 2004) (invalidating a 500-foot campaign-free zone); Freeman v. Burson, 802 S.W.2d 210 (Tenn. 1990) (involving challenges to statutes prohibiting the solicitation of votes within a 100-foot radius of polling places on election day), *rev'd*, 504 U.S. 191 (1992).

160. *See, e.g.*, Edwards v. City of Santa Barbara, 150 F.3d 1213, 1215–16 (9th Cir. 1998) (upholding a city ordinance prohibiting demonstrations within 8 feet of entrances to places of worship).

161. *See, e.g.*, Grider v. Abramson, 180 F.3d 739, 750–51 (6th Cir. 1999) (upholding a "buffer zone" around a courthouse for security reasons during a Ku Klux Klan rally); *see also Los Angeles Bans Ticket Challenge Assistance*, THENEWSPAPER.COM, Dec. 8, 2005, http://www.thenewspaper.com/news/08/824.asp (noting that the Los Angeles County Court has issued rules prohibiting "education or counseling" within 100 feet of a courthouse in response to protesters' initiation of legal challenges to red light camera tickets).

162. *See, e.g.*, Lee v. Katz, 276 F.3d 550, 553 (9th Cir. 2002) (reviewing the designation of three 10-by-10 foot "free speech zones" located in a privately leased, outdoor public area owned by Portland City and challenged in a suit brought by street preachers).

163. *See supra* note 10.

164. *See, e.g.*, Lee v. Katz, 276 F.3d at 558 (noting that "plaintiffs have also, on occasion, violated the free speech zones"); Springfield v. San Diego Unified Port Dist., 950 F. Supp. 1482, 1485 (S.D. Cal. 1996).

facilitation, but the spaces tend to be quite small in relation to the area of public space that is then deemed off limits to expressive activity.[165] Other tactics are sometimes referred to as designated "speech-free zones."[166] These zones, as their name implies, create spaces where speech is expressly prohibited.[167] They tend to be much larger in dimension than "free speech" zones.[168] The two basic types of zones are, of course, closely related; whenever a "free speech" zone is created, the unaffected space becomes a de facto "speech-free" zone.

As noted, this resort to spatial tactics to control speech in public places has become the norm. In a word, spatial tactics have become institutionalized. Today it is the rare public facility, institution, or space that does not have a free speech policy. Such policies now routinely provide for tactical places where expressive activity is permitted. The Cow Palace in San Francisco, for example, adopted a "First Amendment Expression Policy" that prohibited individuals from "demonstrating" outside the Palace except in designated "free expression zones."[169] A "demonstration" was defined to include "oral advocacy within 75 feet from any point along the front entrance and/or in the fire zones."[170] In other words, the policy established a 75-foot "speech-free" zone adjacent to the Palace. The policy further provided for the creation of three "free expression zones onsite for purposes of demonstrations."[171] All three "free expression zones" were placed on the perimeter of a parking lot outside the Palace.[172] The zones were each roughly the size of a parking space; two of the zones were 10-by-20 feet, and the third was 16-by-18 feet.[173] All of the "free expression zones" were "located between 200 and 265 feet from the main entrance doors to the arena."[174] None of the zones provided any meaningful access to patrons

165. *See* SILVERGLATE ET AL., *supra* note 142, at 143–44 (observing that because free speech zones only accounted for 1% of West Virginia University, the remaining 99% of the campus effectively constituted "Censorship Zones"); *see also supra* notes 154–162 (describing the exceptionally small size of many free speech zones).

166. *See, e.g.*, Kirkeby v. Furness, 92 F.3d 655, 661 (8th Cir. 1996) (discussing the constitutionality of a "'speech-free' zone," also referred to as a "'First-Amendment-free zone'").

167. *See* Horizon Health Ctr. v. Felicissimo, 638 A.2d 1260, 1272 (N.J. 1994) ("The paragraph-three restriction effectively creates a speech-free or buffer zone around the Center: defendants may not engage in expressive activity in front of the Center because they must remain across the street.").

168. *Compare* Lee v. Katz, 276 F.3d 550, 553 (9th Cir. 2002) ("designat[ing] three free speech zones . . . each approximately 10 feet by 10 feet in size"), *and Springfield*, 950 F. Supp. at 1485 ("allow[ing] individuals or groups to engage in these prohibited activities only in a handful of 10′ x 14′ 'Authorized Solicitation/Free Speech' zones"), *with Kirkeby*, 92 F.3d at 660 (involving a speech-free zone that prohibited protesting within 200 feet of a person's house).

169. *See* Kuba v. 1-A Agric. Ass'n, 387 F.3d 850, 853–54 (9th Cir. 2004) (discussing the Cow Palace's "First Amendment Expression Policy").

170. *Id.* at 853.

171. *Id.*

172. *Id.* at 854.

173. *Id.*

174. *Id.*

walking from the parking lots to the Palace.[175] This is now a typical spatial arrangement in the areas surrounding public accommodations.

In sum, there has been a remarkable recent rise in the government's resort to spatial tactics to control and discipline expression, particularly expression that agitates, threatens, disturbs, or carries a message of political protest. Generally speaking, the free spcech and spcech-free zones described in this Part are accorded a minimal level of judicial scrutiny. As the Boston speech cage and countless other existing speech zones demonstrate, the "intermediate" level of scrutiny applicable to content-neutral regulations of place does not ordinarily bar the use of such spatial tactics. Content-ncutral regulations are acceptable so long as they purport to serve a substantial governmental interest and do not unreasonably limit alternative avenues of communication.[176] As applied, these are very minimal standards. As one scholar has observed: "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."[177]

This permissive manipulation of place should disturb a society so rightfully proud of its commitment to expressive freedom, particularly its tolerance of public dissent. These spatial tactics are creating public places that not only fail to facilitate public dissent but are hostile to it. As discussed in greater detail in Parts III and IV, tactical places suppress certain viewpoints, thereby distorting the marketplace of social and political discourse. They brand protesters as inherently dangerous members of society. They create an environment in which protesters and others who express divisive ideas are segregated, shunned, and ultimately avoided. Spatial tactics, then, are not run-of-the-mill regulations of the place where speech may occur.

II. Place as *Res*

It is difficult at first to comprehend how something like the Boston speech cage, the "internment camp" the district court described as "a symbolic affront to the role of free expression,"[178] could survive First Amendment scrutiny. How is it that place can be so liberally manipulated, in this and the various other examples just discussed, to control the exercise of fundamental expressive rights? The puzzle becomes less baffling once one closely examines the theoretical and doctrinal roots of the First Amendment

175. One zone was located at the bottom of a stairway and offered no opportunity to pass out leaflets or speak to patrons; another zone was located such that patrons were separated from demonstrators by barricades and moving cars, making communication "virtually impossible." *Id.*

176. Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 293 (1984).

177. Susan H. Williams, *Content Discrimination and the First Amendment*, 139 U. PA. L. REV. 615, 644 (1991) (emphasis added).

178. Coal. to Protest the Democratic Nat'l Convention v. United States, 327 F. Supp. 2d 61, 74–75 (D. Mass. 2004), *aff'd sub nom.* Bl(a)ck Tea Soc'y v. City of Boston, 378 F.3d 8 (1st Cir. 2004).

concept of place. This Part examines the current conception of place, the one that accounts for the constitutional doctrine of place. Part III will sketch a reconceptualization of place that views it as distinctly *expressive*. Part IV will examine the doctrinal implications of the conception of expressive place. It will suggest an approach to spatial tactics that takes into account the intersection of speech and spatiality in tactical places.

The permissive treatment of spatial tactics can be definitively traced to the core idea that place is merely *res*—a neutral container, a backdrop for expression, an inanimate property defined by normatively neutral boundaries. Indeed, the principal presumption of the First Amendment doctrine of place—the combination of the public forum and time, place, and manner doctrines—is that speech and spatiality have little to do with one another. Neither the government's choice to keep a forum closed to expression, for example, nor its decision to significantly displace or confine speech is presently treated as if it raises substantial First Amendment concerns. This judicial attitude springs from the Court's initial decision, one neither initially nor subsequently justified with any theoretical rigor, to treat place solely as property or *res*. For if place is nothing more than a public resource, the power to regulate, manage, and control it belongs primarily to the state. That, as we shall see, accurately summarizes the history and current position of place.

A. State-As-Owner of Place

When place first entered constitutional and, specifically, judicial consciousness, public places like streets, sidewalks, and parks were the principal contested public areas. To the legal and judicial mind, these public places were naturally considered a genus of property. This meant, of course, that someone or something *owned* them and their corresponding bundles of rights.

In the nineteenth century, the sovereign state owned these places. So said Oliver Wendell Holmes, Jr., sitting as a justice of the Massachusetts Supreme Judicial Court. In *Commonwealth v. Davis*, Davis made a speech on the Boston Common without a permit from the mayor.[179] Holmes, speaking for the court, upheld Davis's conviction under a state licensing law.[180] The future Supreme Court Justice said: "For the Legislature absolutely or conditionally to forbid public speaking in a highway or public park is no more an infringement of the rights of a member of the public than for the owner of a private house to forbid it in his house."[181] The Supreme

179. *See* Commonwealth v. Davis, 4 N.E. 577 (Mass. 1886) *and* 39 N.E. 113 (Mass. 1895) (disposing of a defendant charged under the statute requiring government permission to "deliver a sermon, lecture, address, or discourse on the [Boston] Common"), *aff'd sub nom.* Davis v. Massachusetts, 167 U.S. 43 (1897).

180. Commonwealth v. Davis, 39 N.E. at 113.

181. *Id.*

Court affirmed on similar logic: "The right to absolutely exclude all right to use, necessarily includes the authority to determine under what circumstances such use may be availed of, as the greater power contains the lesser."[182]

Thus, just as a private homeowner controlled access to and activity upon his lawn or front porch, so did the state own and control the streets, sidewalks, and parks—what we now refer to as "traditional public forums." A citizen could no more occupy a public park without the state's permission than he could sit in his neighbor's back yard without an invitation. In other words, at the very moment it entered constitutional consideration, place was conceptualized as nothing more than *res*. The bundle of rights in the *res* of place initially belonged exclusively to the state.

B. State-As-Trustee of Place

It should come as no particular surprise that this ownership theory did not survive. Much of the revolutionary past had been acted out on the public streets and in other public places. Although the concept of state-as-owner of wide swaths of public space officially survived for some four decades, it was seemingly formally abandoned in *Hague v. CIO*.[183] In *Hague*, the Supreme Court invalidated a Jersey City ordinance that imposed a permit requirement for speech in all public places.[184] In now famous dictum, the Court stated that wherever *title* to the streets and public parks may lie, these spaces 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."[185]

This dictum subtly transformed the state from the owner of public streets and parks to the trustee of the *res* of such public places. Although the change in state status and function was significant, it occurred without any theoretical reconsideration of the basic concept of place. The *Hague* Court merely replaced state-as-owner with another familiar legal property concept, namely state-as-*trustee*. Place remained *res*.

What did change was the nature of the state's relationship to the *res*. As a result of the state's transition from owner to trustee, the focus of this relationship shifted away from the state's right to exclude persons from the *res*. The state appeared to have lost this power, at least with regard to streets and parks. Instead, judicial attention turned to setting the operative rules of the metaphorical trust. As trustee, the state had an obligation to preserve and manage the *res* of public space for the benefit of the people, the putative trust beneficiaries. Like any other trustee, the state had an obligation to do so

182. Davis v. Massachusetts, 167 U.S. at 48.
183. 307 U.S. 496 (1939).
184. *Id.* at 500, 518.
185. *Id.* at 515 (emphasis added).

neutrally, without official bias concerning the substance of what a speaker or user said in these places. As trustee, the state was to perform several basic tasks: to guarantee some minimal right of access to the public streets, sidewalks, and parks; to resolve competing claims to the *res*; and to generally preserve the condition of the *res* for public use.

As noted, the metaphorical trust did not permit the trustee–state to completely deny citizens access to the trust *res*. "Such use of the streets and public places," the *Hague* Court said, "has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens."[186] Some minimal right of access had passed to citizen–beneficiaries through the mythical trust instrument. Indeed, many of the early cases involving consideration of access to public streets and sidewalks emphasized this basic right of access.[187] This was, of course, the famous era of the Jehovah's Witnesses, who sought to distribute handbills and other literature on the streets, where people could generally be found.[188] It was in this era that the Court most jealously guarded the beneficiary's right of access. The public streets and parks were not places where listeners could expect to be protected from offensive speech. Indeed, the Court emphasized in particular the state's obligation to protect the dissemination of "novel and unconventional ideas [that] might disturb the complacent."[189] The trust provided the unwilling listener no general right of privacy on the public ways; the First Amendment in this respect protected a robust public square.

But if the property ownership model upset deeply felt republican sensibilities, the idea that public places were to be simply thrown open to the masses threatened order and, perhaps ultimately, the rule of law. The state is, of course, no ordinary trustee. It is at once trustee and sovereign, and in the latter capacity possesses substantial police powers. To further the *res* metaphor, these powers might be considered part of a metaphorical addendum to the trust instrument. By virtue of these special powers, the state is authorized to resolve competing claims to the *res*. As the Court observed, some regulation of public places like streets was necessary "'to prevent confusion by overlapping parades or processions, to secure convenient use of the streets by other travelers, and to minimize the risk of disorder.'"[190] So long as the state was not given *absolute* discretion to exclude persons from the trust *res*, for instance through an unbridled licensing scheme, it would be

186. *Id.*

187. *See, e.g.*, Schneider v. State, 308 U.S. 147, 160 (1939) (striking down ban on distribution of literature).

188. *See* Kalven, *supra* note 26, at 1 (noting the early influence of Jehovah's Witnesses on the development of the public forum concept).

189. Martin v. City of Struthers, 319 U.S. 141, 143 (1943).

190. Cox v. New Hampshire, 312 U.S. 569, 576 (1941) (quoting State v. Cox, 16 A.2d 508 (N.H. 1940)); *see also* Grayned v. City of Rockford, 408 U.S. 104, 115 (1972) (stating that "two parades cannot march on the same street simultaneously, and government may allow only one").

permitted, as any trustee must be, to resolve competing claims to the *res*.[191] There was no apparent reason to suppose that the state, as trustee, would fail to perform this task in a neutral and objective manner.[192]

In addition to resolving competing claims of access, the trustee–state was also supposed to ensure that no beneficiary or group of beneficiaries substantially interfered with the primary purpose for which streets and other public thoroughfares exist. In fact, the origins of the "time, place, and manner" doctrine lie here, in the state's power to preserve the *res* for its primary use.[193] The earliest spatial restrictions focused on ensuring the free flow of traffic on public ways.[194] As the Court observed in one early case, "[A] person could not exercise [First Amendment rights] 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."[195] As well, "[A] group of distributors could not 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."[196] Nor, of course, would one be "justified in ignoring the familiar red traffic light because he thought it his religious duty to disobey the municipal command."[197]

These are exceptionally easy cases. Note in particular the evident neutrality of these sorts of spatial concerns—two conflicting parades or processions; speeches in the middle of crowded streets; the outright blockage of all pedestrian traffic. The state, no less than any ordinary trustee, must be empowered to combat this sort of confusion and disorder when it impacts the *res* of public place. Indeed, it has an obligation under the trust to do so.[198] There was thus no reason to question the state's neutrality, or to look for any covert biases in early spatial regulations. Indeed, it was nearly impossible to

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191. *See Cox*, 312 U.S. at 576 (agreeing with the state court that because the statute did not vest the licensing board with "arbitrary power or an unfettered discretion," the state could still issue licenses for parades or processions in order to "giv[e] the public authorities notice . . . to afford opportunity for proper policing").

192. *See id.* ("If a municipality has authority to control the use of its public streets for parades or processions, as it undoubtedly has, it cannot be denied authority to give consideration, without unfair discrimination, to time, place and manner in relation to the other proper uses of the streets.").

193. *See id.* (noting that with regard to a license for a parade or procession, the state court had considered factors of "time, place and manner so as to conserve the public convenience" when defining the duties of the licensing authority and potential licensee); *cf.* Steven L. Winter, *An Upside/Down View of the Countermajoritarian Difficulty*, 69 TEXAS L. REV. 1881, 1885–1901 (1991) (noting that *Hague*'s "time, place, and manner" doctrine for public spaces was developed in accordance with changing conceptions of the purposes of such public spaces).

194. *See, e.g.*, Schneider v. State, 308 U.S. 147, 160 (1939) ("Municipal authorities, as trustees for the public, have the duty to keep their communities' streets open and available for movement of people and property, the primary purpose for which the streets are dedicated.").

195. *Id.*

196. *Id.*

197. *Cox*, 312 U.S. at 574.

198. *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.").

detect any connection between speech and spatiality in these circumstances. The state was not at this point segmenting, zoning, or partitioning public places. It was dealing with the *res* of place as it was, as it existed. In managing place in this fashion, the state could plausibly argue that it was managing things like traffic and competing uses, not expression and dissent.

More or less simultaneously with its initial consideration of spatial regulations, the Court was also beginning to confront issues regarding the appropriate timing and manner of expression in public places. Trust beneficiaries obviously could not be permitted to use the trust *res* at all hours, or in any manner they wished. Early cases emphasized, for example, that one could not claim a constitutional right to disturb the peace by blaring loudspeakers in the middle of the night on a residential street.[199] So the metaphorical trust was amended once again, this time to include some degree of state control over the *time* and *manner* of expression as well as over its *place*. And as with place, so long as the trustee–state did not use time or manner as a pretext for content discrimination, it would be permitted to regulate these aspects of the expressive environment as well.

The concept of place as trust *res* was simply a reflexive substitution of one familiar legal property model for another. Although the state did not own public places, its grip on them remained substantial under the model of trusteeship. Note that from the beginning, the Court's conception of place was primarily instrumental. The trustee was empowered to preserve "the primary uses of streets and parks."[200] Of course, the primary use of the streets is the conveyance of people and vehicles, not thoughts and ideas. Parks exist primarily for entertainment, not expression. Moreover, pursuant to the trust, expressive and associative rights extended only to public places "*where people have a right to be for* [speech] *purposes*."[201] It fell principally to the trustee–state to determine the "appropriate" place for the exercise of expressive rights.[202] At least initially, this did not entail expressive zoning and partitioning. The state was able to manage the *res* of place while still providing ample space for public discourse, including often uncomfortable face-to-face interactions.[203]

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199. *See, e.g.*, Kovacs v. Cooper, 336 U.S. 77, 87 (1949) (upholding the general regulation of sound trucks); Saia v. New York, 334 U.S. 558, 562 (1948) (supporting a licensing scheme for the use of amplifiers in public places).

200. Niemotko v. Maryland, 340 U.S. 268, 276 (1951).

201. Cox v. Louisiana, 379 U.S. 559, 578 (1965).

202. *See* Schneider v. State, 308 U.S. 147, 163 (1939) ("[One] is not to have the exercise of his liberty of expression in *appropriate* places abridged on the plea that it may be exercised in some other place." (emphasis added)).

203. *See, e.g.*, *id.* at 160 ("So long as legislation [limiting access to public streets] does not abridge the constitutional liberty of one rightfully upon the street to impart information through speech or the distribution of literature, it may lawfully regulate the conduct of those using the streets.").

C. *State-As-Proprietor of Place*

Things became much more complicated when speakers sought access to public places beyond the streets, sidewalks, and parks. The expressive topography, the public space the state was entrusted to manage, rapidly expanded to include a range of new places. Beginning in the 1960s, speakers sought access to a variety of public places where potential listeners might be found. They demanded access to public libraries,[204] jails,[205] buses,[206] military bases,[207] schools,[208] theaters,[209] and mailboxes.[210] Consequently, the Court was forced to approach place more systematically. Having chosen property as a conceptual model for place, the Court was obliged to confront the inherent malleability of this concept. The idea of "place," it turned out, was flexible enough to encompass even metaphysical places, such as candidate debates,[211] charitable campaigns,[212] and government programs.[213]

While the trusteeship functions involved managing the *res* of streets, sidewalks, and parks, these new access claims raised far more substantial issues. Now a method was required for literally *defining* which places were open to expression, and which were not. And, of course, the Court had to

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204. *See* Brown v. Louisiana, 383 U.S. 131, 143 (1966) (holding that a state cannot use regulations as a pretext for imposing criminal penalties on protesters engaged in a lawful and peaceful protest against segregation within a public library).

205. *See* Adderley v. Florida, 385 U.S. 39, 46–47 (1966) (holding that the state could convict protesters under a trespassing statute for entering a nonpublic county jail where the arrests were made because of the trespass and not the content of the protest).

206. *See* Lehman v. City of Shaker Heights, 418 U.S. 298, 302–03 (1974) (holding that bus car cards were not a "public forum," and that the city, no less than any other proprietor, was entitled to make managerial decisions with regard to the advertisements it would accept).

207. *See* Greer v. Spock, 424 U.S. 828, 838–39 (1976) (holding that protesters had no generalized constitutional right to make political speeches at a military base and that government and military authorities may apply objective and even-handed policies that designate military property a nonpublic forum).

208. *See* Police Dep't of Chi. v. Mosley, 408 U.S. 92, 99 (1972) (prohibiting the selective exclusion of certain picketing groups from protesting next to a school).

209. *See* Se. Promotions, Ltd. v. Conrad, 420 U.S. 546, 555–56 (1975) (holding that a municipal theater in which petitioners wished to present a musical was a public forum because it was "designed for and dedicated to expressive activities," and that the government was therefore not permitted to make content distinctions).

210. *See* Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 50–51 (1983) (holding that a school district could distinguish between two teachers' unions, only one of which was the official representative of the township's teachers, in determining access to the school system's interschool mailbox system).

211. *See* Ark. Educ. Television Comm'n v. Forbes, 523 U.S. 666, 669 (1998) (holding that a state-owned public television broadcaster, while subject to constitutional constraints applicable to nonpublic fora, can exclude certain candidates from participation in a televised debate if the decision is based on a "reasonable, viewpoint-neutral exercise of journalistic discretion").

212. *See* Cornelius v. NAACP Legal Def. & Educ. Fund, 473 U.S. 788, 813 (1985) (holding that the government does not necessarily violate the First Amendment when it excludes certain political advocacy and legal defense groups from the Combined Federal Campaign, a charity drive aimed at federal employees).

213. *See* Legal Servs. Corp. v. Velazquez, 531 U.S. 533, 537 (2001) (invalidating speech restrictions in connection with governmental funding).

determine *who* was going to decide this critical question, and with how much, if any, oversight. These were momentous decisions insofar as the exercise of public expressive rights were concerned. Indeed, they would determine the shape of the expressive topography for years to come. Here, then, was a most appropriate opportunity to rethink the idea of place.

But there was to be no broad rethinking of place in this or, indeed, any subsequent era. Instead, the Court proceeded to further entrench the *res* concept. In an important article, Harry Kalven, Jr. interpreted certain cases from the civil rights period as recognizing the critical importance of place to expressive and associative rights.[214] Kalven implicitly accepted the property or *res* model of place. He argued that a "First Amendment-easement" existed with respect to certain public places.[215] Kalven opined that the public streets and parks, in particular, were a "forum" that speakers could "commandeer" in the quest to convince the public to support civil rights.[216] This, of course, turned the early ownership principle almost completely on its head. In the 1970s and 1980s, the Court adopted Kalven's easement metaphor and "forum" terminology.[217] But as the public forum doctrine's history demonstrates, the Court has never approached Kalven's enthusiasm for the power of place to facilitate First Amendment freedoms. It has soundly rejected the notion that speakers can commandeer public places. And it has steadfastly held to the notion that place is merely a form of property or *res*.

Faced with the potential explosion of demand for place, the Court sought to control and simplify it through the vehicle of categorization.[218] The entire mass of public space, the Court said, could be partitioned into "public" and "nonpublic" forums.[219] In the most recent iteration of the state's relationship to place, the Court essentially commissioned the state "proprietor" of all public places.[220] Proprietorship vested the state with even more power over place than it exercised as trustee. Proprietorship meant that the state would be responsible for determining whether a public place, other than a public street, sidewalk, or park, was open to expressive activity *at all*. Thus, with regard to the vast majority of public places, the state was once

214. Kalven, *supra* note 26.

215. *Id.* at 13.

216. *Id.* at 12.

217. *See* 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, 1221–22 (1984) (noting that Professor Kalven's "'public forum' has appeared in . . . thirty-two Supreme Court decisions . . . [and] two of these decisions were rendered prior to 1970 and thirteen of the thirty-two have been in the 1980's" (citations omitted)).

218. *See* Massey, *supra* note 26, at 309 (observing that "the Court has formulated its public forum doctrine—which determines the amount of judicial scrutiny any particular speech restriction on public property receives—almost entirely by categorizing the property").

219. *Id.*

220. *See* United States v. Kokinda, 497 U.S. 720, 725–26 (1990) (discussing the principle of governmental proprictorship of public places).

again owner of the *res*—it possessed the authority to exclude *all* expressive activity on these public properties.

In doctrinal terms, there are now three familiar forum types. The "traditional public forum" is, at least ostensibly, the quintessential free speech zone. Such forums are identified with reference to "objective characteristics" of the *res*, such as whether, "by long tradition or by government fiat," the property has "been devoted to assembly and debate."[221] Streets, sidewalks, and parks are exemplary. In fact, the Court has indicated that they exhaust the category.[222] In these places, ordinary trust rules apply: The state may not prohibit all expressive activity; it can enforce a regulation based upon content or viewpoint only if it can demonstrate a compelling purpose for doing so and can show that its distinction is narrowly drawn to achieve that purpose; and it can enforce reasonable, nondiscriminatory "time, place, and manner" regulations.[223] There are two other types of forums. Neither category directly affects the constitutionality of spatial tactics. It is necessary to describe them, however, in order to accurately depict the Court's current conception of the expressive topography.[224] In addition to traditional public forums, there are "designated" public forums. These expressive places are created only "by purposeful governmental action."[225] Mere inertia or inaction is not enough; a speaker cannot claim any right of access unless the state has intentionally opened the forum to public discourse.[226] That intention must be clearly manifested.[227] Objective indicators of state intent include such things as "the policy and practice of the government" and the "nature of the property and its compatibility with

221. Ark. Educ. Television Comm'n v. Forbes, 523 U.S. 666, 678 (1998); Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983).

222. Indeed, the Court has "rejected the view that traditional public forum status extends beyond its historic confines." *Forbes*, 523 U.S. at 678.

223. *See* Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 293 (1984) (noting that time, place, and manner regulations must be justified without regard to the content of speech, be "narrowly tailored to serve a significant [government] interest," and "leave open ample alternative channels for communication").

224. *Forbes*, 523 U.S. at 677.

225. *Id.*

226. *See id.* (citing Cornelius v. NAACP Legal Defense & Educ. Fund, Inc., 473 U.S. 788, 802 (1985)) (determining that once the goverument intentionally opens a forum for public dialogue, if a speaker in the class of people to which the forum is generally made available is excluded, then the government will be subject to strict scrutiny).

227. *See Cornelius*, 473 U.S. at 802 (explaining that when the government designates a public forum "by intentionally opening a nontraditional forum for public disclosure," the Court looks to a number of "objective" indicators "to discern the government's intent"). *Compare* Widmar v. Vincent, 454 U.S. 263, 267 (1981) (holding that the state evidences a clear intent to create a public forum if it has intentionally opened a venue for public disclosure through an express policy of permitting its meeting facilities to be open to specified persons), *with* U.S. Postal Serv. v. Council of Greenburgh Civic Ass'ns, 453 U.S. 114, 129 (1981) (holding that the Court "will not find that a public fornm has been created in the facc of clear evidencc of a contrary intent, . . . nor will [the Court] infer that the government intended to create a public forum when the nature of the propcrty is inconsistent with expressive activity").

expressive activity."[228] Assuming the state has manifested the requisite intent, the rules of engagement in terms of regulating expression are precisely the same in this sort of forum as in the traditional public forum.[229]

All remaining government properties are essentially speech-free zones; they are either nonpublic forums or are not expressive forums at all.[230] Expressive rights in these places are nearly nonexistent. Here the state's relationship to place is closest to the ownership metaphor.[231] It may make distinctions in access based upon subject matter as well as on the basis of speaker identity.[232] Regulation of access must only be "reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view."[233]

Public forum doctrine has been severely criticized, not least for the absence of any theoretical foundation for the haphazardly derived and simplistic categorical approach.[234] It is unnecessary to revisit those critiques here. The upshot is that the Court has fashioned a very anemic expressive topography, one that does not leave much space for public speech.[235] The Court seems not to have been prepared for the complexity and variability of

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228. *Cornelius*, 473 U.S. at 802.

229. *See* Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45–46 (1983) (holding that the government, when it opens a designated puhlic forum, "is bound by the same standards as apply in a traditional public forum").

230. *Forbes*, 523 U.S. at 677–78. I have purposefully excluded from this general description the idea of the "limited public forum" that, as others have noted, is a doctrinally incoherent concept. *See* Robert C. Post, *Between Governance and Management: The History and Theory of the Public Forum*, 34 UCLA L. REV. 1713, 1757 (1987) (arguing that the Court's subsequent treatments of "limited" public forums "shrink[] the limited public forum to such insignificance that it is difficult to imagine how a plaintiff could ever suceessfully prosecute a lawsuit to gain access to such a forum").

231. *See Perry*, 460 U.S. at 46 (reiterating that the government has essentially all the property rights of a private owner with respect to public property that is not a forum for public communication).

232. *Id.* at 49.

233. *Id.*

234. Representative critiques are numerous. Ronald A. Cass, *First Amendment Access to Government Facilities*, 65 VA. L. REV. 1287, 1308–09 (1979); C. Thomas Dienes, *The Trashing of the Public Forum: Problems in First Amendment Analysis*, 55 GEO. WASH. L. REV. 109, 110 (1986); Farber & Nowak, *supra* note 217, at 1234–35; 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); 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). Robert Post has provided the most rigorous theoretical justification for the Court's public forum doctrine. *See generally* Post, *supra* note 230.

235. *See* Farber & Nowak, *supra* note 217, at 1234 (arguing that the public forum doctrine has "only confused judicial opinions by diverting attention from the real first amendment issues involved in the cases"); Post, *supra* note 27, at 1777 (concluding that the public forum doctrine's "present focus 'on the character of the property at issue' is a theoretical dead end, because there is no satisfactory theory connecting the classification of government property with the exercise of the first amendment rights").

place that confronted it in the 1960s. In the face of this spatial complexity, the Court clung to the familiar concept of *res*. It did very briefly entertain a speech-facilitative conception of place, one that would require that speakers be provided access to space so long as their expressive activity was "compatible" with it.[236] But for reasons unexplained, the Court rapidly retreated to a standard that placed no obligation whatsoever on the state to facilitate expression by making room for it.[237] The state–proprietor, like the state–trustee, merely had to remain neutral with regard to content. As proprietor, the state decides whether undifferentiated "space" ever becomes expressive place.

Throughout its development, the doctrine of place has treated the state's mapping of the expressive topography as a presumptively neutral endeavor. Forums are created objectively, based principally upon property management concerns. The time, place, and manner doctrine applies only where the state is neutral with regard to content, the presumption being that place itself has nothing to do with the substance of speech. For all that appears, then, place is neither counected to speech nor subject to manipulation by the state. Like any other *res*, place merely exists; it is a brute construct. Like water, air, or any other collective resource, place communicates nothing. It is merely location.

III. Speech and Spatiality

Place-as-*res* is an entrenched First Amendment concept. Indeed, some have suggested that it is too late in the day to alter this dominant conception of place. There is no denying that place is, in fundamental respects, a species of property. But it does not necessarily follow that *res* exhausts the place concept, or that we must accept that place has little or nothing to do with expression. The Court has never provided any theoretical basis or justification for confining place to this narrow conception. Thus, we need not feel bound by or beholden to it.

The increasing use of spatial tactics described in Part I provides an occasion for rethinking the entrenched concept of place-as-*res*. What is the relationship between speech and spatiality? Is place really just an inert background? Is it a given, brute fact? Are all state regulations of place properly presumed content- and value-neutral? Similar questions regarding place bave been posed by scholars in a host of other disciplines, including sociology, anthropology, history, geography, architectural science, literary studies, and philosophy.[238] Place was once mere background in these

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

237. *See supra* text accompanying notes 221–231.

238. *See, e.g.*, EDWARD S. CASEY, THE FATE OF PLACE: A PHILOSOPHICAL HISTORY, at xi–xii (1997) (noting the "burgeoning interest in place" in various disciplines today, including

disciplines as well.[239] But many scholars have recently rediscovered and reinvigorated place; they have brought it out of its background position into the foreground.[240] In order to achieve a fuller understanding of the implications of the state's use of spatial tactics, and ultimately of the intersection of speech and spatiality more generally, this Part seeks to do the same for place as it relates to First Amendment concerns.

To understand the intersection of speech and spatiality, we must also "fashion[] a fresh face for place."[241] This Part contends that place is not merely *res*; it is, as well, a distinct form and manifestation of *expression*. Tactical places do not simply regulate or relocate expressive behavior. They represent something more. A conception of place as distinctly expressive can help us understand what that something is. This conception shall be referred to as "expressive place." Unlike the undertheorized conception of place-as-*res*, "expressive place" has a rich intellectual pedigree, one with roots in several disciplines. Expressly rejecting the vision of place as inert backdrop, expressive place highlights the variability of place, the primacy of place to expression, the constructive nature of "place," and its dynamism or expressive qualities. Place can be a highly charged and purposeful construct, a repository of meaning, and a symbol of social and political control. Viewing tactical places in this light reveals the need for a more rigorous form of judicial scrutiny. Part IV sets forth arguments and specific proposals for approaching and analyzing tactical places, not as *res* or property but rather as expressive places.

A. Expressive Place

Courts and many commentators no doubt recognize that spatiality affects expressive activity. Indeed, perhaps the most common, although generally implicit, criticism of the public forum doctrine is that it fails to facilitate speech by making adequate room for expression.[242] But neither the mostly tacit recognition of place's importance to expression nor the critical analyses of the public forum concept arise from any concept of place different from or beyond *res*. Courts and commentators cannot seem to get past the idea that place is merely a form of property. To the extent that

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anthropology, architecture, and ecology); Mike Crang & Nigel Thrift, *Introduction* to THINKING SPACE 1, 2 (Mike Crang & Nigel Thrift eds., 2000) (introducing a collection of works addressing the importance of space in various disciplines).

239. *See* CASEY, *supra* note 238, at ix–xi (portraying place as historically having been taken for granted, lying "deeply dormant in modern Western thinking").

240. *See, e.g.*, Crang & Thrift, *supra* note 238, at 25 ("What we can say is that the 'where' is now joining the 'who,' the 'what,' and the 'why' of philosophy and social theory on roughly equal terms.").

241. CASEY, *supra* note 238, at 286.

242. *See, e.g.*, Steven G. Gey, *Reopening the Public Forum—From Sidewalks to Cyberspace*, 58 OHIO ST. L.J. 1535, 1536 (1998) (criticizing the public forum doctrine as "deeply inhospitable to speech in new or nontraditional forums").

questions of "where" arise, they are analyzed as if "forums" and "zones" merely serve to mark neutral boundaries. This approach underestimates and devalues place, which is both more complex and more intimately associated with expression than the *res* concept allows. What follows is a more accurate conception of place and a more nuanced understanding of the intersection of speech and spatiality. This sketch, largely borrowed from disciplines that treat place as a central object of study, will help lawyers, legal scholars, judges, legislators, executive officials, and the public itself better appreciate what is at stake when governments regulate place generally, and when they use spatial tactics in particular.

1. The Variability of Place.—The expressive place concept requires that we move beyond the simple, binary public–nonpublic categorization currently used under the public forum doctrine. It also requires that we cease viewing public areas as generally undifferentiated masses of space. There are at least twice as many types of places than the public forum doctrine currently recognizes. Each type of place raises discrete speech issues, touches upon different expressive traditions, and constitutes a distinct part of our expressive topography.

Scholars in disciplines outside the law have concluded that place is a highly variable concept.[243] It is, some have observed, "as complex as voice."[244] To aid their study of place, anthropologists have identified a variety of different types of places. Among these are what are sometimes referred to in the literature as "contested" places, "inscribed" places, "non-places," "embodied" places, and, finally, "tactical" places.[245] To begin to move beyond *res*, it is helpful to conceive of the expressive topography in similar terms.

"Contested" places are those that constitute the focus of some expressive dispute, such that being in this specific place is a critical aspect of the speaker's message. "Inscribed" places are primarily those with specific historical and symbolic significance, such as the National Mall and Central Park. History, including social and political conflict, is written in and on these places. A "non-place" is essentially undifferentiated space that has no opportunity to develop into a cultural and social place;[246] in the First

243. *See* Crang & Thrift, *supra* note 238, at 2 (referring to the concept of space as defined by various disciplines as a "Babel of conflicting interpretations").

244. Margaret C. Rodman, *Empowering Place: Multilocality and Multivocality*, *in* THE ANTHROPOLOGY OF SPACE AND PLACE: LOCATING CULTURE, *supra* note 18, at 205.

245. Many of these labels can be found in the description of places in Low & Lawrence-Zúñiga, *supra* note 18, at 1–38. The list does not, of course, exhaust the types of expressive places. No discussion of expressive place would be complete, for example, without a treatment of cyber-places. *See, e.g.*, Eugene Volokh, *Cheap Speech and What It Will Do*, 104 YALE L.J. 1805 (1995) (discussing democratizing features of speech in cyberspaces). The specific focus of this Article is on real space expressive concerns, most notably protest in public spaces.

246. *See* Int'l Soc'y for Krishna Consciousness v. Lee, 505 U.S. 672, 678–83 (1992) (holding that airports, as a class of property, are nonpublic forums). *See generally* MARC AUGE, NON-

Amendment context, airports are one example, since they are currently treated as nonpublic forums where speech is especially limited. Spatial tactics can sometimes create this kind of space. "Embodied" places raise issues of spatiality and privacy; they involve access to personal space, as in the abortion clinic context. "Tactical" places, as mentioned, are the constructed products of spatial tactics, as described in Part I. They are cages, zones, pens, and other places designed to control expressive activity.

It is not necessary to develop these various space-types in greater detail here. The point is that expressive place is far more complex than the concept of place-as-*res* and the First Amendment doctrine of place suggest. With regard to spatial tactics, two things should be emphasized. First, as scholars in other disciplines have noted, spatial tactics *produce* a discrete type of place. The architectures of spatial tactics are not ordinary *regulations* of place; they are *themselves* places. Second, given its complexity and variability, "place" requires a far more specific and nuanced analysis than the doctrine of place currently provides. Even the brief description above indicates that each type of place possesses unique characteristics. Each place–type raises discrete concerns with respect to matters such as the quality of social interaction within the place, public access to it, and the historical practices, meanings, and expressive memories associated with the place. Speech and spatiality intersect differently in each of these places.

2. The Primacy of Place.—Ancient Greek philosophers were among the first to recognize the "firstness" of space and place. Aristotle observed in his *Physics* that "[t]he power of place will be remarkable."[247] That sentiment has been echoed at various times, and by a variety of thinkers, through the ages. Thomas Hobbes said in *Leviathan*: "No man therefore can conceive any thing, but he must conceive it in some place."[248] Phenomenologists have long recognized that place is a critical part of our "being-in-the-world."[249] "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."[250]

"Nothing we do is unplaced."[251] This is, of course, as true of expression as anything else.[252] This makes the relative indifference to the concept of

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PLACES: INTRODUCTION TO AN ANTHROPOLOGY OF SUPERMODERNITY (1995) (defining non-places as spaces formed in relationship to certain ends that, unlike anthropological places, are not essentially social).

247. CASEY, *supra* note 238, at ix (emphasis omitted).

248. THOMAS HOBBES, LEVIATHAN 11–12 (Ernest Rhys ed., The Temple Press Letchworth 1940) (1651).

249. HUBERT L. DREYFUS, BEING-IN-THE-WORLD: A COMMENTARY ON HEIDEGGER'S *BEING AND TIME*, DIVISION I (7th ed. 1997).

250. CASEY, *supra* note 238, at ix.

251. *Id.*

252. Even expression that takes place in *cyber*-places, which seem to have no connection to place as it is traditionally understood, takes place *somewhere*. *Id.* at xii–xvi ("Granting that the

place in constitutional jurisprudence and literature all the more remarkable. Place is a critical, if not *the* critical, foundation for all expressive rights. Along with the basic abilities to speak, read, and hear, it makes these rights possible. The Court has on occasion at least hinted at this fact. It has said that expressive freedom requires a robust market*place* of ideas.[253] Moreover, as the Court has repeatedly emphasized, expression requires adequate "breathing space" for its effective exercise.[254] And debate can hardly be "wide open"[255] without adequate physical places set aside for the airing of positions and arguments in public discourse. But these are simple metaphors, not commitments to making physical space for speech. The doctrine of place, and the *res* concept itself, belie any professed understanding that speech can thrive only when given *adequate* room or space.

Spatial adequacy is critical, particularly when considering the use and effects of spatial tactics. The idea of spatial "primacy" does not suggest merely an increase in total, or net, expressive surface area. It requires, rather, a careful consideration of the specific properties and characteristics of places, whatever the forum, that are made available to speakers. This is so because the character of place substantially affects the *experience* of expression. An enclosed cage, a parking lot, some space at the bottom of a stairwell, and a small gazebo are all places where expressive activity can occur, to be sure, but they are surely not encouraging or facilitative places. The particular geometries and architectures of place have a substantial and profound impact on the *substance* of expressive rights. This is just one of the ways in which speech and spatiality are intimately related.

Sociologists have long recognized this fundamental principle of spatiality: The specific *qualities* of a place condition the possibilities of social interaction within that place.[256] Georg Simmel, in his seminal article *The Sociology of Space*, carefully examined how spatial conditions affect social interaction.[257] Especially in the past decade or so, many architects, geographers, and anthropologists have reached the same insight with respect to the influence of spatial characteristics on such things as the quality of

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literal locus of the technologically engaged person is a matter of comparative indifference, this locus is still not nowhere.").

253. *See* FCC v. Pacifica Found., 438 U.S. 726, 745–46 (1978) (stating that the "government must remain neutral in the marketplace of ideas").

254. *E.g.*, NAACP v. Button, 371 U.S. 415, 433 (1963).

255. N.Y. Times Co. v. Sullivan, 376 U.S. 254, 270 (1963).

256. *See, e.g.*, HENRI LEFEBVRE, THE PRODUCTION OF SPACE 73 (Donald Nicholson-Smith trans., Blackwell Publishing 1991) (1974); YI-FU TUAN, SPACE AND PLACE: THE PERSPECTIVE OF EXPERIENCE 101–17 (1977); David E. Sopher, *Place and Location: Notes on the Spatial Patterning of Culture*, 53 SOC. SCI. Q. 321–37 (1972).

257. *See* Georg Simmel, *The Sociology of Space*, *reprinted in* SIMMEL ON CULTURE: SELECTED WRITINGS 137 (David 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, *supra* note 238, at 54, 54–55.

urban living, the nature of local culture, even citizens' feelings with regard to nationality.[258]

We may add to this list of things affected by spatial characteristics the enjoyment of expressive rights, which are crucial to social interaction in our society. The principle of spatial primacy indicates that the exercise of these rights depends not only upon some minimal provision of space, but specifically on places that facilitate communication and citizen interaction. The architecture of a place is thus critical to an examination of the scope of expressive rights afforded by that place.

3. The Production of Place.—Merely recognizing these first two features of space—variability and primacy—should lead courts to ask more appropriate questions with regard to tactical places: How, specifically, do these places relate to expression? How are they created? By whom? For what purpose? What are their characteristics, their architectural features? How do these features affect social interaction and communication inside and outside these places? Who or what is most affected by tactical places? What, if anything, do they symbolize or communicate to those inside and those outside their boundaries?

In treating place as an undifferentiated mass, place-as-*res* misses yet another critical link between speech and spatiality. Scholars in other disciplines have long recognized that the process whereby places take shape—who is responsible for their design, who is being burdened, at what point in time, and why—is a matter of critical importance in understanding the significance of place.[259] Theorists and social scientists have thus made the "production" of place a subject of independent study.[260] Critical human geography, a branch of the geographic discipline informed by Marxism, feminism, and poststructuralism, places special emphasis on the idea that places are not given but *made*.[261] Two basic principles follow from this theoretical perspective. First, it is through the process of social production that the raw material of undifferentiated space *becomes* place.[262] Second, at least according to critical theorists, places are generally created by some

258. *See generally* Low & Lawrence-Zúñiga, *supra* note 18, at 1–37 (surveying the approaches of anthropology, environmental psychology, sociology, architecture, geography, and urban planning to place).

259. For a critical account of this process, see LEFEBVRE, *supra* note 256, at 11 ("Later on I shall demonstrate the active—the operational or instrumental—role of space, as knowledge and action, in the existing mode of production.").

260. *See, e.g.*, *id.*

261. *See* TIM CRESSWELL, PLACE: A SHORT INTRODUCTION 26–29 (2004) (describing the work of critical geographers).

262. *See* TUAN, *supra* note 256, at 6 ("What begins as undifferentiated space becomes place as we get to know it better and endow it with value.").

class of people with more power than others.[263] These power-elites decide what is or is not appropriate within any particular place.[264]

Place-as-*res* downplays this process, treating "forum" as a mere label for property that exists rather than a place that is continually in process. A "public forum" is not merely a historical artifact defined by its original function and the state's subsequent use of the property. Forums, whether they are streets or parks or airports, are judicial, social, and governmental constructs. *Res* does not capture the dynamic process of spatial production, the manner in which people connect to places, or are prevented from doing so. For example, the primary purpose of a street, as the Court has emphasized,[265] is to facilitate travel or movement. As raw material, asphalt and stone, a street is seemingly unrelated to expression. But the street becomes a "forum" for expressive activity when courts, government officials, and citizens declare its existence, regulate it, and actively utilize it, respectively. "Place," in other words, is actively *produced* by the interaction, combination, and collision of laws, rules, norms of behavior, and social practices.[266]

Once again, although we do not tend to conceptualize them as such, speech zones, cages, and pens are *places*. They too are constructed or produced. These mini-forums are carved from preexisting forums like streets, ostensibly to make room for speech or to direct it to locales that officials consider more appropriate. The production of such tactical places results in this simple fact: People speak *here*, or they do not speak at all. What speakers say, and how they say it, will depend upon the specific characteristics of these places, which are in turn a function of the nature of the spatial tactics used. Ultimately, whether zoned or partitioned areas become expressive places, or remain undifferentiated and inert spaces, depends on a number of factors: the properties of the area set aside for speech; the restrictions on activities within; and the interactions users have with the place itself and with those outside its boundaries.

As critical geographers surmise, tactical places, like most others, are constructed primarily by those who possess power to contain and control those who do not.[267] Whether it is a mailbox, a military base, a sidewalk, or

263. For an influential account of the construction of space, see generally LEFEBVRE, *supra* note 256.

264. *See* CRESSWELL, *supra* note 261, at 12 ("Place, at a basic level, is space invested with meaning in the context of power.").

265. *See, e.g.*, Cameron v. Johnson, 381 U.S. 741, 750 (1965) (declaring that "'[m]unicipal authorities . . . have the duty to keep their communities' streets open and available for movement of people and property, the primary purpose to which the streets are dedicated'" (quoting Schneider v. State, 308 U.S. 147, 160 (1939))).

266. *See* MICHEL DE CERTEAU, THE PRACTICE OF EVERYDAY LIFE 108 (Steven F. Rendall trans., 1984) (emphasizing the manner in which human activity makes places).

267. *See, e.g.*, NICHOLAS L. BLOMLEY, LAW, SPACE, AND THE GEOGRAPHIES OF POWER, at xiii (1994) (positing judges and lawmakers as overlooked framers of space); MICHEL FOUCAULT, DISCIPLINE AND PUNISH 236 (Alan Sheridan trans., Vintage Books 1979) (1977) (highlighting the

a buffer zone, "place," properly understood, is a manifestation of this power dynamic. This is not difficult to see insofar as tactical places are concerned. Planning boards, campus officials, lawmakers, and law enforcement officials are the architects of tactical places. The contours of these places suit their needs. Given the power granted to these officials as trustees and proprietors of public areas, we should be far more concerned with understanding who or what is being placed in tactical places. The mere fact that protesters, social agitators, and others who challenge the status quo are disparately confined to these spaces does not necessarily demonstrate a violation of expressive rights. But the identity of those confined does support the notion that place manifests power and that this power can be used to muffle or silence certain points of view. And that, of course, does implicate serious First Amendment concerns. In any event, it should be evident that using spatial tactics entails more than the mere partitioning of some *res* or parcel of property. It is an exercise of the power, granted doctrinally to the state as trustee and proprietor of public space, to displace political dissent and speech that is likely to offend viewers and listeners.

Taking into account place's primacy, the state's power to influence the production of tactical and other places can lead to a substantial impact on expressive and associative rights. As noted, the character of a place strongly influences social interaction and, by extension, the enjoyment of expressive rights within. 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."[268] This conception of place as a social construct is, in contrast to place-as-*res*, no empty vessel or mere backdrop. Here place is viewed as a repository and manifestation of social exchange, memories, images, uses, and *meaning*. Thus, the power to define which public areas are open to expression, and just how open they will be, is ultimately the power to affect not only expression, but a great deal more than that as well.[269]

We must, as one scholar said, move "away from a sense of space as a practico-inert container of action towards space as a socially produced set of manifolds."[270] The *res* concept does not permit this sort of conceptual advancement. As a result, we are led to believe that the state's control of the spatial terms of expression is generally nothing more than the neutral partitioning of public properties. By viewing place as a construct, we can reconnect speech and spatiality on yet another fundamental level. We can, more specifically, better appreciate and understand the implications of the

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prison as the exemplar of containing and controlling space); EDWARD SOJA, POSTMODERN GEOGRAPHIES: THE REASSERTION OF SPACE IN SOCIAL CRITICAL THEORY (1989).

268. Low & Lawrence-Zúñiga, *supra* note 18, at 20 (quoting SETHA M. LOW, ON THE PLAZA: THE POLITICS OF PUBLIC SPACE AND CULTURE 128 (2000)).

269. *See* Rodman, *supra* note 244, at 203 ("[P]laces are socially constructed by the people who live in them and know them; they are 'politicized, culturally relative, historically specific.'").

270. Crang & Thrift, *supra* note 238, at 2.

tactical places we see all around us. Place is not merely a forum where expression occurs; it is a manifestation or symbol of the speech that occurs within. All places, including tactical ones, do more than contain bodies; they hold and represent memories, emotions, and meanings. Further, as the next section demonstrates, they communicate. A *res*, of course, does not do any of these things.

4. The Dynamism of Place.—A final important insight from the spatial turn in disciplines like geography, philosophy, and anthropology is that place is not, as place-as-*res* indicates, inert and non-communicative. Place is dynamic; it is *itself* an event. More than this, places can themselves actually "express" or "communicate" something about the specific activities that they permit, regulate, or suppress. As will become apparent, this is a critical recognition in terms of the analysis of tactical places.

Jacques Derrida opined "that a building is more of a happening than a thing."[271] Derrida's insight applies to places more generally. 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*, to be 'the imminence of that which happens now.'"[272] Put another way, as Derrida and others have observed,[273] place gives or makes room for things to occur. Architecture, then, is "a mode of spacing that makes a place for the event."[274]

Here place's power resides not so much in its past—the events of its production—as in its possibilities—the events that may take place there in the future. Streets, sidewalks, and parks, for example, all make some room for expressive events. But spatial tactics diminish the possibilities for expressive happenings in these forums. As they partition, confine, and segregate, spatial tactics render place inert, a non-happening, a non-event. Tactical places like the Boston speech cage described in Part I can transform public places from hopeful possibilities into more-or-less aborted events.

Places themselves are *expressive* happenings. As places happen, as they are socially produced, speech is conveyed, amplified, muted, suppressed, recalled, and altered. As it exists, a place expresses something. As it becomes regulated, it may express something else. As one scholar has suggested, places are "'multivocal'; they *bespeak* people's practices, their history, their conflicts, their accomplishments."[275] As another scholar, an

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271. CASEY, *supra* note 238, at 313.

272. *Id.* (quoting Jacques Derrida, *Point de Folie—Maintenant L'Architecture*, *translated in* Kate Linker, AA FILES, Summer 1986, at 65, § 3).

273. *See, e.g.*, AUGE, *supra* note 246, at 43 ("The place eommon to the ethnologist and its indigenous inhabitants is in one sense (the sense of the Latin word *invenire*) an invention: it has been discovered by those who claim it as their own.").

274. CASEY, *supra* note 238, at 313.

275. Rodman, *supra* note 244, at 214 (emphasis added). As one anthropologist suggested: "In describing 'political events,' sites such as a courtroom, a Red Square, Whitehall, the White House

anthropologist, observed: "[T]here is a condensation of values in particular sites, and transactions that constitute the totality of social life may be spatially mapped with specific sites expressing relatively durable structured interests and related values."[276] Spatial dynamism conveys the "idea, well established in geography, that places produce meaning and that meaning can be grounded in place."[277] Places, in other words, do not merely contain speech and conduct—they communicate something about these things. It is imperative that we ask what these places are communicating—with respect to power, with respect to the speech and the speakers regulated in places, and with respect to our commitment to public expression generally.

Place-as-*res* cannot encompass the complexities of expressive place—its variability, primacy, production, or dynamism. It cannot do so, first and foremost, because place-as-*res* artificially separates speech and spatiality. As the foregoing discussion demonstrates, speech and spatiality are intimately associated; they intersect in various and complex ways. The state's power to manage, control, and produce place substantially affects the speaker's ability to convey her message. These insights apply to expressive place in general. But they have special salience when considering tactical places which, as the next section demonstrates, are uniquely troubling regulations of expressive activity given their constructive and dynamic qualities.

B. Spatial Tactics As a "Benthamite Physics of Power"

Thus far, this Article has sought to distance place from *res* by suggesting that place is distinctly different from mere property. It is, among other things, variable, primary, constructed, and dynamic. This conception casts regulation of the "where" of expression in a new light. It suggests a need to look more closely at what spatial tactics accomplish, on whose behalf, at whose expense, and with what effect on public expressive activity.

The idea that space can be used to control and discipline behavior is not, of course, unique to the speech context. Spatiality has always been an attractive organizing principle. Indeed, for as long as there have been sovereign authorities, or any hierarchy of authority for that matter, place has been used to control populations.[278] Officials have recognized the power of place to distribute things like knowledge, wealth, access, and power.

As it happens, spatial tactics have a rich historical and intellectual pedigree. Michel Foucault, who laced many of his works with important

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can be interpreted as giving an emotional effect, comparable to the power of rhetoric, to the voice of authority." Hilda Kuper, *The Language of Sites in the Politics of Space*, *in* THE ANTHROPOLOGY OF SPACE AND PLACE: LOCATING CULTURE, *supra* note 18, at 258.

276. Hilda Kuper, *The Language of Sites in the Politics of Space*, *in* THE ANTHROPOLOGY OF SPACE AND PLACE: LOCATING CULTURE, *supra* note 18, at 258.

277. Rodman, *supra* note 244, at 207.

278. FOUCAULT, *supra* note 267, at 195 (describing a seventeenth-century order that relied upon "strict spatial partitioning" to combat the plague).

insights about the power of place, noted a critical distinction between architecture that was built to be seen and that which was built "to permit an internal, articulated and detailed control."[279] Foucault observed, for instance, that those in power used place tactically to arrange populations: officials used place to separate ailing communities from healthy ones, the sane from the insane, and men of higher ranks from those of lower ranks.[280]

Foucault, perhaps more than any other modern thinker, recognized the ubiquity of spatial tactics. He observed these at work in, among other places, military camps, schools (which he referred to as "pedagogical machines"), prisons, factories, and asylums.[281] In the course of examining these and other tactical "architectures," Foucault noted the degree of social control made possible by these institutions' spatial character. He conceptualized the architecture of these places 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."[282]

Foucault recognized that the power of place, from the state's perspective, lay in its ability to segregate, discipline, surveil, and control that which threatened the status quo.[283] In *Discipline and Punish*, Foucault's examination of the history of the modern prison, he theorized that the state's choice of architecture was intended to accomplish precisely these things.[284] The purpose of prisons was the creation of a "docile body" through "enclosure and the organization of individuals in space."[285] This docility was accomplished, Foucault observed, principally through the application of spatial arrangements and particular architectural features to the human body.[286]

Foucault drew heavily upon Jeremy Bentham's *Panopticon* as a paradigmatic example of the tactical use of place.[287] The *Panopticon* was

279. *Id.* at 172.

280. *See* MICHEL FOUCAULT, THE BIRTH OF THE CLINIC (1976); FOUCAULT, *supra* note 267, at 145–47 (using as an example the Jesuit college model, itself based on the Roman legion, to show how the place one occupies in a classification scheme defines rank); MICHEL FOUCAULT, MADNESS AND CIVILIZATION: A HISTORY OF INSANITY IN THE AGE OF REASON 3–13 (Richard Howard trans., Vintage Books 1988) (1965) [hereinafter FOUCAULT, MADNESS AND CIVILIZATION] (discussing the use of special houses to isolate lepers and the use of ships to distance the insane).

281. *See, e.g.*, FOUCAULT, *supra* note 267, at 171–74 (discussing the spatial tactics of military camps, schools, hospitals, and factories).

282. Low & Lawrence-Zúñiga, *supra* note 18, at 30 (quoting FOUCAULT, *supra* note 267, at 198).

283. *See* FOUCAULT, *supra* note 267, at 170–74 (suggesting that the architectural design of buildings by those in power is motivated by a need for surveillance).

284. *See id.* at 249–50 (describing how architects were directed to specifically design prisons to further the goals of discipline and economy).

285. Denise L. Lawrence & Setha M. Low, *The Built Environment and Spatial Form*, 19 ANN. REV. ANTHRO. 453, 485 (1990) (discussing Foucault's theory of architecture as a mechanism of control).

286. FOUCAULT, *supra* note 267, at 143.

287. *Id.* at 200.

perhaps 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.[288] Foucault referred to the *Panopticon* as a "cruel, ingenious cage."[289] He specifically noted the tactical feature of individual cells: "They are like so many cages, so many small theatres, in which each actor is alone, perfectly individualized and constantly visible."[290] The *Panopticon*, Foucault said, represented "an architectural mechanism of control in its ideal form."[291] It was designed and built

> to permit an internal, articulated and detailed control—to render visible those who are inside it; in more general terms, an architecture that would operate to transform individuals: *to act on those it shelters, to provide a hold on their conduct, to carry the effects of power right to them, to make it possible to know them, to alter them.*[292]

Foucault noted that this tactic, or at least something like it, ultimately came to serve a variety of disciplinary ends, among them the ready surveillance and control of inmates, patients, and schoolchildren.[293]

As the *Panopticon* exemplifies, spatial tactics like cages, pens, and zones represent a precise and effective form of discipline and control. Foucault noted the "progressive objectification and the ever more subtle partitioning of individual behaviour," the "innumerable petty mechanisms" of control and surveillance built into these sorts of architectures.[294] He also provided the significant insight, insofar as the discussion of modern spatial tactics is concerned, that these tactics operate with a subtlety that obscures their substantial influence on behavior. Foucault's remarks might well be applied to many of the tactics discussed in Part I: "The disciplinary institutions secreted a machinery of control that functioned like a microscope of conduct; the fine, analytical divisions that they created formed around men *an apparatus of observation, recording and training.*"[295] Foucault emphasized that this power was exercised 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."[296] Significantly, no force or violence was necessary; control was exercised through "the laws of optics and mechanics,

288. *Id.* at 200–02.
289. *Id.* at 205.
290. *Id.* at 200.
291. Low & Lawrence-Zúñiga, *supra* note 18, at 30.
292. FOUCAULT, *supra* note 267, at 172 (emphasis added).
293. *Id.* at 200–01.
294. *Id.* at 173.
295. *Id.* (emphasis added).
296. *Id.* at 202.

according to a whole play of spaces, lines, screens, beams, [and] degrees."[297] It was exercised, in other words, spatially.

Through this geometric precision, this exercise of raw power through place, officials discovered the effective technique of what Foucault referred to as "binary division and branding," by which he meant a mode of separating populations—the mad from the sane; the dangerous from the harmless; the normal from the abnormal.[298] In separating populations in this fashion, place communicated something about potential dangers or threats to the community. In terms of the principle of spatial dynamism discussed in the previous section, place *expressed* something about the status of those within to those who remained on the outside. It symbolized status, power, knowledge, and danger.

In addition, spatiality has been used throughout history "to make differences in power perfectly recognizable."[299] In contexts in which spatial tactics have been considered and applied, a common theme is the role spatial relations play in the maintenance of power of one group over another—guard–prisoner; schoolmaster–principal; factory boss–worker; health care worker–patient; resident–outsider; ruler–ruled.[300] The "preferred spatial modalities" represented by the architectures of these *constructed* places are thus "expressions of specific distributions of power."[301] These "calculated distributions" of space and place are preferred by those in power because of what they provide: order, control, surveillance, separation, and branding.[302]

Tactical places are highly pragmatic architectures insofar as government officials are concerned. As Foucault noted, the power of place has been used to serve government's first need: to maintain order.[303] In fact, Foucault specifically addressed the central issue of this Article when he observed that

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297. *Id.* at 177.

298. *Id.* at 199; *see id.* at 201 ("Hence the major effect of the Panopticon: to induce in the inmate a state of conscious and permanent visibility that assures the automatic functioning of power.").

299. Rabinow, *supra* note 20, at 353, 357–58. Modern cultural geographers and anthropologists have made the same point in their studies of spatial tactics in urban and suburban geography. They have drawn on Foucault's insights in studying such phenomena as gated communities, planned towns, and tourist villages. *See, e.g.*, Low, *supra* note 20, at 387 (describing recent research on spatial tactics).

300. *See, e.g.*, Low, *supra* note 20, at 387 (suggesting that gated communities reinforce class relations); Rabinow, *supra* note 20, at 353 (theorizing that urban planning supports "military control" and helps to "establish a comprehensive order").

301. CASEY, *supra* note 238, at 298.

302. FOUCAULT, *supra* note 267, at 219.

303. Importantly, Foucault stated,

> This enclosed, segmented space, observed at every point, in which the individuals are inserted in a fixed place, in which the slightest movements are supervised, in which all events are recorded, . . . in which power is exercised without division, according to a continuous hierarchical figure, in which each individual is constantly located . . . —all this constitutes a compact model of the disciplinary mechanism.

Id. at 197.

through spatiality "an exact geometry" could be used by the state specifically to combat disorder and dissent.[304] This, Foucault noted, is an especially significant power for a government faced with mass phenomena like protests and demonstrations.[305] He observed: "Whenever one is dealing with a multiplicity of individuals on whom a task or a particular form of behaviour must be imposed, the panoptic schema may be used."[306] Place, Foucault observed, could be *ordered* to "neutralize the effects of counter-power," such things as "agitations, revolts, spontaneous organizations, coalitions."[307] Put rather bluntly, spatial tactics render the bodies of agitators "docile" through "enclosure and the organization of individuals in space."[308]

For Foucault, however, power was not *inherent* in architecture. Rather, he theorized that place has been an element of specific "political strategies" at certain points in history.[309] If Foucault is correct, then we would expect to see a rise in spatial tactics as social and political conditions threaten the status quo. The tactical places described in Part I fit this theory quite well. So, too, does other evidence of this responsive or defensive use of spatial tactics. For example, recent gated residential developments are a private response to, among other things, increased crime and overcrowding. Like spatial tactics generally, these places are constructs designed to further interests in power, control, and separation. There is meaning in these architectures. They are dynamic constructs. Indeed, 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."[310] Others in the same field have noted the rise of the "fortress city" in places like Los Angeles, where architecture is utilized "as a strategy for controlling and patrolling the urban poor that is made up of predominantly ethnic—Latino and Black—minorities."[311] These architectures, as well, "facilitate avoidance, separation, and surveillance."[312]

Foucault's observations about place provide further support for conceptualizing place not as mere *res*, but as an expressive manifestation of power. Spatial tactics, in particular, are purposeful political technologies,

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304. *Id.* at 174.

305. *Id.* at 219 ("[Discipline] must also master all the forces that are formed from the very constitution of an organized multiplicity; it must neutralize the effects of counter-power that spring from them and which form a resistance to the power that wishes to dominate it: agitations, revolts, spontaneous organizations, coalitions—anything that may establish horizontal conjunctions.").

306. *Id.* at 205.

307. *Id.* at 219; *see id.* ("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.").

308. Low & Lawrence-Zúñiga, *supra* note 18, at 30.

309. Low, *supra* note 20, at 355.

310. *Id.* at 387.

311. *Id.* at 389.

312. *Id.* at 391.

designed and utilized in response to pressing social and political circumstances. As Foucault observed, place acts as "a functional mechanism that must improve the exercise of power by making it lighter, more rapid, more effective, a design of subtle coercion."[313] But the implications of spatial tactics are far graver than this. They extend beyond rather discrete places of power, like prisons and schools. Spatial tactics condition our most public social places, some of the last remaining public areas in which we encounter one another spontaneously and involuntarily. As they continue to multiply, spatial tactics will recast the expressive topography. A "Benthamite physics of power" is being utilized to create what Foucault called the "disciplinary society."[314] Part IV addresses what approach courts should take in light of this fuller appreciation of the power place has to affect and control public discourse.

IV. Judicial Review of Spatial Tactics

This Part applies Part III's interdisciplinary insights regarding place to generate proposals for judicial review of the spatial tactics described in Part I. Spatial tactics currently enjoy the presumption of neutrality that applies to place in general, and to other run mine spatial regulations. Accordingly, a substantial portion of this Part is devoted to rebutting the notion that spatial tactics are neutral regulations of the place where expression may occur. First Amendment doctrine makes it very difficult to demonstrate purposeful content discrimination. Thus, it may not be possible to demonstrate in any particular case that the state has targeted a specific point of view. But this does not mean that courts should continue to view spatial tactics as unrelated to content. The perspective of place set forth in Part III reveals that tactical places may properly be described as "content-correlated."[315] Given this connection between speech and spatiality, there is sufficient justification for applying what might be called "spatial skepticism" to the tactical use of place. The state should be forced to justify the use of spatial tactics by actually demonstrating the substantial interests it asserts. In addition, courts should carefully review the lines the state has drawn, the "tailoring" of tactical places, and confirm that the lines restrict no more speech than necessary to serve the state's substantial interests.[316] Finally, given place's primacy and dynamism, courts should be highly skeptical of arguments that messages displaced or cut off by spatial tactics can simply be expressed

313. *Id.*

314. FOUCAULT, *supra* note 267, at 209.

315. City of Los Angeles v. Alameda Books, Inc., 535 U.S. 425, 457 (2002) (Souter, J., dissenting).

316. *See* United States v. Playboy Entm't Group, Inc., 529 U.S. 803, 813 (2000) (noting that a restriction based on content survives only upon a showing of necessity to serve a compelling governmental interest combined with the least restrictive narrow tailoring).

elsewhere. Whether alternative places are truly adequate should be a serious part of the constitutional inquiry.

This proposal differs from the usual argument that time, place, and manner regulations should generally be subject to greater scrutiny. First, it applies only to spatial regulations. This is not to say that time and manner cannot be manipulated; but the Article has demonstrated that place, in particular tactical place, merits special consideration. Second, rather than simply beginning from the mistaken premise of *res* or property, we now know *why* place, and spatial tactics, are uniquely problematic. This will inform the analysis of governmental neutrality, spatial tailoring, and the purported existence of adequate alternative places for speech.

This Part concludes by considering the most likely objection to singling out spatial tactics for special judicial attention: In an age when access to a modem is all one needs to blog, vent, and otherwise express an opinion on virtually any topic, why should courts spend energy and capital scrutinizing real, physical places? There will undoubtedly be those who view concern over access to streets, sidewalks, and parks as outdated. This Part, however, offers several reasons why real public places remain critical to expressive and associative freedoms.

A. Place and Neutrality

The presumption that place is a resource partitioned without regard to expressive content stems from the conception of place-as-*res*. This misconception in turn causes courts to ignore how place is being utilized, by whom, for what purposes, and with what effect on expressive and associative rights. As Part III emphasized, spatial tactics do more than determine the place where expression may occur. The government uses spatial tactics to separate speakers from listeners, to subject speech to surveillance, and to immobilize expression. Tactical places brand, even stigmatize, the speech, and the speakers, within. Careful examination of these places reveals that neither the constructive process, nor the tactical places themselves, are as neutral as courts presume.

1. The "Calculated Distributions" of Spatial Tactics.—The constitutional doctrine of place gives "place" a neutral veneer. A "forum" is simply a locale where speech does or does not occur, depending upon the property's objective characteristics and the state's objectively manifested intent. "Time, place, and manner" regulations serve normatively neutral interests like the maintenance of order, tranquility, and aesthetics. But as Part III emphasized, scholars in many other disciplines have long questioned the presumptive neutrality of place.[317] Anthropologists, for example, have observed: "The assumed neutrality of [place] conceals its role in maintaining

317. *See supra* notes 238–240 and accompanying text.

the social system, inculcating particular ideologies and scripted narratives."[318]

The legal discipline generally does not grasp this important insight. It is wholly missing from the constitutional doctrine of place. When courts see cages and zones, indeed when they see any place, they do not see ideologies, narratives, or messages. They see only legal *res*—public property managed and partitioned by governmental trustees and proprietors. But in critical terms, zones, cages, pens, and other tactical places are not brute facts. These places are not given. As the concept of expressive place emphasizes, they are *made.*

Spatial tactics do not merely distribute legal property; they allocate power, wealth, access, and knowledge. They are, indeed, an aspect of the "disciplinary society" Foucault lamented.[319] Our most basic geography, public and private, is a manifestation of this. Large, open spaces are becoming less prevalent in urban and suburban areas. Partly because space is so scarce, every space is assigned a specific, approved use. We are routinely told where to sit, stand, run, smoke, walk, drive, drink, play, and, of course, speak. In addition to public regulations, private forces also routinely dictate which places we can and cannot enter, which are off limits to those without special permission to be there, and what we can do once we are in place. If you do not have a first class ticket, you cannot sit in this place. If you do not have a pass or membership, you are not privileged to enter this club or community. These kinds of regulations and restrictions do not raise constitutional concerns. Still, few would suggest that they are *neutral.* They contribute to, and result in, expectations with regard to who and what "belongs" where. Place, then, is always doing more than merely fashioning a "neutral" system of access, behavior, or activity.

This insight applies with equal force to tactical places. Tactical places are created for the same reason Foucault ascribed to architectures like asylums, schools, and prisons—to discipline and control that which is captured within.[320] Spatial tactics are designed to control expression. They arise wherever offensive speech threatens the repose of listeners, or the interests of government. Recent examples of this reactive use of spatial tactics abound. Thus, just after protesters recently began to show up at funerals to protest the Iraq War, legislators acted to impose speech zones.[321] After a protester began handing out literature facilitating challenges to court

318. Low & Lawrence-Zúñiga, *supra* note 18, at 30; *see also* Patricia Yaeger, *Introduction* to THE GEOGRAPHY OF IDENTITY 1, 1–39 (Patricia Yaeger ed., 1996) (explaining that dominant discourses regarding space discount its social effects and exploring new "cultural geography" approaches to space that illustrate its political and social influence).

319. FOUCAULT, *supra* note 267, at 209.

320. *See id.* at 209.

321. *See supra* note 10.

citations, court officials banned expression within 100 feet of the courthouse.[322] The pattern is typical.

One cannot, of course, leap directly from timing to the conclusion that tactical places target specific points of view such that a more skeptical judicial scrutiny is appropriate. As mentioned, it is very difficult to demonstrate content targeting in general.[323] But courts ought to be aware of this timing and recognize the reactive use of spatial tactics where it occurs. More specifically, three aspects of tactical place undermine the neutrality presumption: the architects of tactical places, the design elements of these architectures, and the impact these places have on certain kinds of expression.

It is important to recognize, as Foucault did,[324] that spatial tactics are historically contingent. We should thus not be surprised at the recent use of spatial tactics on the streets, at universities and abortion clinics, and in other places where agitation is likely to occur. These tactics are targeted responses to some of the most wrenching and divisive social and political issues of our time, subjects like war, racism, and abortion. As Foucault theorized, spatial tactics are *political technologies* used by government to counter mass agitations, revolts, and other threats to the status quo.[325] In other words, tactical places are "*calculated* distributions" of place.[326] Those who use spatial tactics in times of turmoil—the law enforcement and other officials who are doing the calculating—are inherently biased against disruptive expression. As discussed below, it may be appropriate to presume that city planners, who design zoning schemes, are not biased as to any particular use of property.[327] But this presumption does not apply to government officials seeking to defuse tense expressive environments, particularly where the tension relates specifically to *governmental* policies.

The architectural design elements of tactical places also undermine these places' presumptive neutrality. Given their generally restrictive characteristics and out-of-the-way locations,[328] it is difficult to see these spaces as anything other than manifestations of a certain discomfort with and bias against demonstrations, protests, and other agitations. The degree of displacement is often itself troubling. Protesters may end up thousands of feet from their intended audiences. For example, a recent ordinance banning

322. *See supra* note 161.

323. *See supra* text accompanying notes 66–68.

324. *See* FOUCAULT, *supra* note 267, at 218 ("The formation of the disciplinary society is connected with a number of broad historical processes—economic, juridico-political, and, lastly, scientific—of which it forms part.").

325. *Id.* at 141–49, 215–16, 219.

326. *Id.* at 219.

327. *See infra* notes 375–382.

328. *See, e.g.*, Low, *supra* note 20, at 387 ("[A]dding walls, gates, and guards produces a landscape that encodes class relations and residential (race/class/ethnic/gender) segregation more permanently in the built environment." (citation omitted)).

protests within five thousand feet of any funeral service reportedly forced protesters to demonstrate at the county sanitation department on the edge of town.[329] As well, there are normative judgments lurking in the look and feel of these new architectures. The Boston speech cage is the clearest example. The jersey barriers, razor wire, mesh, and other design elements of the DZ's architecture were designed with a particular type of expression in mind. These features created a place in which it was apparent that little, if any, dissent or agitation was supposed to occur. The DZ's architecture was intentional; it anticipated and countered disruption at each specific turn, right down to the application of a double-mesh barrier that inhibited convention-goers' ability to see the protesters.[330] Sensing that little or no social or expressive activity was possible in this space, no one entered it.[331] In the end, then, the DZ was like the *Panopticon*: "an exemplary institution of state power."[332] It did not merely regulate dissent; it actually suppressed it.

Although their architectures are less dramatic, other spatial tactics raise similar concerns. As a genre, bubbles, pens, buffers, and zones do more than inconvenience speakers by displacing them and their messages. Given the primacy of place to expression, these calculated distributions ultimately affect whether speech will reach its intended audience at all or will instead be hidden, obscured, and avoided. A "free speech zone" that is the size of a parking space or gazebo, and is located where few if any listeners will pass, is specifically *designed* to minimize communication and interaction.

Spatial tactics are not entirely neutral with regard to speakers, or the forms of speech protesters, demonstrators, and other "agitators" typically rely upon. They routinely distort the *vocality* of place. They disparately, if not exclusively, affect voices of agitation, dissent, and disruption. They are, again, designed with these sorts of voices in mind. Demonstrations and other expressive agitations are attacks on the status quo. Abortion and political protests, even certain strains of hateful speech, are expressive "revolts" against current policies, circumstances, or conditions. Notably, *disruption* is a significant aspect of the message these speakers seek to convey.[333] That message is suppressed entirely when demonstrators, protesters, and other social agitators are herded into pens, cages, gazebos, and speech zones. In these places, protests and demonstrations become little more than staged events, bland and neutered imitations of past social and political movements. They are capitulations to order and the status quo, rather than challenges to these things.

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329. *Tenn. County Bars Protests Near Funerals*, FIRST AMENDMENT CENTER, Oct. 27, 2005, http://www.firstamendmentcenter.org/news.aspx?id=15985.

330. *See supra* note 63 and accompanying text.

331. *See supra* note 80 and accompanying text.

332. CASEY, *supra* note 238, at 309 (referring to the *Panopticon* as a space that is "stringently controlled and internally transparent").

333. I am indebted to Brian Tamanaha for making this particular point in our discussions regarding protest activity in the 1960s.

Some examples help to highlight the content correlation of spatial tactics. Suppose that if a speaker wishes to support the President, she may stand near him, where she can be seen and heard.[334] This is, perhaps, outright viewpoint discrimination. Less overtly or obviously, suppose that if, however, she wishes to dissent with respect to certain administration policies, she must do so at a baseball field a substantial distance from the event.[335] If a speaker wishes to participate in a protest, she must stand within the provided pens or barricades, where authorities and passers-by can see who is involved, who is dissenting, and who is responsible for any disruption or inconvenience.[336] If a speaker wants to protest with others at a national party convention, she must commit to a cage provided for that purpose.[337] If you wished to protest animal cruelty at the Cow Palace before 2004, you had to stand within one of the 10-foot-by-20-foot "free speech" zones provided.[338] But if you were on the grounds for any purpose other than conducting a "demonstration," then according to the institution's "free speech policy," you were free to make your point wherever you chose.[339] In each instance, *where* you are placed depends in substantial part on *what* you have to say.

Location depends, as well, on *how* you intend to convey your message. Spatial tactics are designed to deal with specific modes of communication. Mass agitations and other expressions that rely upon some combination of speech and conduct are most likely to be affected by cages, pens, and other tactical containers. There is no reason to doubt the wisdom of Professor Kalven's observation that courts are *inherently* biased against what he called "speech plus," which includes things like protests, demonstrations, marches, and parades.[340] There is no reason to believe that local officials are not similarly disposed toward these sorts of expressive "nuisances." Those charged with maintaining order generally view negatively the distractions and logistical problems associated with mass agitations and other forms of protest.[341] The fact that this is a logical, common, and even understandable reaction to disruptive speech is all the more reason to carefully scrutinize the decisions of those in charge of designing tactical places.

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334. *See* Bovard, *supra* note 42 (discussing the Bush administration's "quarantining" of protesters in designated places distant from public events).

335. *Id.*

336. *Id.*

337. Coal. to Protest the Democratic Nat'l Convention v. City of Boston, 327 F. Supp. 2d 61, 65–66 (D. Mass. 2004), *aff'd sub nom.* Bl(a)ck Tea Soc'y v. City of Boston, 378 F.3d 8 (1st Cir. 2004).

338. Kuba v. A-1 Agric. Ass'n, 387 F.3d 850, 863 (9th Cir. 2004) (striking down as unconstitutional the restrictions limiting protestors to small, distant free speech zones).

339. *Id.* at 853.

340. *See* Kalven, *supra* note 26, at 22.

341. *See, e.g.*, Steve Rubenstein & Kathleen Sullivan, *S.F. Cops Grouse About What It's Like on the Front Lines*, SAN FRANCISCO CHRON., Mar. 22, 2003, at W5, *available at* http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2003/03/22/MN283872.DTL (describing the irritation that police felt during a riot).

The effects of spatial tactics on certain speakers and messages are magnified by the nature of the power they confer on the government. Structures like the Boston speech cage, the university gazebo, campaign "free speech" zones, and the 10-foot-by-20-foot speech zones outside the San Francisco Cow Palace all make it faster and easier for the state to observe speakers and to intervene when certain types of speech "go too far." More than this, as Foucault observed, tactical places are designed "to permit an internal, articulated and detailed control—to render visible those who are inside it"; the zones and other architectures "operate to transform individuals: *to act on those it shelters, to provide a hold on their conduct, to carry the effects of power right to them, to make it possible to know them, to alter them.*"[342] Examined in this light, the presumption that such tactics are not designed to affect expressive content seems all the more implausible.

Consider spatial tactics' effects from the perspective of the speaker ushered into a tactical place. From the speaker's point of view, spatial tactics make speech far more burdensome, and thus far less appealing. Spatial tactics, in other words, can have a substantial chilling effect on expression. That chill is magnified by the fact that spatial tactics operate directly on the body. This, among other things, is what makes place unique as a regulatory tool. Unlike most time, place, and manner regulations, spatial tactics are inherently coercive.[343] If a speaker knows that stepping outside designated boundaries or zones can lead to punishment, she may be less inclined to step into them in the first place. If by entering a pen or barricade she forfeits her right to leave it, a protester may simply go home and skip the protest altogether. Or, as at the Democratic National Convention in Boston,[344] the architecture may itself be so unappealing, or unsafe, that speakers simply refuse to enter. Note that these effects on participation are often obscured by spatial tactics' purported purpose, which is presented as *accommodation* of expression.[345] The state claims to set aside space for expression by providing free speech zones.[346] Spatial tactics thus can appear to facilitate speech while, in reality, suppressing and chilling it.

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342. FOUCAULT, *supra* note 267, at 172 (emphasis added).

343. This is not to say that time and manner cannot be used to suppress speech. *See, e.g.*, Saia v. New York, 334 U.S. 558, 562 (1948) ("In this case a permit is denied because some persons were said to have found the sound annoying. In the next one a permit may be denied because some people find the ideas annoying. Annoyance at ideas can be cloaked in annoyance at sound. The power of censorship in this type of ordinance reveals its vice."). But it is less likely, and often far more obvious when this discrimination does occur. Time and manner regulations are not as visible to potential listeners as spatial ones. Nor do they operate in the same physically coercive way as zones, pens, and cages. The power to suppress expression by displacing it is both more subtle and substantial than the power to do so by resort to either time or manner.

344. *See* Coal. to Protest the Democratic Nat'l Convention v. City of Boston, 327 F. Supp. 2d 61, 65–66 (D. Mass. 2004), *aff'd sub nom.* Bl(a)ck Tea Soc'y v. City of Boston, 378 F.3d 8 (1st Cir. 2004) (describing demonstration zones); *see also supra* notes 63, 80, 82 and accompanying text.

345. *See supra* Part I.

346. *See supra* Part I.

In sum, even if it is impossible to say that spatial tactics target particular points of view or subject matters, it is at least clear that tactical places are not entirely unrelated to the content of the expression they contain. Spatial tactics are politically and historically contingent strategies for dealing with particular types of disturbing and, from the state's perspective, threatening expression. The character of these places can chill and suppress expression on subjects like abortion, race, and the legitimacy of war. There is substantial reason to doubt the presumption that spatial tactics are wholly content-neutral. In these contexts, speech and spatiality are at least closely related.

2. The "Message" of Tactical Place.—There is yet another perspective from which to view, and question, the presumption of content neutrality applied to tactical places: the perspective of those situated on the outside of these places. We have already examined the effect that tactical places have on speakers within. But recall that Part III's reconceptualization of place emphasized that place is dynamic, even vocal. Courts should thus also be interested in what these places "say" to listeners and viewers. If tactical places do in fact "speak" or communicate some message to potential audiences, if they actually say something about those they contain or their messages, then the presumption of content neutrality will be further undermined.

As noted, in a general sense, where one is "placed" says something about relative status, knowledge, and power.[347] Place thus communicates something about one's position in society. Things like permits, access to special events, first class accommodations, and gated communities speak of matters like wealth, influence, race, and ethnicity.

Spatial tactics operate in a similar manner with regard to protesters. As Foucault observed with regard to asylums, prisons, and other institutions, spatial tactics are a means of "separating and branding" individuals.[348] The placement of persons tells a community, for example, who is sane, and who is not; who is dangerous, and who is not.[349] Cages, pens, buffers, and zones separate and brand speech and speakers considered offensive, disruptive, and dangerous. Through the edifice of place, the state communicates something about the nature and character of those inside to those who remain outside. In these tactical places reside the disgruntled minority, the societal "opposition." This is the tiny, agitated, displaced minority.

In fact, tactical places may communicate something even more troubling than this. They may suggest that certain speakers be avoided

347. *See supra* Part III.

348. *See* FOUCAULT, *supra* note 267, at 231 (noting that imprisoning individuals is a means of "fixing them in space, classifying them, . . . [and] maintaining them in perfect visibility").

349. *See id.*; FOUCAULT, MADNESS AND CIVILIZATION, *supra* note 280, at 68 (citing the practice of confining the mentally ill and then putting them on public display).

altogether. It is at least plausible to interpret many tactical places as a statement to the effect that spatial tactics are needed to segregate these speakers from others because they (and, by implication, their messages) are dangerous, offensive, or otherwise objectionable to society.[350] This spatial branding directly implicates the First Amendment's neutrality principle. Viewed in this manner, tactical places do more than separate speakers from potential listeners (willing and unwilling alike); they *stigmatize* the speech and the speakers they contain.

Viewing tactical places as active and communicative, rather than inert and unrelated to expression, provides yet another basis for rejecting the presumption that place is a neutral divider. Adding this insight to the observations above regarding both the constructive process and expressive effects of tactical places rebuts the presumption that these uses of place are, like ordinary time, place, and manner restrictions, neutral with regard to speakers and expressive content.

3. The "Correlation" of Spatiality and Speech Content.—Doctrinally, to say that speech and spatiality are closely related or that spatial tactics disparately impact certain speakers and messages does not provide sufficient basis for applying strict judicial scrutiny. The Supreme Court has held that any regulation "that serves purposes unrelated to the content of expression is deemed neutral," even where "it has an incidental effect on some speakers or messages but not others."[351] So long as a regulation on the place of expression is "*justified* without reference to the content of the regulated speech,"[352] it does not receive strict scrutiny.[353] The government will rarely, if ever, fail to meet this standard when it utilizes spatial tactics. Spatial tactics are typically said to serve interests in order and security.

Nonetheless, as noted, the intersection of speech and spatiality sets spatial tactics apart from ordinary time, place, and manner regulations. Since spatial taetics neatly fit neither the content-neutral nor the content-based category, this Article suggests that courts consider spatial tactics "content-correlated" regulations of expression. The "content-correlated" label is borrowed from the context of zoning of "adult" expression.[354] For some on

350. *See* Kuba v. 1-A Agric. Ass'n, 387 F.3d 850, 863 (9th Cir. 2004) ("Cordoning protesters off in a free expression zone the size of a parking space, located over 200 feet from the entrance, far from encouraging interaction with them, is more likely to give the impression to passers by that these are people to be avoided.").

351. Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989).

352. Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 293 (1984) (emphasis added).

353. *See id.* at 312–13 (stating that "while regulations that turn on the content of the expression are subjected to a strict form of judicial review, regulations that are aimed at matters other than expression receive only a minimal level of scrutiny" (citation omitted)).

354. *See* City of Los Angeles v. Alameda Books, Inc., 535 U.S. 425, 459 (2002) (Souter, J., dissenting) (addressing the city's use of a zoning ordinance to limit the number of adult businesses that could operate in a single building).

the Court,[355] these zoning measures, which target establishments that display sexually explicit content, occupy "a kind of limbo between full-blown, content-based restrictions and regulations that apply without any reference to the substance of what is said."[356] As in that context, calling a tactical place "content-correlated" would "not only describe it for what it is, but keep alert to a risk of content-based regulation that it poses."[357]

The doctrinal and prescriptive implications of this label are explored below. To the extent they have elaborated on the approach, the Justices who subscribe to the "content-correlation" theory would subject the zoning of adult speech to greater scrutiny than is currently applied to ordinary time, place, and manner regulations.[358] These Justices would part company with their colleagues by requiring, at least, an empirical demonstration of the "secondary effects" the government claims to rely upon to justify its zoning.[359] Whether they might require even more than this, perhaps in other contexts where regulations are correlated with content, is uncertain.

In considering what sort of scrutiny to apply, it is worth pointing out that an upward adjustment would not be wholly novel insofar as spatial tactics are concerned. As noted in Part I, the Court has subjected injunctive abortion clinic "buffer zones" to a heightened standard of scrutiny.[360] Justice Scalia sarcastically labeled this "intermediate-intermediate" scrutiny.[361] But the Court's insight, which seems fundamentally sound, was that allowing judges to *enjoin* speech spatially gives rise to a special risk of content discrimination.[362] Taking into account the process whereby tactical places are produced, however, there is no need to limit that insight to judges crafting injunctions. Legislatures, law enforcement officials, and other administrators can be just as intimately concerned with, and biased with respect to, certain speakers and expressive content.[363]

B. Spatial Skepticism

A time, place, and manner restriction must be content-neutral, serve important governmental interests, be narrowly tailored to serve those interests, and leave open ample alternative avenues or channels of

355. The "content-correlated" concept originates from the first part of a dissenting opinion authored by Justice Souter, in which Justice Stevens and Justice Ginsburg joined. *Id.* at 453.

356. *Id.* at 457.

357. *Id.*

358. *Id.*

359. *See id.* (discussing the need for "empirical evidence" of secondary effects).

360. *See supra* subpart I(B).

361. Madsen v. Women's Health Ctr., 512 U.S. 753, 791 (1994) (Scalia, J., dissenting).

362. *See id.* at 764 (majority opinion) ("Injunctions also carry greater risks of censorship and discriminatory application than do general ordinances.").

363. *See supra* Part I.

communication.[364] The Court has significantly diminished the bite of this standard. As to neutrality, the Court has held that any regulation that is "*justified* without reference to the content of the regulated speech" will be deemed content-neutral.[365] As noted, spatial regulations are nearly always justified with reference to order, safety, and other content-neutral interests that are considered important.[366] The Court has also taken pains to point out that the tailoring of spatial regulations need not be the least restrictive or intrusive means available to the government.[367] Finally, the *adequacy* of spatial alternatives has never been a serious component of the time, place, and manner analysis. Alternative places need only be theoretically, not realistically, available to the speaker to be considered "ample."[368] And in terms of adequacy, places are treated as more or less fungible properties. Speakers are not entitled to the most efficacious place. Whatever the spatial regulation, it seems there is always an alternative space the speaker can utilize to make his point.

This Article contends that courts confronting spatial tactics should be far more aware of the power of place to distort and suppress expression. The label that best captures this prescriptive proposal is spatial skepticism. Spatial skepticism does not entail that spatial tactics can never be utilized or that speakers have a right to speak anywhere they desire. Rather, the spatial skepticism concept seeks to limit the application and scope of spatial tactics to truly necessary contexts. It requires an inquiry into actual governmental purpose, skeptical review of the lines and boundaries of tactical places, and

364. Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983) ("The State may [] enforce regulations of the time, place, and manner of expression which are content-neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication.").

365. *See* Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 293 (1984) (emphasis added) (stating that time, place, and manner restrictions "are valid provided that they are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information"); *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").

366. *See, e.g.*, MacDonald v. City of Chicago, 243 F.3d 1021, 1032–33 (7th Cir. 2001) (holding Chicago's parade ordinance "justified without reference to the content of the marchers' speech" because it required consideration of "whether the proposed activity will interfere with traffic," "whether the concentration of parade participants will prevent proper fire and police protection," and "the availability of police to protect participants from *traffic hazards*").

367. *See Ward*, 491 U.S. at 800 ("So long as the means chosen are not substantially broader than necessary to achieve the government's interest . . . the regulation will not be invalid simply because a court concludes that the government's interest could be adequately served by some less-speech-restrictive alternative.").

368. *See* City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 53–54 (1986) (disagreeing with the assertion that, because some of the suggested altemative locations for an adult theater were "occupied by existing businesses," such that there was purportedly no "'commercially viable'" space available, the alternative avenues of communication were inadequate).

serious examination of any purported alternative places where it is contended the expression may occur.

1. Place, Post-9/11.—As mentioned in the Introduetion, one of the probable reasons for the rise of spatial tactics is the sense of foreboding that has gripped the nation since the events of September 11, 2001. This does not account for all spatial tactics, of course. But it does account for some of the more disturbing tactical places, like those that are now fixtures of political protests in this country. Like so many other things, place has been affected by the threat and fear of public violence.

There are general justifications, as noted above, for doubting spatial neutrality. Courts should not merely accept any governmental justification. They should demand some showing that the purpose is genuine, and that using place is necessary. In this regard, there is one purpose that merits special consideration. In the post-September 11 context, "security" from one thing or another has become perhaps the most prominent governmental rationale for spatial tactics.[369] Courts will encounter this justification with increasing frequency.

There are two reasons for courts to be skeptical of this particular justification. First, "security" is a far more malleable justification than those the state has historically used to justify spatial regulations. Ensuring that two parades do not collide, or that traffic continues to flow on a busy thoroughfare, are rather mundane considerations regarding basic order. Security is, by nature, a more complex, emotional, and politically charged justification than these sorts of things. Because courts are by nature less inclined to challenge this justifieation, "security" threatens a substantial expansion of governmental control over public places. Second, although spatial tactics do make us more secure (we are all "safer" insofar as those who seek to disrupt and agitate are peuned and caged), this security comes at a substantial price, namely a spatial regime premised upon "protection" from expression that disturbs, agitates, and offends. Courts should be quite sensitive to this tradeoff when assessing the security justification.

Security is, of course, a substantial state interest. But there is a particular danger in our current social and political environment that courts will too readily defer to this governmental justification. No court, after all, wants to be responsible for violence (or worse) should there be a breach of security. As the Boston speech cage demonstrates, courts are too willing to

369. *See* Bl(a)ck Tea Soc'y v. City of Boston, 378 F.3d 8, 13 (1st Cir. 2004) (assessing the City of Boston's interest in "maintain[ing] security at the [2004 Democratic National] Convention," which led to the creation of a demonstration zone for protesters), *aff'g* Coal. to Protest the Democratic Nat'l Convention v. City of Boston, 327 F. Supp. 2d 61 (D. Mass. 2004); *cf.* Bourgeois v. Peters, 387 F.3d 1303, 1321 (11th Cir. 2004) (relating the purported governmental interest behind a policy subjecting would-be protesters to magnetometer searches as the maintenance of public safety and security, an interest the city claimed was bolstered by the "post-Scptember 11 environment").

defer to this rationale, even in the absence of any evidence to support it.[370] Protesters there were denied an opportunity to speak based upon reasoning that came dangerously close to a form of "guilt by association."[371] The fact that past protesters elsewhere had committed violent acts was treated as reason enough to credit the government's assertion that these protesters would do likewise.[372] This sort of reasoning only contributes to the growing bias against and unease with dissident expression. Courts should make every effort to avoid it.

This does not mean, however, that courts should second-guess every security determination made by law enforcement officials. It means only that where the presumption of neutrality no longer applies to spatial tactics, there is room to question governmental justifications for their use. There should be sufficient evidence of a threat to governmental interests to satisfy the court that "security" is not being used as a pretext to affect or suppress expression. This is a tricky empirical issue, since security relies in some cases on projections of danger. It may be necessary to consider some of the basis for the security justification *in camera*. In any event, the mere incantation of "security" should not be treated as sufficient cause for locking place down.

Judicial skepticism should not, as noted, be limited to justifications based on security concerns. Spatial tactics represent a new generation of place restriction. They are purposefully being used to defuse social and political unrest. Given this trend, even ordinary justifications such as maintenance of "traffic flow" should be more skeptically reviewed where spatial tactics are used. Non-security-based justifications are generally susceptible to the sort of demonstration being urged here. The danger of pretextual resort to spatial tactics is sufficiently high that whatever the justification, the state should be required to provide some evidence that its interests and concerns are genuine.

2. Tailoring Space.— Courts appear to be as reluctant to scrutinize the lines governments draw in constructing tactical places, their "tailoring," as they are to assess justifications for them. This reluctance can probably be traced in part to the historical deference given governmental zoning

370. The First Circuit recognized the need for sensitivity to the security justification in reviewing the denial of protesters' request for injunctive relief during the 2004 Democratic National Convention. *Bl(a)ck Tea Soc'y*, 378 F.3d at 13. The court stated, "Security is not a talisman that the government may invoke to justify *any* burden on speech (no matter how oppressive). Thus, the question of narrow tailoring must be decided against the backdrop of the harms that a particular set of security measures are designed to forfend." *Id.* Yet the First Circuit ultimately approved the district court's decision, stating that "[t]he risks of violence and the dire consequences of that violence seem more probable and more substantial than they were before 9/11. When judges are asked to assess these risks in the First Amendment balance, we must candidly acknowledge that they may weigh more than they once did." *Id.* at 19.

371. *See supra* text accompanying notes 66–82.

372. *See supra* text accompanying notes 66–82.

measures.[373] Contemporary Euclidian zoning, the sort that comprehensively partitions and regulates land uses, began to appear in the early twentieth century.[374] As a spatial modality, zoning "institutes a centralized, command-and-control style of land use regulation. It operates on the principle, 'a place for everything, and everything in its place.'"[375] Spatial tactics are, of course, based upon a similar principle. To continue the analogy, spatial tactics might be viewed as regulations of "expressive uses." Thus, just as officials determine where certain business uses are appropriate, so too do they zone speech where this "use" is most appropriate.

Despite the apparent similarity, the usual deference to governmental line-drawing is inappropriate where spatial tactics are used. The power of local officials to zone property for specific uses is well established.[376] From the beginning, three principles have been thought to generally validate spatial ordering through land use regulation. First, zoning schemes were *comprehensive* plans.[377] Through place, they implemented a common community vision for cities and suburbs.[378] Thus, rather than target specific uses, these plans were exercises of the police power in pursuit of the general welfare.[379] Second, zoning relied substantially on *experts* to conceptualize and operationalize community plans.[380] The operative assumption was "that the most important problems in land-use planning were not political but scientific and technical."[381] Architects, engineers, and other professionals were expected to play a major role in developing zoning plans.[382] And these professionals were presumed to be neutral with regard to specific uses.[383] Third, the increased specialization with regard to place contributed to a reduction in the scope of judicial review applied to zoning plans.[384] Experts, it was believed, should be flexibly permitted to manage changing landscapes.[385] Judges are in no position to second-guess the basis for or the

373. *See infra* text accompanying notes 384–391.

374. Eric R. Claeys, Euclid *Lives? The Uneasy Legacy of Progressivism in Zoning*, 73 FORDHAM L. REV. 731, 739 (2004); *see also* Vill. of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926) (upholding a comprehensive local zoning plan).

375. Claeys, *supra* note 374, at 739.

376. *See, e.g.*, Laurie Reynolds, *Zoning the Church: The Police Power Versus the First Amendment*, 64 B.U. L. REV. 767, 784–85 & nn.96–97 (1984) (stating that "[c]ommentators and courts have heralded special use zoning as a sound method of protecting the general character of a district through the grant of broad discretionary authority to local officials").

377. Claeys, *supra* note 374, at 740.

378. *See id.* at 750 ("The Progressives loathed the absence of a comprehensive plan.").

379. *See id.* at 750–51 (noting the "communitarian ideals" expressed through early zoning plans).

380. *See id.* at 754 (noting that "the Progressives elevated experts and deprecated judges").

381. *Id.*

382. *Id.*

383. *Id.* at 754–55.

384. *See id.* at 755 (noting that "as social progress and expert planners rationalized land use, they reduced the scope of judicial review").

385. *Id.*

specifics of zoning decisions.[386] From the beginning, then, substantial *judicial deference* has been applied to ordinary zoning measures.

These progressive principles—comprehensiveness, expertise, and judicial deference—may counsel against interference with the regulation of slaughterhouses and subdivisions. But courts should not apply them unthinkingly to justify upholding spatial restrictions on the exercise of fundamental expressive and associative rights. For one thing, spatial tactics are not comprehensive plans. They are, once again, *targeted* responses to social and political unrest. Nor, as has already been pointed out, are the "architects" of tactical places neutral engineers, scientists, land planners, or other land use experts. They are, by and large, officials with an inherent bias for order and control over expression.[387] Hence it is no overstepping of judicial bounds to question the tailoring applied to "expressive uses." The rationale for judicial deference does not apply to spatial tactics.

Courts do sometimes invalidate the spatial choices government officials make. But this typically occurs only where the speech zone is completely disproportionate to the government's stated needs. As noted in Part I, the 2000 Democratic National Convention in Los Angeles featured a 185-acre "secured zone" around the stadium where the convention was to take place.[388] The official demonstration area, or "free speech zone," offered to protesters was located 260 yards from any participating delegate.[389] On its face, that tactical place is not a tailored response to any problem. Nor is a speech zone located 1/3 of a mile from the site of contention and the intended audiences. But the challenge is for judges to steel themselves to look more carefully at the lines drawn in even closer cases. Recognizing that these decisions are necessarily matters of degree, or rather feet, courts should nevertheless demand a persuasive showing that 50-, 75-, or 100-foot zones truly *burden no more speech than is necessary under the circumstances.*

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386. *Id.* at 756–57.

387. The Court has permitted deferential zoning with regard to sexually explicit adult establishments. But it has done so on the implicit theory that the expression has little value. *See* Young v. Am. Mini Theatres, Inc., 427 U.S. 50, 73 (1976) (upholding Detroit zoning ordinances that geographically dispersed "adult" theaters by prohibiting any adult theater from being located within 1,000 feet of any two other "regulated uses" or within 500 feet of a residential area); *id.* ("society's interest in protecting this type of expression is of a wholly different, and lesser, magnitude" than the interest in protecting political debate or other expression); *see also* City of Los Angeles v. Alameda Books, Inc., 535 U.S. 425, 429–43 (2002) (plurality opinion) (upholding a zoning restriction on multiple-use "adult" establishments); City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 43 (1986) (upholding a zoning ordinance that prohibited adult motion picture theaters from locating within 1,000 feet of any "residential zone, single- or multiple-family dwelling, church, park, or school"). Whatever deference may be due localities when they regulate "low value" speech, this logic does not apply to the politically and socially significant expression affected by spatial tactics.

388. *See supra* text accompanying notes 52–57.

389. Serv. Employee Int'l Union v. City of Los Angeles, 114 F. Supp. 2d 966, 972 (C.D. Cal. 2000); *see also* Kuba v. 1-A Agric. Ass'n, 387 F.3d 850, 853–54 (9th Cir. 2004) (invalidating a free speech policy that included designated zones).

They should ask whether hard barricades and pens are truly necessary. If these questions had been asked and answered honestly, it is difficult to imagine that the Boston speech cage would have survived meaningful judicial scrutiny.

Courts may be more inclined to scrutinize the boundaries and features of tactical places if they understand how critical these things are to expressive rights. Among other adverse effects, spatial tactics undermine the historically venerable practice of intimate persuasion, practices like face-to-face communication, and the distribution of literature. As institutional free speech policies proliferate, speakers will continue to be drawn into out-of-the-way places that render face-to-face communication impossible. And if courts remain reluctant to engage questions of spatial tailoring, that is where such speakers will remain.

There should be a *presumption* that any spatial tactic that prevents, or substantially burdens, attempts at intimate persuasion fails the tailoring standard. Of course, in situations like presidential appearances, that presumption can be overcome by real concerns for the president's safety. This does not mean presidents should receive a several-mile buffer, but personal contact is, and must necessarily be, limited in that context. But presidential access is a relatively minor aspect of the problem. In most circumstances, the need for separation between speakers and listeners is far less critical. Protesters outside auditoriums or conventions, in parks, and at health clinics should be given the benefit of the presumption that spatial tactics preventing intimate persuasion are unconstitutional. This may mean that greater security is required at these places. And if greater security is not sufficient to deal with a real and present danger, then spatial tactics may in the end prove to be necessary. But they should be a last, rather than a first, resort.

3. Spatial Adequacy.—One of the things courts are supposed to consider in assessing any spatial regulation is whether the regulation "leave[s] open adequate alternative channels of communication."[390] Spatial skepticism would require that this inquiry, as well, be more rigorous in situations where spatial tactics are used.

As current doctrine is interpreted and applied, it is the rare case that fails this particular element of the time, place, and manner test.[391] This is so for the quite obvious reason that in most cases, a regulation of place will not wholly prevent a speaker from communicating elsewhere. If a speaker cannot post signs here, for example, then he may still hand out literature over there. The doctrine of place generally presumes that one place is as good as

390. Schad v. Borough of Mount Ephraim, 452 U.S. 61, 76 (1981).

391. There are some examples, however. For a recent case finding a lack of adequate alternative channels of communication in the context of a political protest, see *Blair v. City of Evansville*, 361 F. Supp. 2d 846, 859 (S.D. Ind. 2005).

the next. And speakers are not in any event entitled to the best place, but only one that is "adequate." Consequently, courts spend little, if any, time contemplating the relative expressive merits of alternative places.

As the avenues of communication have multiplied, it has only become easier to gloss over this part of the analysis. Recall the First Circuit's conclusion that the protesters subject to the speech cage in Boston could have communicated their messages through the media assembled to cover the national convention.[392] This is a dubious supposition to begin with; the media typically cover the act of protest itself, which the cage prevented. But the deeper problem with this analysis is that the court failed to appreciate the significance of the place of expression to the protesters' intended message. Being *there*, at that place, was in some sense critical to the protesters. Massing with others to confront those who were attending the event was an inextricable part of the message they sought to convey. The principles of spatial primacy and dynamism, discussed in Part III, emphasize that the place of expression is often critically associated with the expressive message.[393] As the First Circuit's analysis indicates, courts generally fail to take such insights into account when examining place.

Aside from making this broad connection between speech and spatiality, there are several specific things that courts should consider in deciding whether ample or adequate space remains available to speakers. How efficient is the alternative place relative to the place speakers have been denied? How far is it from where the speakers originally wanted to be? Does it entail additional costs, either in terms of time or money? How are its specific characteristics or qualities likely to affect the planned social and expressive activity? To what extent will the alternative space force speakers to alter their message or their chosen method of communication? This is by no means an exhaustive list. At a minimum, however, an *adequacy* determination should not be made without considering the expense, location, qualities, and expressive effects of the suggested alternative place or places.

C. Space As an "Index of Freedom"

Questioning governmental purposes, ensuring minimal impact on expressive and associative rights, and assessing spatial adequacy may, to some, seem hardly worth the effort in this context. After all, these things are being done merely to preserve discourse in public places that no longer seem critical to expression. This is particularly so in light of the various communication technologies modern speakers and listeners have at their disposal. What difference does it make, some might say, that a protester

392. Bl(a)ck Tea Soc'y v. City of Boston, 378 F.3d 8, 14 (1st Cir. 2004), *aff'g* Coal. to Protest the Democratic Nat'l Convention v. City of Boston, 327 F.Supp 2d 61 (D. Mass. 2004).

393. *See* discussion *supra* sections III(A)(2), III(A)(4).

cannot speak in the public park when she can blog or otherwise electronically communicate her view to millions? This sort of reasoning underlies the First Circuit's rationale urging the convention protesters to resort to media coverage as an alternative to demonstrating in person.[394] Of course, the Internet and other technologies have become critical media for the cheap, rapid, and widespread exchange of ideas. But that does not mean that they have supplanted real, physical places. Protection of access to the streets, sidewalks, and parks remains critical to expressive and associative freedoms.

Despite advances in expressive technologies, there are three broad reasons for undertaking the suggested skeptical examination of spatial tactics. The first relates to First Amendment theory broadly. The shrinking and segmenting of public space that is open to expression undermines many of the foundational premises of freedom of expression. Spatial techniques produce a much smaller "market*place* of ideas," less space for self-government, and less room for individual self-fulfillment.[395] We cannot self-govern from inside cages, pens, and finely wrought zones. Public officials who travel in bubbles and appear in dissent-free zones are increasingly isolated and insulated from the public and its concerns. Moreover, place is a critical component of the "safety valve" for our society's most offensive and divisive expression.[396] But face-to-face confrontation is no longer viewed as simply uncomfortable; it is being treated as presumptively insidious and dangerous.

These theoretical concerns have now confronted a stark modern reality. Public space is a rapidly diminishing resource. That is particularly true with respect to public space that is open to expressive activity, the so-called public forums. Main street has been replaced by the super-mall, where the First Amendment generally does not apply.[397] We spend an increasing amount of time today in places like airport terminals and subway systems, what some scholars call "non-places."[398] These places are not designed for social interaction or expression. In these places, then, opportunities for significant public debate and expression are few, and dwindling.

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394. *See Bl(a)ck Tea Soc'y*, 378 F.3d at 14 (noting that "[m]essages expressed beyond the first-hand sight and sound of the delegates nonetheless have a propensity to reach the delegates through television, radio, the press, the internet, and other outlets"; thus, "viable alternative means existed to enable protesters to communicate their messages to the delegates").

395. *See* ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT 15–16, 24–27 (1948) (advancing self-governance theory); Kent Greenawalt, *Free Speech Justifications*, 89 COLUM. L. REV. 119 (1989) (discussing "marketplace" and other free speech justifications).

396. *See* THOMAS I. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 7 (1970) (arguing that free speech leads to stability).

397. *See* Hudgens v. NLRB, 424 U.S. 507, 520–21 (1976) (holding that labor picketers had no right to demonstrate at a shopping center); Lloyd Corp. v. Tanner, 407 U.S. 551, 568 (1972) (holding that Vietnam War protestors had no right to distribute handbills in a shopping center).

398. *See supra* notes 245–246 and accompanying text.

If the requisite breathing space for expression is to be preserved, our streets, sidewalks, and parks must remain free, open, and speech-facilitative. What Harry Kalven, Jr. said in his seminal article on the public forum remains true today:

> [I]n an open democrac[y] . . . the streets, the parks, and other public places are an important facility for public discussion and political process. They are in brief a public forum *that the citizen can commandeer; the generosity and empathy with which such facilities are made available is an index of freedom.*[399]

Spatial tactics, of course, preclude speakers from "commandeering" any public places, including the streets and parks. If the openness of public places to expressive activity is in fact an "index of freedom," then we appear as a society not to value public discourse much at all.

Second, on a more practical but no less important level, cyberspace, for all of its innovations, simply cannot replace or imitate live protests and other forms of expression. Anyone who has ever participated in an "online protest" already knows this. As recent street protests around the world attest, *being there*, and *with others*, are critical aspects of public dissent.[400] If the Internet is an effective substitute for this spacc, then why do we still see people massing in public streets and squares where it and like technologies are readily available? Part of the answer has to be that there is powerful symbolism in gathering with others in public spaces. This does not depend upon changing minds or any other notion of expressive effectiveness. The event itself is cathartic, expressive, evocative, emotive, and meaningful to those who participate. Speech on the Web shares few, if any, of these critical characteristics.

Nor are cyberplaces more generally adequate substitutes for public places like streets and parks. The history of civil protest is, in substantial part, a history of *places*. The Mall, the Lincoln Memorial, Central Park, Selma; these are integral aspects of our social and political heritage. Cyberplaces do not retain or conjure lessons, meanings, or memories in a like manner. Only real places are dynamic and expressive in this sense. In sum, as important as they are to expressive freedom, cyberplaces and other metaphysieal places cannot alone ensure that "debate on public issues [will] be uninhibited, robust and *wide-open*."[401]

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399. Kalven, *supra* note 26, at 11–12 (emphasis added).

400. *See, e.g.*, Blair v. City of Evansville, 361 F. Supp. 2d 846, 856 (S.D. Ind. 2005) (discussing the defendant's First Amendment argument regarding his right to be close enough to the Vice President and the Vice President's supporters that they could hear his protests); Thomas Fuller, *Day of French Protests Draws Droves Nationwide*, INT'L HERALD TRIB., Oct. 5, 2005, at 3 (reporting that "[h]undreds of thousands of demonstrators took to the streets across France on Tuesday in 150 anti-government marches to protest privatization, stagnant wages and a law that makes it easier to lay off employees at small companies").

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

Third, and finally, despite occasional suggestions to the contrary, the public square lives. Harry Kalven, Jr. was writing at the height of the Civil Rights movement, with special sensitivity to that particular movement's need for public room or space.[402] Perhaps we cannot return to an era in which citizens can "commandeer" the streets. There is real danger in that sort of freedom, and there are certainly those who might abuse it. But we should be careful not to turn the possibility of violence and confrontation, or the existence of alternative modes of communication, into an excuse for permitting the government to manipulate public places. Again evidence from around the world demonstrates that real places like streets, parks, and public squares still matter to social and political movements. The streets have been central to recent protests in Colombia,[403] China,[404] and Kyrgistan to name only a few countries.[405] At home, the protests of the Iraq War,[406] the national political conventions,[407] and the presidential inauguration[408] all demonstrate that these public places are still critical to social movements and political culture.

If the public cannot commandeer the public square, then at least spatial tactics should be limited and constrained to permit the effective use of these places. Demonstrations depend for their effectiveness, including their media coverage, upon reasonable proximity to intended audiences.[409] As past

402. *See supra* note 214 and accompanying text.

403. *See, e.g.*, Larry Rohter, *By Millions, Colombians Take to Streets Against War*, N.Y. TIMES, Nov. 7, 1999, at 15 (reporting that "at least five million Colombians marched late last month in more than 700 cities and towns to urge an end to [civil conflict] and related human rights abuses").

404. *See, e.g.*, John Pomfret, *A Buildup of Irritation in Relations*, WASH. POST, Apr. 3, 2001, at A1 (noting that following the U.S. bombing of China's embassy in Yugoslavia, hundreds of thousands of Chinese took to the streets to demonstrate against the United States).

405. *See, e.g.*, Christopher Pala, *Protests Force Leader to Flee in Kyrgyzstan*, N.Y. TIMES, Mar. 25, 2005, at A1 (stating that "[p]rotesters alleging corruption, repression and electoral fraud forced the longtime president of this central Asian country to flee his palace").

406. *See, e.g.*, Manny Fernandez, *In D.C., a Diverse Mix Rouses War Protest*, WASH. POST, Oct. 26, 2003, at A8 (describing anti-Iraq war protests that took place in more than two dozen U.S. cities on the previous day, including one in Washington, D.C. that proceeded "along a route that ringed the Washington Monument, the White House and the Justice Department").

407. *See, e.g.*, Serv. Employee Int'l Union v. City of Los Angeles, 114 F. Supp. 2d 966, 968, 975 (C.D. Cal. 2000) (holding that protestors of the 2000 Democratic National Convention were entitled to use the surrounding streets and sidewalks for public demonstrations, marches, and speeches).

408. *See* Paulson, *supra* note 36 (noting that protesters were issued permits to demonstrate only in designated areas along the parade route during the 2000 presidential inauguration).

409. *See, e.g.*, Alan E. Brownstein, *Rules of Engagement for Cultural Wars: Regulating Conduct, Unprotected Speech, and Protected Expression in Anti-Abortion Protests—Section II*, 29 U.C. DAVIS L. REV. 1163, 1206 n.109 (1996) ("Proximity allows the speaker to establish both aural and visual contact with the listener in a personal manner. This facilitates and amplifies the transmission of the message being conveyed by enhancing the dramatic impact of expression and demonstrating the intensity of the speaker's beliefs."); Mark S. Nadel, *Customized News Services and Extremist Enclaves in* Republic.com, 54 STAN. L. REV. 831, 871 (2002) (book review) ("Today, a public forum's role as a mass media channel for speakers is primarily as a location for staging

demonstrations have taught, confrontation, disruption, and a degree of spontaneity are critical aspects of these fundamental collective rights.[410] It is impossible to imagine the 1960s Civil Rights movement or the era of Vietnam protests—two periods indelibly etched on our collective national psyche—occurring from within pens, cages, bubbles, and "free speech zones." Unrestrained protests can teach volumes; demonstrations in tightly constructed cages, by contrast, convey only how little value we currently place on protest and dissent.

In our own time, spatial tactics are making it impossible for history to repeat itself. A demonstration on the West Side Highway, for example, is simply not an adequate substitute for one that abuts the site of the Republican National Convention.[411] A cage that makes it impossible for protesters to be seen or heard, or for their presence to be felt, does not provide a constitutionally adequate place for expression. Barricades create docile bodies, to be sure, but at the expense of the spontaneity and creativity that make protest an effective mode of expression. As one commentator put it: "The 'Huddle on Washington' just doesn't have the same ring to it."[412] A social or political movement must, after all, have some freedom *to move*.

Our expressive topography is increasingly inhospitable to the very speech that merits the greatest protection, namely speech on matters of public concern, including political speech. The speech that takes place in the public streets and parks is very often uncomfortable for many to witness. But it is a truism that the measure of a society's freedom is its ability and willingness to embrace unpopular behaviors and attitudes. By that measure, spatial tactics speak volumes regarding this society's current commitment to freedom of expression. To return to Kalven once more:

> Among the many hallmarks of an open society, surely one must be that not every group of people on the streets is a mob, and another that its streets time out of mind have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions.[413]

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presentations, including protests and rallies, intended to reach mass audiences via conventional mass media.").

410. *See, e.g.*, Shuttlesworth v. City of Birmingham, 394 U.S. 147, 163 (1969) (Harlan, J., concurring) (asserting that "timing is of the essence" with regard to political protest because "when an event occurs, it is often necessary to have one's voice heard promptly, if it is to be considered at all"); Cheh, *supra* note 35, at 62 (offering examples in support of the assertion that "[c]onfrontational and troublesome protests and demonstrations, particularly those held in Washington D.C., have had a direct effect on the great public questions of the day").

411. For an account of this real-life forum substitution, see Diane Cardwell, *Protesters Accept a Stage Distant from G.O.P. Ears*, N.Y. TIMES, July 22, 2004, at B3, which reported that a large rally that protesters had originally hoped to hold in Central Park had been moved to a site on the West Side Highway.

412. Paulson, *supra* note 36.

413. Kalven, *supra* note 26, at 32 (quotations omitted).

We would do well to keep such sentiments in mind in the current century, and in centuries to come.

V. Conclusion

Streets, sidewalks, and other public spaces are increasingly subject to spatial tactics, the utilization of space for social and political control. As Harry Kalven, Jr. wrote forty years ago: "[T]he generosity and empathy with which such facilities are made available is an index of freedom."[414] That index is presently at a low point; speakers are now routinely confined to cages, zones, pens, and other spatial architectures. This Article has argued that place in general, and spatial tactics in particular, are not as neutral as current speech doctrine indicates. To decide *where* expression takes place is to choose a distribution of power and knowledge, to make normative judgments about what speech should be seen and heard and what speech should be segregated and avoided. Tactical places separate and brand speakers; communicate to the public that dissent, and dissenters, are dangerous and are to be avoided; facilitate avoidance of unpopular or offensive speech; inhibit movement and associative expression; and allow for tight surveillance of unpopular speech and speakers.

This Article argues that we must finally abandon the conception of place-as-*res*. It proposes that courts adopt a reconceptualization of place as distinctly expressive—as variable, primary to speech, constructed, and dynamic. This is a critical first step to reconnecting speech and spatiality. Based upon this reconceptualization, this Article advocates what it calls spatial skepticism, essentially a closer review of spatial tactics and tactical places. Armed with the knowledge of what place actually is, courts should no longer blindly accept a state's proffered justifications for resorting to spatial tactics. Nor should courts simply defer to the lines, boundaries, and architectural features the state imposes, or accept unquestioningly the "adequacy" of the places the state offers as alternative locations for expressive activity. The state, in other words, should henceforth be forced to justify the expressive topography it is mapping.

414. *Id.* at 12.