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As the 2004 Democratic National Convention prepared to convene in Boston, Massachusetts, the first national political event to be held since the September 11, 2001 terrorist attacks, officials puzzled over a conflict that has so often frustrated democratic societies: How does a society protect dissent while also offering a safe and secure environment for its citizens?

The 2004 answer to the question could be found tucked beneath an interstate overpass more than a block from the FleetCenter (now known as the TD Garden) where Democrats would gather to nominate their candidate for president. The site, referred to as a Demonstration Zone (DZ), featured overhead netting, chain-link fence, razor wire and armed guards. For many, the space more resembled a prison than an area to celebrate First Amendment freedoms, something that was not lost on U.S. Federal Judge Douglas P. Woodlock, who toured the site before the convention began:

> I at first thought, before taking a view [of the protest zone], that the characterization of the space being like a concentration camp was litigation hyperbole. Now I believe it's an understatement. One cannot conceive of other elements put in place to create a space that is more of an affront to the idea of expression than the designated demonstration zone.[1]

Despite those views—in his written decision Judge Woodlock referred to the space as a "festering boil"[2]—the judge ruled that the zone was a constitutional limitation on dissent, but noted with sadness that Americans live in a time where such security precautions are necessary.[3]

Judge Woodlock's troubled acceptance of these types of spaces is not unusual in the legal history of what has come to be referred to as free speech zones. While ruling in favor of their constitutionality, judges often express regret at their need and try to make the spaces more palatable by tinkering with the aesthetic qualities of the space. And while the legal contours of free speech zones have been scrutinized,[4] the effect of these spaces on democratic life, as well as the ideas that justify their existence, has been largely ignored. This paper suggests that legal analysis tells only part of the story of free speech zones. It suggests that free speech zones as a way of managing dissent is better understood as the product of cultural movements within society—movements reflected in legal decisions—that influence how we have come to understand the relationship between public space and the realization of democracy.[5]

That relationship can be captured through an examination of the spatial frameworks that underlie how dissent is managed during different periods in the United States. The term "spatial framework"[6] as used in this paper refers to the interconnection between expression, the space within which that expression is performed, and the regulatory structure that is imposed on both that expression and space. It attempts to capture the notion that dominant ideas in society about expression in public spaces at a certain point in time are reflected in the legal thinking of that period. As such, this paper doesn't seek to discover the true meaning of the First Amendment in regard to expressive freedom, but rather chart how those freedoms are influenced by changing values within society.[7]

It will be argued that the use of free speech zones as an acceptable limitation on dissent is the product of a series of developments that can best be understood through three spatial frameworks: Property, Place, and Planning. Each framework brings with it ideas about how public space ought to be used, for what purposes, how much control can be rightfully exerted by government, and the importance of both dissent and public space to democracy. It will be argued that today's Planning Framework, which makes order and efficiency primary, damages public life by devaluing the public value of dissent.

I. Democracy, Dissent and Public Space

While space has long been acknowledged as being important to the idea of freedom of expression in the United States, it has been an understudied area of the law. As a result, space, in First Amendment discussions, is often both under-defined and under-theorized. Timothy Zick has argued that space serves as a "background principle" in expressive freedom,[8] and when it does surface it tends to be associated with notions of property. As Zick notes, the result is that space tends to be seen "as a secondary, inert, mostly fungible, and (like other public resources) neutrally distributed backdrop for expression."[9]

Space has not always been viewed as being secondary to questions of public expression. John Stuart Mill, in reacting to the Hyde Park Riots in July 1866 and subsequent attempts to prohibit use of the public parks for dissent,[10] recognized the importance of public space to democracy:

> [M]an has a right to speak his mind, on politics or on any other subject, to those who would listen to him, when and where he will. He has not a right to force himself upon anyone; he has not a right to intrude upon private property; but wheresoever he has a

> right to be, . . . he has a right to talk politics, to one, to fifty, or to 50,000. I stand up for the right of doing this in the parks.[11]

While critics suggested that large demonstrations attracting thousands of citizens could not possibly meet any ideal notion of discourse, Mill argued that public expressive acts are seldom about discussion. Rather, for Mill, large public protest is about demonstration and the "public manifestation of the strength of those who are of a certain opinion."[12]

Bruce D'Arcus has also recognized the importance of space to dissent, terming public space a medium of citizenship.[13] As he notes, the evolution of how public space is used and managed "offers important insights into how rights and responsibilities are understood, and with that, democracy itself."[14]

While the space in which dissent has been performed is often a secondary concern in the study of expression, the value of dissent to democracy has received more attention. Cass Sunstein (who defines dissent as "the rejection of the views that most people hold"[15]) concludes that "[w]ell-functioning societies take steps to discourage conformity and to promote dissent."[16] Sunstein is critical of political theories that see consensus and agreement as their end point, suggesting that the search for consensus will lead to conformity.[17] However, in line with theorists such as Jürgen Habermas,[18] Sunstein recognizes that the right kind of dissent at the right time calls for a supportive culture of free speech, in which "the attitude of listeners is no less important than that of speakers."[19]

Steven Shiffrin recognizes the multiple roles that dissent plays in not only individual self-realization, but also in associational roles and the search for truth.[20] As such, he suggests that dissent in an of itself ought to be recognized as a "major first amendment value.[21]

Dissent is embedded in the public sphere, not only in the space that citizens use to express that dissent but also in the democratic purpose of dissent. Public dissent invites citizens to engage with ideas that might be contrary to their worldview, challenging them to think critically.[22] It exposes citizens to different ideas. And while that dissent is sometimes raucous and discomforting, as Mill and others recognized, it is still a vital part of democracy.

Dissent, then, is important at both the individual and societal level. However, the spatial frameworks that guide freedom of expression in the United States have not always protected both aspects of dissent.

II. Property as a Spatial Framework

The interconnections of ideas about democracy, space and social order run deep in American culture. Some constitutional scholars have argued that one way of controlling space, property rights, especially as articulated in the Fifth Amendment to the U.S. Constitution,[23] was originally viewed as being the central way of protecting all other rights of citizenship.[24] Property rights were not simply a way of securing the control of space and territory, or of securing financial resources, but also a way of creating more virtuous citizens. In the eyes of people such as Thomas Jefferson and John Adams, it was through land ownership that citizens would feel connected to the land and work to become responsible citizens.[25]

The transformation of space into property was in part accomplished through technology such as the rectangular survey system, allowing the creation of neat, one-square-mile sections that could be easily subdivided or added to.[26] Jefferson, who advocated for the Land Ordinance of 1785 leading to the survey of what was then known as the western territories, saw land ownership as vital to the success of a self-regulating democracy. The grid created by the survey

system would allow the land to get into the hands of citizens more quickly, avoiding speculators.[27] Based on the idea that American land was best viewed as allodial property,[28] Jefferson saw property as playing an important role in the realization of individual autonomy and serving a "political, civic function."[29]

For some, the political function of property extended to the communication of ideas. James Madison wrote of the two "senses" of property: (1) property commonly associated with land, merchandise and money, and (2) the property of a person's "opinions and free communication of them."[30] Gregory Alexander suggests that Madison's argument is not simply about the realization of individual freedoms, but also about societal freedoms.[31] Property rights enabled citizens to become involved in public life, allowing them to express their ideas freely. Republican thought in the late 1700s, then, was guided by the notion that private interests were embedded in ideas about the common welfare.[32] Property was vital to the realization of that goal, for the free circulation of property became the way for citizens to realize virtue and to have the freedom to participate in public life.[33]

The importance of space went far beyond how property would create virtuous citizens, however. The proper ordering of space, through a grid system that became the dominant way for designing cities in the late 1700s, became a reflection of democracy itself. As Dell Upton suggests, the grid allowed for a certain transparency for the "examination and understanding by all comers; classification, or the visible representation of relationships; and articulation, or the creation of relationships that were flexible and individually manipulable."[34]

Within that structuring can be found ideas about how democracy ought to function, where property-owning citizens have freedom of entry, with an absence of limits, where social mobility

is possible, and, perhaps most importantly, where possessions are used not only for individual gain but also for the creation of the common good.[35]

Some have argued that the connections between virtue and property, so central to early American legal thought, diminished by the late 19th century, replaced by *laissez-faire* constitutionalism, a doctrine that was far more interested in creating economic freedom for individuals in the marketplace than it was for developing virtuous citizens.[36] However, more recent scholarship has demonstrated that this movement was more complex than originally thought and that *laissez-faire* constitutionalism still brought with it ideas about the public good.[37]

In making that argument, some have pointed to the U.S. Supreme Court's 1877 decision in *Munn v. Illinois*[38] involving the price regulation of grain warehouses and elevators. In the decision, the Court did not simply back private property ownership, but rather created what might be called quasi-public property—property that is affected with a public interest. As Chief Justice Morrison R. Waite wrote:

> When, therefore, one devotes his property to a use in which the public has an interest, he, in effect, grants to the public an interest in that use, and must submit to be controlled by the public, for the common good, to the extent of the interest he has thus created.[39]

The affectation doctrine, as it became known, brought with it many legal and moral assumptions. While giving the public some say over private property, especially that property that served the needs of the public, it also recognized that certain kinds of property helped "maintain a proper social order."[40]

This was reflected in the police power, giving states the ability to impose restrictions on property owners when those decisions might help create a well-ordered civil society. As defined by Judge Thomas Cooley in 1886, the police power insured "to each the uninterrupted enjoyment

of his own, so far as it reasonably consistent with a like enjoyment of rights by others."[41] Cooley noted that states had the power to make "regulations as to the time, mode, and circumstances" of the actions of citizens.[42]

By the late 1880s, led by U.S. Supreme Court Justice Stephen Field and his nephew, Justice David J. Brewer, the Court had successfully partitioned property law into two distinct spheres: in the public sphere the notion of property playing a civic role was maintained and was guided by the affectation doctrine while in the private sphere, property was viewed as being primarily for private gain.[43] However, the civic role envisioned by Field and others was not that government ought to play an active role in the management of property, but rather that government ought to serve as a "night watchman," in the words of Alexander, making sure that landowners fulfill their responsibilities to the community.[44] By the end of the 19th century, legal thought on the role of property in democratic society was concerned not only with the creation of private wealth, but also about property's role in the maintenance of social order.[45] These ideas, however, were not limited to the law. Notions of property, social order, and civic virtue were also present in discussions about the proper use of public parks for dissent.

A. Parks and Social Order in the Property Framework

Law does not exist in a vacuum and can be viewed as reflecting changes within society.[46] As a result, legal decisions about the use of public space reflect the cultural value assigned to those spaces at that time. In 1897, as the U.S. Supreme Court prepared to hear arguments in the case *Davis v. Massachusetts,*[47] the question of freedom of speech in public parks was unexplored territory for the justices. Lower courts had explored the topic in a broad set of cases, ranging from anti-dancing statutes,[48] to controls on parades,[49] and the construction of private buildings in

public squares.[50] It was the view of most state and federal courts that the regulation of public space fell within the police powers granted to government and therefore raised few, if any, First Amendment concerns.[51] In the few instances when courts did question government's control of public space, those decisions generally rested in the Fourteenth rather than the First Amendment.[52] In short, from a legal perspective, public space was considered property that was under the control of government.[53]

In *Davis* the U.S. Supreme Court was asked to rule on the extent of governmental property rights. William F. Davis, a preacher, had attempted on several occasions to give public addresses in the Boston Common. Davis was convicted by a Massachusetts jury for violating ordinances that forbid giving public addresses in the Common without the permission of the mayor of Boston. The question that faced the Court was whether the Boston ordinance violated Davis's Fourteenth Amendment rights. The Court's decision, authored by Justice Edward D. White (drawing heavily on the decision of the Massachusetts Supreme Court opinion written by Judge Oliver Wendell Holmes, Jr.[54]), ruled in favor of Boston's control of the Common. Quoting from Holmes' decision, the Court ruled:

> 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. When no proprietary right interferes the legislature may end the right of the public to enter upon the public place by putting an end to dedication to public uses.[55]

Looking back at the *Davis* decision today, commentators often puzzle over how the Court could reach such a conclusion.[56] History is filled with examples of citizens using public space

for expression and assembly.[57] The Court's rationale becomes more clear when the views of commentators on the use of public space at the time are considered.

Historically, the space now referred to as the Boston Common was created in 1640 when William Blackstone sold 45 acres of treeless land to the city. As Mona Donesh notes, the space had become public property and was used for grazing cattle, attracting little attention from citizens throughout most of the 17th and 18th centuries. In that respect, it existed in that time as a true commons. However, in the late 1700s and early 1800s the city began encroaching on the Common and large, elegant homes began appearing on adjoining streets. As Donesh notes, the Common was a "source of pride" for elites in Boston society and it "served as the front yard" for those who lived around its edges.[58] As a result, that elite group of citizens sought to control development and use of the Common.[59] Donesh writes:

> [B]y controlling the "public" arena of politics and economics, the upper class was able to protect a public space for its private use. In addition, by so doing, it was also able to fulfill its ideological commitment to public service as its attempts to protect the Common were couched in terms of helping the citizenry and the public good.[60]

An increase in immigrant population and the growth of the working class put increased pressure on the Common. With that additional pressure, "the 'private' space of the Brahmins' Common had been invaded by people not of their ancestry and who did not share their value system."[61]

It is within the context of battles over the use of the Common as a public space that the *Davis* decision was reached. The decision by both the Massachusetts Supreme Judicial Court and the U.S. Supreme Court, arguing that the Common was property controlled by the government,

reflected the dominant idea about public space at that time in Boston,[62] if not in other areas of the United States.[63]

As David Schuyler notes, the growth of American urban life, with an increase in density as well as apartment and tenement life, "seemed to undermine traditional values associated with family and community."[64] The answer to these problems, for many, could be found in the creation of green spaces. Led by designers such a Frederick Law Olmsted, public parks were seen as being vital to cultivating citizenship in an urban environment. While some critics have often dismissed Olmsted and others as using space as a form of social control, as a way of refining lower-class residents, Schuyler notes a "deep commitment to the nation's republican destiny."[65] Rather than endorsing public expressive acts, however, Olmsted stressed the sociological and psychological value of space.[66] Parks were not generally places for citizens to exercise their free speech rights[67] and Olmsted sought to instill in the public an attitude about how to properly use public space.[68]

That desire to control public morality is reflected in the dominant free-speech test used during the period, the bad tendency test.[69] Under this restrictive test, speech that tended to have a bad tendency for society could be prohibited.[70] As such, the bad tendency test is considered to be the product of a time when courts cared little about individual expressive freedom.[71] Looked at through the lens of the Property Framework, however, the bad tendency test is less a product of dislike for individual freedom and more a desire to control public space and how citizens behaved in that space. The bad tendency test was an attempt to instill within citizens some sense of virtue, however that might be defined.

While it is easy to dismiss the Court's decision in *Davis* as being the product of a group of justices clinging to outdated notions of property, this example of public space in the late 1800s illustrates how dominant ideas circulating in society at that time influenced judicial opinions.

The notion that public space was government property, subject to governmental control, is evident in the police power and in the emerging theory of landscape design. While there is clearly a history of public space being used for expressive activities, the dominant view of many leaders at the end of the 19th century was to use space as a way to control crowds and instill in citizens the notion of virtue and responsibility central to the realization of democracy. Parks were considered vital public space, for it was through the existence of this public space, whether real or rhetorical, that citizens were able to achieve democracy. In theory, it broke down class distinctions, allowed working class people to temporarily escape horrible living conditions, and demonstrated that in the United States property could exist for the public good. But that public space came with restrictive rules and government retained the right to prohibit expressive activity when it was deemed not to be in the public's interest.

As such, the Property Framework played an important role in the management of dissent, giving government great authority over judgments about what types of expression aided public virtue.

III. Place as a Spatial Framework

While the Property Framework would not face a direct legal challenge for some 40 years after the *Davis* decision, political movements began to chip away at its dominance. As David Kairys notes, the period between 1897 and 1939 presented fundamental challenges to American

society: “Industrialization, the First World War, the Depression, the New Deal, and the left and labor movements led to basic shifts in consciousness and social and power relations.”[72]

As dissenting voices associated with various movements challenged the status quo and sought a right of expression, they did not, however, seek a legal remedy. As speakers filled jails and dynamite-throwing protesters caused chaos,[73] in important ways the battle for freedom of expression in the United States was won in the streets long before it was awarded legal protection.[74] To back the Property Framework, government often turned to what sociologist Holly J. McCammon has called “repressive intervention,” using police and private security forces to disrupt protest activities. However, as those tactics proved to be increasingly ineffective, government turned to “integrative intervention” where dissenting voices were institutionalized. In the area of labor, this integration was achieved through formalized collective bargaining rights and legal avenues to resolve disputes.[75]

Central to this transformation in how dissent was to be managed in a democratic society was the establishment of a new spatial framework. As control of public space through repressive actions proved to be increasingly ineffective, leaders institutionalized public space through the establishment of content-neutral rules and guidelines that governed how public space would be used. This new framework, which came to be labeled simply as Place, changed government’s oversight of public space and dissent in fundamental ways.

A. Transforming Property to Place

The idea that the primary purpose of property law was to protect individual wealth as well as support social norms of dominant groups within society, so central to *laissez-faire* constitutionalism, began to wither in the early 1900s. Alexander argues that part of this

transformation can be traced to the professionalization of legal training in the United States. While judges and prominent legal writers into the early 1900s had enjoyed a legal education that had clear moral overtones, the legal culture that became established in the early part of 20th century was based more on expertise and the scientific analysis of the law.[76] Lawyers became less philosophers and more technicians.

Fundamental to the undoing of the Property Framework, however, was a redefinition of property itself. Led by Progressive challenges in the early 1900s, property was not simply about some relationship between a person and thing (either tangible or intangible), but rather property involved a bundle of associated rights that went far beyond traditional limits of property. Viewing property as being inherently relational and social,[77] Progressives argued that property could be used to achieve a variety of public goods. Morris R. Cohen, for example, argued for the elimination of the idea that property existed prior to government. For Cohen, Classical Liberalism was built on an erroneous foundation: that individual freedom ought to be separated from interference from the state. Cohen preferred a more positive role for government that was aimed at finding ways for government to use property to improve society. As he wrote, "A government which limits the right of large land-holders limits the rights or property and yet may promote real freedom. Property owners, like individuals, are members of a community and must subordinate their ambition to the larger whole of which they are a part."[78]

The recognition that property was not pre-political, and that government was heavily embedded in the very creation of property rights, was also recognized in judicial decisions. Part of the Progressive redefinition of property was the elimination of the affectation doctrine, so important to the establishment of the Property Framework. Under the influence of newer ideas about property, distinctions made between private and public property were no longer needed.

As the Court noted in the 1934 case *Nebbia v. New York,*[79] all property was embedded with a public interest. As Justice Owen Roberts, who was to play a central role in the establishment of the Place Framework, wrote in support of the state of New York's ability to regulate the dairy industry:

> No exercise of the private right can be imagined which will not in some respect, however slight, affect the public; no exercise of the legislative prerogative to regulate the conduct of the citizen which will not to some extent abridge his liberty or affect his property. But subject only to constitutional restraint the private right must yield to the public need.[80]

This growing awareness of the social component of property also had ties to suspicions about the power of property. Property was no longer solely the way to protect individual liberty, but property, held by both individual and corporate interests, was being used by the powerful to limit the freedom of other citizens.[81]

These ideas—that property was not pre-political, that all property had a public interest, and that property was a source of very real political and economic power—were at the heart of the move away from the Property Framework. Property was no longer a way of protecting public virtue and the protector of civil liberties, but it was the source of many troubles facing society. Allowing government to lock-down public space as a way to control dissent was causing more problems than it solved and the solution was to open up public space to allow citizens to express themselves. Rather than having police break up public assemblies before trouble could begin,[82] "governmental interference should be delayed . . . until the last possible moment before violence occurs."[83]

As a result, notions about the importance of public space in the display of dissent began to change. Increasingly, the Olmstedian notion of parks as refuges from city life was left behind as, Schuyler notes, Progressive reformers articulated new visions of city parks.

> The City Beautiful invaded the naturalistic landscape and so littered it with mock temples and statuary that instead of being an alternative to the urban environment the park became an extension of it. . . . Country, even the conscious evocation of the country within the park, gave way to a celebration of the city.[84]

Public space, such as streets and parks, came to be seen less as government property and more as space open to citizen use. Ernst Freund, in his influential 1904 text on the police power, questioned the legitimacy of the Court's *Davis* decision. He termed the common use of public streets a constitutional right and said that government must justify any restriction that it puts in place.[85] Increasingly, public streets and parks were being seen less as property controlled entirely by government and more as space that was being held in trust for citizens to use. Following Justice Roberts' *Nebbia* decision, government-controlled public space had an inherently public nature and citizens had some say over how that property was to be used.

In the years after the Court's *Davis* decision, both the legal and cultural notion of public space had been transformed. Gone was the idea that property ownership was central to creating more virtuous citizens and protecting individual freedom. Gone as well was the idea that exposing citizens to open spaces would lead to moral uplift. It was replaced by the idea that embedded in all property was a social component that invited society to figure out how to best manage that property. Public space was no longer something to be admired from afar, but was something to be used and engaged with.[86]

B. The Establishment of the Place Framework

In the early 20th century the U.S. Supreme Court turned its attention to questions of civil rights, with freedom of expression being a central component of that focus.[87] With a new definition of property and an increased attention to civil liberties, the U.S. Supreme Court met to consider a challenge to the Property Framework established in *Davis*. In *Hague v. Committee for Industrial Organization (CIO)*,[88] the Court was asked to decide whether Jersey City, New Jersey, could refuse to grant permits to a labor organization to hold public meetings.[89] In a 5-2 decision, the Court ruled that the city had exceeded its authority. More importantly, however, the Court took its interpretation of public space in a new direction. In a plurality opinion, Justice Roberts[90] began by building on the historical use of public space in the city. He noted that the parks in Jersey City "are dedicated" to "the recreation of the public" and that the city granted other people the right to speak and hold meetings in parks and in the streets.[91] As a result, Roberts distinguished the Court's decision in *Davis* from the *Hague* decision.[92]

In Roberts' decision, the regulation of expression moved from being solely about the protection of public space for the public good, as it was in *Davis*, to the point where the Court felt compelled to recognize the history and tradition of how that space had been used by the public. Freedom was determined less by considerations of what government considered the public good to be and more through what might be termed procedural fairness in the management of public space. In a statement that would come to serve as the foundation of legal interpretations for years to come, Justice Roberts wrote:

> Where ever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions.

> Such use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens. The privilege of a citizen of the United States to use the streets and parks for communication of views on national questions may be regulated in the interest of all; it is not absolute, but relative, and must be exercised in subordination to the general comfort and convenience, and in consonance with peace and good order; but it must not, in the guise of regulation, be abridged or denied.[93]

After *Hague*, public space was no longer simply a form of property that government could do with what it wanted. The ruling recognized that citizens had some standing and ability to use public space. The problem facing the courts after *Hague* was less a legal question and more a spatial-cultural-historical question about how public space had and will be used in a democracy.

While on the surface Justice Roberts' decision seems to break with traditional ideas about property and public space, it does not remove property from the equation entirely. Rather than breaking free of the idea that parks were government property, Roberts wove the new idea of property even more tightly into the management of dissent. Roberts' notion that expressive rights depend to some degree on historical use has direct links to common law property,[94] notions of adverse possession,[95] and public trust.[96]

The concept of public trust seems to play a particularly powerful role in the Roberts decision. Especially strong in 19th-century common law, the notion of "inherently public" property was central to the public-trust doctrine. Carol Rose notes that in addition to private property, 19th-century property law recognized two types of public property: property owned and managed by government (as recognized in the *Davis* decision), and property "collectively

'owned' and managed by society at large, with claims independent of and indeed superior to the claims of any purported governmental manager."[97]

Roberts' decision clearly has connections with the second type of public property described by Rose. It articulates a notion that while government retains ownership over public parks, the ability of citizens to use the park for expressive purposes transcends that ownership. This new type of property, both in Roberts' *Hague* decision and in an influential *amicus* brief filed in the case by the American Bar Association's newly formed Bill of Rights Committee,[98] was simply referred to as "place."[99] The terminology allowed Roberts to break free of the limits of property law set forth in the *Davis* decision where government retained title to the land but enjoyed only minimal oversight due to history and tradition. As the ABA brief explains the distinction:

> It is untenable to assert that a city "owns" its parks in the same way that a man owns his house, with the right to exclude or admit anyone he pleases. The parks are held for the public. A man's house is primarily for himself and his family, and if he chooses to admit strangers, that is his incidental right. But the primary purpose of a park is to provide generally for the use and recreation of the people.[100]

But Place does more than provide a new label for a certain kind of space. It attempts to articulate a new philosophy about public space. The idea of place was constructed on two elements, one individual and one social: 1) that citizens had a constitutional right to use public areas to express themselves, and 2) individual freedom could be justified through the public's need to have access to a diversity of information for the formation of public opinion.

This two-part philosophy becomes clear in the ABA Committee's brief. While recognizing the importance of individual dissent, the freedom was justified through the social

good that dissent served. It recognized the value of citizens having access to public space as being essential to the survival of democracy.[101] Building on the post-*Nebbia* notion that all property was invested with a public interest, it suggested that at certain times and places ownership rights are secondary to the public's interest.[102] The brief notes the growing fear that government is increasingly controlling more and more property, potentially cutting citizens off from those expressive venues.[103]

The Place Framework, then, attempts to articulate both an individual and a social freedom. The use that citizens bring to public space makes that space more than simply governmental property. Place becomes a type of space that is essential for the survival of democracy and assembly and ought not be managed in an arbitrary manner.

C. The Contours of Place as a Spatial Framework

While the *Hague* decision introduced the Place Framework, Justice Roberts more clearly defined the framework in subsequent decisions. One year after *Hague,* in *Cantwell v. Connecticut*[104]*,* the Court reviewed prosecutions of a man and his two sons, all Jehovah's Witnesses, in New Haven, Connecticut. Jesse Cantwell and his sons approached members of the community and asked whether they could play a record on a portable phonograph. If permission was given, the record was played and citizens were asked to purchase a book. Cantwell and his sons focused on a neighborhood where about 90 percent of the residents were Roman Catholics and at least some of the literature they presented included attacks on the Catholic religion.[105] A unanimous Court overturned their convictions and introduced an essential part of the Place Framework—the time, place, and manner test.[106] In arguing that government retains some regulatory authority over the "freedom to act,"[107] Roberts wrote:

> It is equally clear that a State may by general and non-discriminatory legislation regulate the times, the places, and the manner of soliciting upon its streets, and of holding meetings thereon; and may in other respects safeguard the peace, good order and comfort of the community, without unconstitutionally invading the liberties protected by the Fourteenth Amendment.[108]

Roberts offers little discussion of the time, place and manner test, a test that today dominates much First Amendment jurisprudence.[109] By 1940, both time and manner were well established as acceptable ways of regulating speech through the government's police power.[110] Place, however, was a more recent addition to the legal lexicon that had not been clearly defined by the *Hague* court.

Roberts further defines what he means by place in his opinion in *Schneider v. State,*[111] a decision written about six months before *Cantwell*. At issue in *Schneider* was a series of cases in three cities (Los Angeles, California; Milwaukee, Wisconsin; and Worcester, Massachusetts) that prohibited citizens from using public streets to distribute leaflets. Roberts notes that while it is the duty of government to keep streets open for the movement of people and property, that goal cannot interfere with individual expression. Roberts writes:

> We are of the opinion that the purpose to keep the streets clean and of good appearance is insufficient to justify an ordinance which prohibits a person rightfully on a public street from handing literature to one willing to receive it. . . . [T]he streets are natural and proper places for the dissemination of information and opinion; and 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.[112]

Roberts' decisions in *Schneider, Cantwell,* and *Hague* provide the general contours of the Place Framework. Following his *Nebbia* decision, Roberts accepted that all property was in some sense public. And while private property still relied primarily on questions of ownership, the Place Framework suggested a less rigid structure for public property. It called for an examination of its historical and cultural use. And so in *Hague,* Roberts found that the use of public parks had been reserved for use by citizens "time out of mind" and, in *Schneider,* streets were "natural and proper places" for expressive activity. But even more important was Roberts' notion of "appropriate" places for expressive activity. This opened the door for the management of public space through the application of the time, place, and manner test. While decisions prior to *Hague* focused on the control of public space—that is, making sure that property was protected for the good of the community as determined by government—Roberts put forward a managed notion of public space that was captured in his concept of Place. Government's job was less about determining what kinds of uses were acceptable on its property and more about making sure that citizens had access to places that would allow them to fulfill their expressive needs for the benefit of society. As a result, parks and streets were places that government needed to manage to make sure that dissent was not prohibited. But more importantly, that management called for making sure that expression was allowed in the right place at the right time and expressed in the right manner.[113]

In the end, the Place Framework charted a new role for space to play in the management of dissent. First, it rejected any closed categorization of what constitutes public space that is open for public expressive use. Rather than rely on the categorization of ownership, the Place Framework called for an examination of how citizens had used the space over time. Streets and parks were seen as space open to expression because citizens had traditionally used them for

those purposes. And second was the related concept of boundaries. Under the Place Framework, public space was envisioned as existing without boundaries or borders, a place where citizens from different social and economic groups might be able to come together. The Place Framework envisioned public space as having few if any established boundaries. And the boundaries that did exist, such as delineating between public and private space, were transparent and permeable borders allowing citizens to not only observe but to access and engage with a wide range of information and ideas. This transparent and permeable space was theorized as a way of aiding democracy, of bringing people together and increasing the diversity of information within society. Both transparent and permeable, the Place Framework, in theory, protected individual expression, but justified that freedom through the social needs of citizens to access a diverse range of ideas.[114] In many ways, of course, the Place Framework presented an idealized vision of how democracy ought to function. And in that manner, even its advocates at times fell short of achieving the goals established by the framework. However rhetorical in nature, the Place Framework demonstrates how free-speech advocates at that time attempted to differentiate their ideas from those of the Property Framework.

IV. Planning as a Spatial Framework

While the Place Framework provided an important turn away from a property-based regulatory regime, its failure to articulate a complete break from property law is significant. In important ways, notions of government ownership of public space, which were moved to the periphery in the Place Framework, returned to the center as a new way of managing dissent emerged—the Planning Framework. This section will examine the rise of the Planning

Framework, its connection to the zoning movement, and its influence on the creation of free speech zones.[115]

A. Planning and the "Pig in the Parlor"

While the roots of the modern planning movement in the United States can be traced to the passage of New York's zoning legislation in 1916[116] and the establishment of a Standard State Zoning Enabling Act by the U.S. Department of Commerce in 1926,[117] regulation of space according to its use—what might be called zoning restrictions—has a longer history. John F. Hart, for example, has demonstrated that colonial governments in the United States regulated land use extensively. Hart has observed that colonial governments sometimes imposed "affirmative use requirements" on landowners,[118] allowed members of the public to use private land for certain purposes without the owners permission,[119] dictated what land could be used as private residences,[120] and even imposed aesthetic restrictions such as the heights of buildings and the kinds of material that could be used for buildings.[121] Many of these rules existed in different forms across communities. However, it was not until the Progressive redefinition of property that government began to develop and use zoning laws to shape the environment of citizens.[122] With government freed to play a role in managing private property, zoning laws increased in popularity as a way of bringing order to public life. New York's first zoning law was developed as a way to remove the garment industry from Fifth Avenue. As Seymour Toll writes:

> They wanted this because the things that were the essences of the garment industry—the strange tongues, the outlandish appearance and the very smell of its immigrant laborers, its relentless drive to follow the retail trade wherever it went, its great concentrations of plans and people—violated the ambience in which luxury retailing thrives.[123]

While zoning's primary objective is often viewed as the stabilization of property values, from the beginning zoning was about more than that, as Alfred Bettman noted in the *Harvard Law Review* in 1924. Bettman saw stabilization of property values as a by-product of zoning. The real goal of zoning was the "[s]tabilization of the living and working environment."[124] Bettman argued that the power of zoning, as recognized in the police power, was not the elimination of public nuisances; legislation had proven to be rather ineffective at accomplishing that goal. Rather, the power of zoning was putting an end to public nuisances by telling people what they ought to do through clearly defined community standards.[125] In some ways, zoning continued the Olmstedian project by doing more than simply imposing restrictions on land use, but also providing guidance to citizens about how they ought to behave on those lands, both public and private.

The question of whether zoning laws were a constitutional use of the government's police power reached the U.S. Supreme Court in 1926. In the case, a property owner claimed that the zoning ordinance for the Village of Euclid, Ohio, unfairly restricted the use of his property. Justice George Sutherland, writing for the majority, upheld the constitutionality of zoning regulations as long as they were not "clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals or general welfare."[126] Justice Sutherland admitted that defining a bright-line distinction about what constitutes the public welfare and what does not was a difficult thing to do. Much, he argued, depended on the circumstances and locality. The construction of one kind of building in a city might be acceptable, but construction of that same building in a more rural village might not be. Or, as Justice Sutherland put it, "A nuisance may be merely a right thing in the wrong place—like a pig in the parlor instead of the barnyard."[127]

Eric R. Claeys has argued that the *Euclid* decision was heavily indebted to what he terms "Progressive political theory," elevating "order, community, homogeneity, financial security, and beauty" and subordinating "more self-centered goods like freedom and individual expression in the use of land."[128] More importantly for Claeys, the *Euclid* decision presented a fundamental shift in how Americans began to think about property rights. As he noted, "Before zoning, most land uses were presumed legitimate, unless specifically shown to be dangerous or unsuitable to the neighborhood. Afterward, most land uses were presumed illegitimate unless they conformed to the master plan's specifications for the local use district."[129]

As a result, post-*Euclid* American society endorsed a "governance-based conception" of property rights[130] in which decisions about the cultural and historical use of space, so important to the *Hague* court, were funneled through and determined by governmental bodies. Central to that was a redefinition of what constituted the public welfare. Prior to the growth of the Planning Framework, public welfare meant the sum of private goods "with government simply providing a legal and administrative medium within which to pursue them."[131] Public welfare as reflected in Planning carved out a more significant role for government—in many ways, government came to define the public welfare. As such, cities began to aggressively plan their development and zoning laws became the primary enforcement tool.

The seeds of the Planning Framework, located in the planning and zoning movements and the *Euclid* decision, were being planted even as the Place Framework was being established. As a result, the Place Framework is best viewed as a transition from Property to Planning, a temporary phase that was necessary to move the regulation of public space from the idea of government control to government management.

B. The Planning Framework: Categories, Boundaries, and Ample Alternatives

The establishment of the Planning Framework, and its use to justify free speech zones, required an important restructuring of the Place Framework. Planning requires a clear articulation of not only the *space* in which expression will be allowed, but also *definitions* of the expression that will be allowed within that space.[132] The Place Framework neither offered nor required such definitions. Expressive freedom was based more on the use citizens brought to space. The Planning Framework instead created a public sphere that was heavily managed by government through clearly defined space and rules about how citizens might use that space.

In the Place Framework, public space was envisioned as being transparent and permeable, allowing citizens free access to space to increase the diversity of information. In the Planning Framework boundaries tend to be more secure and far less permeable. Rather than being envisioned as a way to bring groups together, space is viewed as a way to contain dissent. In the Planning Framework, it is necessary for public space to remain transparent to enable the surveillance of dissent. However, the boundaries are harder and more secure, serving as a way to separate citizens from dissent. As a result, dissent in the Planning Framework is not something for citizens to engage with, but rather a nuisance to be controlled.

Categories, Boundaries and Public Space

The legal foundation for the Planning Framework was established in the early 1970s[133] with the categorization of public space. This categorization, which has come to be called the public forum doctrine, puts forward, in Robert C. Post's words, a "byzantine scheme of constitutional rules" to determine when citizens can use public space for expressive purposes.[134] The U.S. Supreme Court formally began the categorization of space in 1972 in *Police Dep't. of*

Chicago v. Mosely,[135] but the basic categories that exist today were formalized in 1983 in *Perry Educational Association v. Perry Local Educators' Association*.[136] Those categories are as follows: a traditional public forum (a place that is by tradition or government fiat open to public assembly and debate), a limited public forum (government space open to some members of the public to discuss a limited range of topics), and a non-public forum (government-controlled property that is not open to the public).[137]

As legal scholars have noted, the dominant line of public forum cases suggest that the type of space that a speaker elects to use determines the amount of expressive freedom that citizens enjoy.[138] The type of speech that is involved is often not a part of the equation.[139] Significantly, the public forum doctrine continues the post-*Euclid*, Progressive project that frees government to determine what constitutes the public welfare. As Post sums up the public forum doctrine, "In the end the public realm created by the public forum doctrine is nothing other than a governmentally protected public space for the achievement of private ordering."[140]

Public forum doctrine research focuses on the desire of courts to draw bright-line distinctions between different types of space. The result is often a lack of clarity, as the categorization is not guided by any clearly articulated theory.[141] The public forum doctrine is a bold attempt to capture and preserve the government's ability to control space as a way of managing dissent.

Ample Alternatives and the Management of Public Space

The key to managing dissent in the Planning Framework rests in the determination of where dissent will be allowed. The Planning Framework is concerned with making sure that dissent, while enjoying constitutional protection, is not located in the "wrong place." In an

attempt to facilitate the public welfare and at the same time protect constitutional rights of freedom of expression, it became necessary to find a way to relocate dissent when necessary. To meet that need, the ample alternatives test was created.[142]

Building on the idea that space could be categorized with clear boundaries, the test allowed courts to view restrictions on expression as being acceptable as long as speakers had other expressive space at their disposal.[143] The ample alternatives test allowed government to plan for expressive events and relocate them, if necessary, in the name of the public welfare. For example, in 1976, the U.S. Supreme Court approved a zoning ordinance aimed at dispersing theaters that showed sexually explicit adult movies because ample alternatives existed in other parts of the city.[144] However, in 1977 the Court rejected an ordinance that forbid the placement of real-estate "For Sale" or "Sold" signs because there were limited alternative channels for the communication of that information.[145] And in 1981, in an early form of a free speech zone, the Court allowed state officials to restrict religious speakers at the Minnesota State Fair to "fixed locations."[146]

By 1984 the ample alternatives test was so established that the Court was able to declare that a time, place, and manner restriction will be considered justified provided it is done "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."[147]

Just as the categorization of public space through the establishment of legal boundaries was necessary for the management of dissent, so too was the creation of ample alternatives test. Rather than serving as a way to increase expressive opportunities within society, the ample alternatives test became an important tool in the government management of dissent. In short, the

test was the implementation of the *Euclidean* ideal of putting the pig in the barnyard instead of the parlor. It allowed government to make decisions about where to locate dissent based on government's interest rather than the interests of the speakers.[148] Together, the categorization of public space, the establishment of boundaries around that space, and the implementation of the ample alternatives test have come to define the Planning Framework. And in turn, that framework serves to justify the use of free speech zones.

C. The Planning Framework and Free Speech Zones

Free speech zones serve as the paradigmatic example of the Planning Framework. Being artificial spaces that lack permanence or history (that is, spaces that have been created by government to temporarily serve a narrowly defined purpose), free speech zones rely on boundaries to separate and contain citizens and the idea of ample alternatives to justify their existence. This containment allows government officials to claim they are preserving expression by allowing citizens to express themselves while at the same time making the surveillance and management of dissent more efficient. Courts have generally categorized free speech zones as limited, not traditional, public *fora* where government is given some latitude in overseeing expressive activities.[149] However, complicating the issue is that the free speech zones are often carved out of space that at different times would be considered a traditional public forum (parks, parking lots, streets, etc.). Courts tend to focus their review of free speech zones on where they are located and how the boundaries are established. Locating zones too far away from an intended audience reduces the power of dissent,[150] while locating zones too close to an intended audience is seen as being disruptive to either the public order or the event.[151]

The establishment of free speech zones can be traced to college campuses in the late 1960s as a way of controlling dissent during the Vietnam War. The first recorded legal challenge involving a free speech zone arose out of a protest at Southwest Texas State University. In *Bayless v. Martine*,[152] students challenged the creation of a "student expression area" as a restriction on their First Amendment rights. University officials argued that the zone was needed to insure that anti-war protesters would not disrupt classes. A court upheld the constitutionality of the zone, noting that the expression area allowed students to use the zone during certain periods of time but did not exclude protests in other areas on campus.[153]

Free speech zones became more popular in the 1980s following the U.S. Supreme Court's categorization of space and the creation of the ample alternatives test. In 1983, the National Park Service adopted rules calling for superintendents to "designate on a map, that shall be available in the office of the superintendent, the locations available for public assemblies."[154] The rules also allowed the park to close the areas under certain circumstances.[155] In 2004, a federal appeals court found that the Park Service had exceeded its authority by telling protesters at San Francisco Presidio National Park that they could only protest in a designated zone located some 150 to 175 yards from their preferred spot.[156] However, the court avoided the more difficult question of whether the free speech zone itself was constitutional. As Judge Marsha S. Berzon wrote:

> On the one hand . . . the protestors' relegation to the "First Amendment area" seriously distorted the intended incorporation of the location into [the protestors'] message. On the other hand, the demonstrating . . . members retained some ability to connect their messages to the venue that was critical to its content; the building was visible from the

area where they were permitted to speak, although faintly, obliquely, and with partial obstruction.[157]

Courts have confronted free speech zones more directly in questions concerning protests at political conventions. Free speech zones were first used during the 1988 Democratic National Convention in Atlanta, Georgia, and the first legal challenge came in 2002 at the Democratic National Convention in Los Angeles, California. At the Los Angeles convention, government designated a "secured zone" surrounding the Staples Center, the site of the convention. The area encompassed more than 8 million square feet (about 185 acres), including streets, sidewalks and other buildings.[158] After the government established a free speech zone about 260 yards from the Staples Center, a number of groups claimed that the secured zone, as well as the free speech zone, violated their expressive rights.

At the heart of the decision by U.S. District Judge Gary Allen Feess was whether the free speech zone allowed adequate expressive opportunities to protesters. Feess found that delegates arriving at the Staples Center would have a difficult time seeing or hearing protesters due to a large media village separating protesters from delegates. Feess wrote that "at this crucial political event, those who do not possess a ticket to the convention cannot get close enough to the facility to be seen or heard. The First Amendment does not permit such a result."[159] Still, despite the fact that there was general agreement that the protest was occurring on space that would be considered to be a traditional public forum, both sides ultimately accepted a secured zone with concrete barriers and chain-link fencing closer to the delegates.[160]

Four years later, government officials had learned from the mistakes of Los Angeles. At the Democratic National Convention in Boston, Massachusetts, government officials created two different zones: a hard security zone and a soft security zone. The hard security zone, which

encompassed the FleetCenter where the convention would be staged, was under the control of the U.S. Secret Service. Only people with credentials were allowed inside the hard security zone. The soft security zone, in general surrounding and adjacent to the hard security zone, was under the control of city officials and open to all citizens.[161]

The free speech zone, termed a demonstration zone (DZ) in Boston, was located within the soft zone (see Figure 1). Described at the beginning of this paper, the zone was a "grim, mean and oppressive space."[162] Judge Woodlock noted that while the space was far from being ideal,[163] it did provide "the only available location providing a direct interface between demonstrators and the area where delegates will enter and leave the FleetCenter."[164] As he noted, organizers were constrained by geography in locating the zone.[165] On appeal, a three-judge panel reached much the same conclusion, noting that the free speech zone provided "an opportunity for expression within sight and sound of the delegates, albeit an imperfect one."[166]

Figure 1. Demonstration zone (DZ) within soft zone.

The cases arising out of free speech zones in Los Angeles and Boston indicate the importance of the Planning Framework. They established that the zones, no matter their location, were spaces under the control of government. The categorization of free speech zones established that these were not traditional public forums with a continuing history and culture of free speech, but rather temporary, abstract space that fulfilled a governmental need. As a result, the legitimacy of free speech zones as government-owned space, with their barriers and wire, were no longer open to question. Instead, the debate turned to what might be termed the siting and the aesthetics of the zones themselves. Judges increasingly wrestled with the location of the zones and the sanitary conditions inside the zones.[167]

In Los Angeles and Boston, the boundaries between protesters and citizens became harder. While the Place Framework viewed dissent in public space as a way to increase the flow of ideas, in the Planning Framework the goal was to protect the ability of protesters to speak with governmental oversight. And free speech zones achieved that goal. In the Planning Framework, citizens were able to express their ideas, yelling and screaming through chain-link fence to other citizens who had little interest or reason to engage with the voices of dissent.

D. Retheorizing the Public's Role in Dissent

How the Planning Framework changes the relationship between dissent and the public can be seen in the case arising from 2008 Democratic National Convention in Denver, Colorado. In *ACLU of Colorado v. City and County of Denver,*[168] Judge Marcia S. Krieger was asked to assess the constitutionality of a free speech zone established for the Convention. Judge Krieger's

decision reviews the existing case law and puts forward the most complete explanation, to date, of the Planning Framework.

As the convention neared, the U.S. Secret Service, as well as state and federal authorities, put into action a plan to deal with an estimated 50,000 convention attendees and tens of thousands of protesters.[169] The government established a security perimeter surrounding the convention's main facility, The Pepsi Center. Only people with credentials would be allowed inside the security perimeter. However, the government also located a 47,000-square-foot "Public/Demonstration Zone"[170] within the security perimeter. On three sides, the zone was enclosed by two rows of concrete barriers, eight feet apart, topped with chain-link fencing. The fourth side of the zone, the furthest away from the Pepsi Center, was open, however protesters would be required to gain entry to the rest of zone by passing through an array of concrete barriers.[171] Water and sanitary facilities were provided, as well as a sound-amplification system.[172] Delegates attending the convention would be dropped off near the zone and make their way along a tree-lined sidewalk to the Pepsi Center (see Figure 2). Walking to the convention center, delegates would pass within 200 feet of the zone. Delegates were free to leave the sidewalk and approach the zone, but would not be allowed to get any closer to the protesters than eight feet, due to the existing barriers. Tables to allow the distribution of leaflets were provided outside of the barriers.[173]

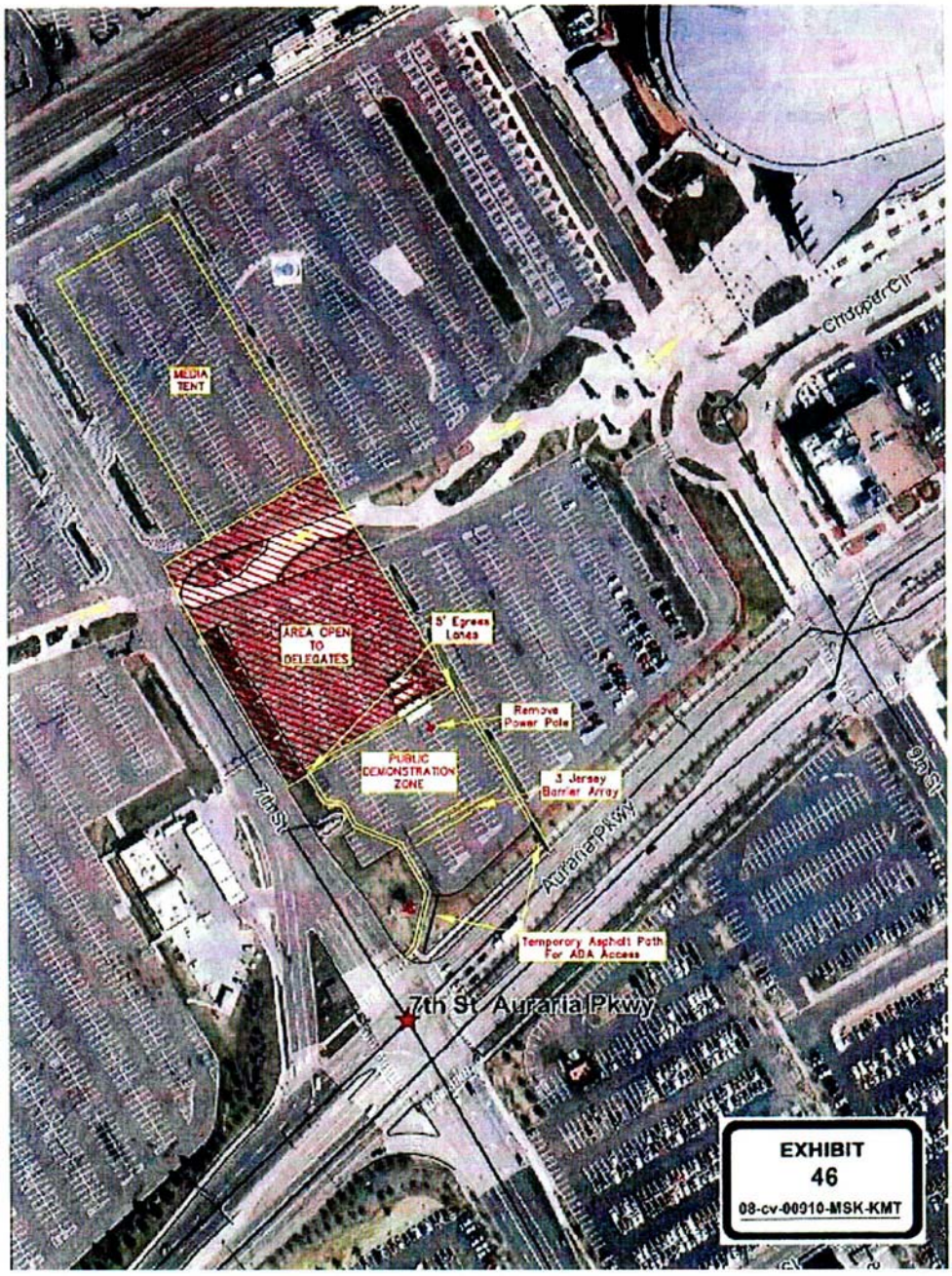

Figure 2. Site of 2008 Democratic National Convention, Denver, Colorado. [174]

Judge Krieger admitted that while nearly all delegates had to enter by walking past the zone, it did not provide protesters with an unobstructed view of the Pepsi Center itself.[175] Much of Judge Krieger's assessment of the constitutionality of the zone rested on the ample

alternatives test, a test that she admitted the U.S. Supreme Court has not addressed in any detail.[176] Plaintiffs in the case argued that the zone did not provide ample alternatives to speech because it was not within "sight and sound" of passing delegates.[177] Judge Krieger refused to accept "sight and sound" as a legal test, saying that people have attempted to "affix largely assumed and unspoken . . . meanings to these terms" in an attempt to determine constitutional distances.[178]

Judge Krieger noted that there was no disagreement that passing delegates would be able to hear people in the zone, and argued that they could easily read signs that were displayed by protesters within the zone. Noting testimony from an acoustics expert, she found that the zone "presents an adequate alternative channel of communication for members of the public."[179]

Judge Krieger was equally unsympathetic to claims by protesters that they were unable to symbolically present their message because they did not have an unobstructed view of the Pepsi Center from the zone.[180] While admitting that the protester's messages would be more powerful with the Pepsi Center in the background, Judge Krieger said the zone was not created to make messages more powerful. As she wrote, "[T]he Public/Demonstration Zone was designed to provide meaningful access *to the delegates*, rather than to provide media-worthy views of the Pepsi Center."[181]

She went on to note that a speaker's desire "to control all of the conditions that affect his or her message occasionally must yield where imperfect-yet-adequate alternatives exist."[182] She added that groups have a wide range of spaces available to them to make their messages heard, from parade routes outside of the security zone to the "myriad of traditional media channels that exist to disseminate ideas."[183] In addition, protesters can confront delegates who choose to walk

to the convention site outside of the security zone, and once delegates are inside the security zone they are free to go to the zone to gather more information from protesters.

Judge Krieger's decision takes a traditional public forum and transforms it into an artificial public space that has little connection to history or culture. For Krieger, free speech zones exist to serve a governmental purpose and the expressive needs of citizens are of secondary concern. And while she admits that there is a connection between the meaning a speaker attempts to create and the space in which that speech takes place, it is not enough to overcome the government's ability to control the purpose of the zone.

Zones fundamentally alter the relationship between public space and dissent. The concept of place was built not only on the importance of protecting individual speech, but also on the ability of citizens to gain access to diverse ideas. It was for that reason that Justice Roberts claimed in *Schneider* that it was not constitutional to prohibit speech simply because it could be exercised in some other location. Judge Krieger's decision changes that relationship. In her decision, dissent is reconceptualized as implicating only individual freedoms. Society's right to have access to a wider array of messages becomes secondary. Citizens are allowed to express themselves behind chain-link fences and constitutional standards are met as long as delegates can see and hear them. Dissent is no longer something of value to society; it is no longer a way of increasing the diversity of information. Instead, dissent is something that the constitution demands must be tolerated, but there is no need to make that dissent easily accessible. Yes, as Judge Krieger notes, delegates could go out of their way, walk an additional 200 yards, and engage protesters in a discussion while separated by two rows of concrete barriers and chain-link fence. However, it is more likely that dissent, under the Planning Framework, is reduced to a political spectacle, something for citizens to watch from afar but to rarely engage with. The

Planning Framework creates what might be called an inactive public sphere where citizens lose connection with public expressive acts.[184]

In short, the Planning Framework, and its associated free speech zones, changes the management of public expressive acts in fundamental ways. By seeing the individual expression of speakers as being the primary good to be protected, the framework simultaneously devalues public interaction with dissent and disempowers individual speakers.

V. Conclusion

The three spatial frameworks examined in this paper tell us much about not only how society manages dissent, but also about how democracy is realized. The Property Framework instilled ownership of public property in government and brought with it a responsibility for government to try to achieve a sense of civic virtue through the use of public space. That civic virtue was achieved not through the ability of citizens to use the space as they saw fit, but rather through determinations by government about what kinds of expressive acts best served the public welfare and whether that expression might have a bad tendency for the public. It was through the proper use of public space that citizens would be made more virtuous and democracy would be enhanced.

The rise of the Place Framework was a reaction to the limitations of the Property Framework. Through the redefinition of property, government was no longer the owner of public space. Rather, government was little more than the caretaker or traffic officer, deciding who could use a given space at a given time. The Place Framework was at once intended to bring an end to civil strife by providing citizens with the opportunity to express themselves in public space and also a way to increase the diversity of information available to citizens. Amid the fear

of the growing concentration of power within society by government and business, public space was theorized as a way to increase the flow of diverse information within society while also serving as a way to manage dissent—of making it more civil.

The Planning Framework returned property interests to questions of dissent. Using concepts linked to planning and zoning to categorize public space and construct boundaries to separate and protect citizens from dissent, Planning offers up a managed version of individual expression. However, the Planning Framework is far less concerned about the societal value of dissent. The right of individuals to express themselves within a managed public sphere is far more important to advocates of the Planning Framework than the ability of citizens to engage with dissent.

Planning's lack of concern for the social aspect of dissent is most troubling for democracy. Public space can serve an important role in bringing citizens together, but it can also serve to separate and divide.[185] Identifying spatial frameworks makes visible the role that space can play in the realization of democracy and the role it does play in the management of dissent. When dissent is caged it tells citizens that dissent is dangerous, something that must be feared and avoided. As advocates of the Place Framework realized, such fears too often can become reality. As those who engage in dissent are increasingly marginalized and ignored by their fellow citizens and as they are increasingly treated as being dangerous to democracy, they seek out other ways to make their voices heard.[186] A healthy democracy needs to do more than simply carve out space where individuals can perform dissent. It needs to concern itself about protecting space that will allow citizens to engage with that dissent.

First Amendment theory, in general, seems to have moved away from concerns about the social value of expression. Critics, fearing that relying too heavily on the societal value of dissent

would encourage judges to restrict speech, argue instead for speech as an individual right.[187] The spatial frameworks examined in this paper suggest, however, that ignoring the social value of dissent can have dire consequences for society. It is the marginalization of the social value of dissent that is at the core of the creation of free speech zones. Strengthening the democratic public sphere requires not only the recognition of an individual's expressive freedom, but also a protective culture that values the social nature of dissent.

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[1] Theo Emery, *Judge upholds 'free speech zone' but permits march on FleetCenter*, Associated Press, July 22, 2004, *available at* http://www.boston.com/news/politics/conventions/articles/2004 (last visited Sept. 29, 2004) .

[2] Coalition to Protest the Democratic National Convention v. Boston, 327 F. Supp. 2d 61, 78, (D. Mass., 2004).

[3] As Judge Woodlock wrote, "We have come to a point where it may be anticipated, at this and similar national security events, that some significant portion of the demonstrators, among those who want the closest proximity to delegates or events, consider assault, even battery, part of the arsenal of expression." *Id.* at 77.

[4] *See e.g.*, Thomas J. Davis, *Assessing Constitutional Challenges to University Free Speech Zones Under Public Forum Doctrine*, 79 IND. L. J. 267 (2004); Nick Suplina, *Crowd Control: The Troubling Mix of First Amendment Law, Political Demonstrations, and Terrorism*, 73 GEO. WASH. L. REV. 395 (2005).

[5] *See e.g.*, Michael Les Benedict, *Laissez-Faire and Liberty: A Re-Evaluation of the Meaning and Origins of Laissez-Faire Constitutionalism*, 3 LAW & HIST. REV. 293, 296 ("Law does not develop in isolation from the perceptions and ideas of the general community. Changing understandings of how society operates, changing standards of fundamental right and wrong help to shape legal doctrine.")

[6] Timothy Zick has suggested that the U.S. Constitution puts forward a spatial framework that "contains troubling extra-territorial and intra-territorial gaps in protection of basic liberties." Zick, *Constitutional Displacement*, 86 WASH. U. L. REV. 515, 608 (2009). Ethan Katsch has argued that one of the advantages of adopting spatial frameworks as an analytical tool is that it does not isolate activities but rather links those activities to other institutional and social changes. Katsch, *Law in A Digital World: Computer Networks and Cyberspace*, 38 VILL. L. REV. 403, 412 (1993).

[7] David Yassky has argued that there are at least three eras in American free speech history. However, his perspective differs from the idea attempted to be captured in this paper. Yassky argues that most First Amendment scholarship sees changes in notions about freedom of expression as being gradual as people accumulate more wisdom. Contrary to that view, Yassky suggests that changes are more related to structural transformations in the Constitution itself. As he puts it, the history of the First Amendment is made up of "long periods of relative stasis interrupted by transfigurative eruptions." Yassky, *Eras of the First Amendment*, 91 COLUM. L. REV. 1699, 1743-1744 (1991). This paper adopts much the same holistic view of constitutional interpretation, yet suggests that those transfigurative eruptions are often triggered by movements outside of Constitutional interpretation.

[8] TIMOTHY ZICK, SPEECH OUT OF DOORS: PRESERVING FIRST AMENDMENT LIBERTIES IN PUBLIC PLACES, 8 (2009).

[9] *Id*. at 9.

[10] For a description of the Hyde Park Riots, see LISA KELLER, TRIUMPH OF ORDER: DEMOCRACY & PUBLIC SPACE IN NEW YORK AND LONDON, 93-108 (2009).

[11] *As quoted* in K.C. O'ROURKE, JOHN STUART MILL AND FREEDOM OF EXPRESSION, 152 (2001).

[12] *Id.* at 153. Some have argued that modern day protest has increasingly become less about discussion and more about public display, particularly in trying to gain media attention. See Kevin Michael DeLuca and Jennifer Peeples, *From Public Sphere to Public Screen: Democracy, Activism, and the 'Violence of Seattle,'* 19 CRIT. STUD. MEDIA COMM.,125 (2002).

[13] BRUCE D'ARCUS, BOUNDARIES OF DISSENT: PROTEST AND STATE POWER IN THE MEDIA AGE, 20 (2006).

[14] *Id*. at 15.

[15] CASS SUNSTEIN, WHY SOCIETIES NEED DISSENT, 7 (2003).

[16] *Id*. at 213.

[17] *Id.* at 9.

[18] *See* David S. Allen, *Jürgen Habermas: Consensus and Citizenship*, in ETHICAL COMUNICATION: MORAL STANCES IN HUMAN DIALOGUE 193 (Clifford J. Christians and John C. Merrill eds., 2009).

[19] SUNSTEIN, *supra* note 15, at 110. *See also* John Stuart Mill, *On Liberty*, in THE ENGLISH PHILOSOPHERS FROM BACON TO MILL 949, 991 (Edwin A. Burt ed., 1967) ("[A]nd giving merited honor to everyone, whatever opinion he may hold, who has calmness to see and honesty to state what his oppoents and their opinions really are . . .. This is the real morality of public discussion").

[20] STEVEN H. SHIFFRIN, THE FIRST AMENDMENT, DEMOCRACY, AND ROMANCE 90 (1990)

[21] *Id*. at 108.

[22] See e.g. LEE C. BOLLINGER, THE TOLERANT SOCIETY 10 (1986) (suggesting that "free speech involves a special act of carving out one area of social interaction for extraordinary self-restraint, the purpose of which is to develop and demonstrate a social capacity to control feelings evoked by a host of social encounters").

[23] U.S. CONST. amend. V, cl. 4 (no person should be " be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation").

[24] *See e.g*., JAMES W. ELY, JR., THE GUARDIAN OF EVERY OTHER RIGHT (1992).

[25] *See* GREGORY S. ALEXANDER, COMMODITY & PROPRIETY: COMPETING VISIONS OF PROPERTY IN AMERICAN LEGAL THOUGHT, 1776-1970, 43-59. (1997).

[26] *See e.g*., C. ALBERT WHITE, A HISTORY OF THE RECTANGULAR SURVEY SYSTEM, 2-16 (1983), Philip Fisher, *Democratic Social Space: Whitman, Melville, and the Promise of American Transparency*, 24 REPRESENTATIONS, 60, 64 (1988), and ANDRO LINKLATER, MEASURING AMERICA: HOW AN UNTAMED WILDERNESS SHAPED THE UNITED STATES AND FULFILLED THE PROMISE OF DEMOCRACY (2002).

[27] *Id*. at 72.

[28] Allodial property rights are the opposite of feudal property. Allodial property is unfettered, absolute and outright. For a discussion of allodial rights and Jefferson, *see* ALEXANDER, *supra* note 25, at 51-55.

[29] *Id*. at 52.

[30] James Madison, "Property," in THE PAPERS OF JAMES MADISON 266 (William T. Hutchinson ed., 1977).

[31] ALEXANDER, *supra* note 25, at 69.

[32] *Id*. at 29.

[33] *Id.* at 31.

[34] DELL UPTON, ANOTHER CITY: URBAN LIFE AND URBAN SPACES IN THE NEW AMERICAN REPUBLIC, 134 (2008).

[35] Fisher, *supra* note 26, at 66. Fisher has also suggested that there are four characteristics of undamaged, democratic social space: uniformity, openness to entry and mobility, transparency and intelligibility, and the "absence of an observer position that makes self-awareness and criticism possible." *Id*. at 76.

[36] For a discussion of laissez-faire constitutionalism, see Charles W. McCurdy, *Justice Field and the Jurisprudence of Government-Business Relations: Some Parameters of Laissez-Faire Constitutionalism, 1863-1897*, 61 J. AM. HIST., 970 (1975); Alan Jones, *Thomas M. Cooley and 'Laissez-Faire Constitutionalism': A Reconsideration*, 53 J. AM. HIST. 751 (1967); and Benedict, *supra* note 5.

[37] ALEXANDER, *supra* note 25, at 249 ("[P]olitical ideals of liberty and equality, not the economic ideal of an unregulated market, dominated late nineteenth century American judicial thought").

[38] 94 U.S. 113 (1877).

[39] *Id.* at 126.

[40] ALEXANDER, *supra* note 25, at 263.

[41] THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS, 572 (Da Capo Press 1972) (1868).

[42] *Id*. at 597.

[43] ALEXANDER, *supra* note 25, at 271.

[44] *Id*. at 275.

[45] See KELLER, *supra* note 10, at 22-31 (arguing that by the 1870s the City of New York became the first major city in the United States in which public meetings "were sanctioned and allowed by permit only." In the name of order, Keller notes that in 1871 "open-air preaching in the city's streets and parks was banned. By 1872, anyone who wanted to hold a meeting on the street or have a procession had to request a permit from the police. . . .").

[46] ALEXANDER, *supra* note 25, at 267 (arguing that changes in property law in the late 19th century and early 20th century can at some level be traced to criticisms, as well as public protests, of capitalism put forward by socialists).

[47] 167 U.S. 43 (1897).

[48] Village of Des Plaines v. Poyer, 123 Ill. 348 (Sup. Ct. 1888).

[49] Garrabad v. Dering, 84 Wis. 585 (Sup. Ct. 1893).

[50] Rung v. Shoneberger, 2 Watts 23 (Pa. Sup. Ct. Middle D. Sunbury 1833).

[51] COOLEY, *supra* note 41, at 596-597. *See also* ERNST FREUND, THE POLICE POWER: PUBLIC POLICY AND CONSTITUTIONAL RIGHTS 514-515 (Arno Press 1976) (1904), and JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 736 (Da Capo Press 1970) (1833).

[52] *See e.g.*, DAVID M. RABBAN, FREE SPEECH IN ITS FORGOTTEN YEARS, 139-141 (1997).

[53]This does not mean that all citizens saw public space through the same lens. Despite judicial decisions giving government regulatory authority over public space, citizens continued to use that space for public events, with or without governmental approval. For a discussion of this, see Tabitha Abu El-Haj, *The Neglected Right of Assembly*, 56 UCLA L. REV. 543 (2009)

[54] Commonwealth v. Davis, 162 Mass. 510 (Sup. J. Ct. 1895).

[55] Davis 167 U.S., 43, 47 (1897).

[56] *See e.g.*, Harry Kalven, Jr., *The Concept of the Public Forum: Cox v. Louisiana*, 1965 SUP. CT. REV. 1, 12 (1965) (calling Holmes' opinion for the Massachusetts Supreme Judicial Court one of his "less admired efforts), and Geoffrey R. Stone, *Fora Americana: Speech in Public Places*, 1974 SUP. CT. REV. 233, 236 (1974) (referring to the decision as "Holmes's uncharacteristically forgettable opinion").

[57] Many studies have chronicled the use of public space during different periods. The following represent only some: BENJAMIN L. CARP, REBELS RISING: CITIES AND THE AMERICAN REVOLUTION (2007); PAUL L. GILJE, THE ROAD TO MOBOCRACY: POPULAR DISORDER IN NEW YORK CITY, 1763-1834 (1987); Robert D. Leighninger, Jr., *Cultural Infrastructure: The Legacy of New Deal Public Space*, 49 J. ARCH. ED. 226 (1996); Mona Domosh, *Those 'Gorgeous Incongruities': Polite Politics and Public Space on the Streets of Nineteenth-Century New York City*, 88 ANNALS ASS'N AM. GEOGS. 209 (1998); Hilda Kruper, *The Language of Sites in the Politics of Space*, 74 AM. ANTHRO. 411 (1972); GARY B. NASH, THE URBAN CRUCIBLE: SOCIAL CHANGE, POLITICAL CONSCIOUSNESS, AND THE ORIGINS OF THE AMERICAN REVOLUTION (1979; Stuart Banner, *The Political Function of the Commons: Changing Conceptions of Property and Sovereignty in Missouri, 1750-1850*, 41 AM. J. LEGAL HIST. 61 (1997); Carol Rose, *The Comedy of the Commons: Custom, Commerce, and Inherently Public Property*, 53 U. CHI. L. REV. 711 (1986); Don Mitchell, *The*

Liberalization of Free Speech: Or, How Protest in Public Space is Silenced, 4 STAN. AGORA 1 (2004); and D'ARCUS, *supra* note 13.

[58] MONA DONESH, INVENTED CITIES: THE CREATION OF LANDSCRAPE IN NINETEENTH-CENTURY NEW YORK & BOSTON 127 (1996).

[59] LOUIS MENAND, THE METAPHYSICAL CLUB: A STORY OF IDEAS IN AMERICA, 67 (2001) (suggesting that the Common was considered sacred space by Boston elites and quoting Oliver Wendell Holmes, Sr., writing in 1861 about his love for Boston: "We all carry the Common in our heads as the unit of space, the State House as the standard of architecture, and measure of men in Edward Everetts as with a yard-stick").

[60] DONESH, *supra* note 58, at 144.

[61] *Id.* at 153.

[62]El-Haj, *supra* note 53, at 582 (suggesting that the Massachusetts Supreme Judicial Court's reasoning in *Commonwealth v. Davis* was "anomalous"). However, earlier decisions concerning use of the Common and other parks in the Boston area do seem to support that court's logic. *See e.g.*, Steele v. Boston, 128 Mass. 583 (Sup. Ct. 1880) (ruling the city controlled the common and was not liable after a resident was hit by a sled on a sidewalk in the Common), and Commonwealth v. Abrahams, 156 Mass. 57, 60 (Sup. J. Ct. 1892) (holding that government could refuse to allow a labor group to hold a meeting in Franklin Park because it would be "inconsistent with the public uses for which these places are held" and that the use is done at the exercise of the discretion of park commissioners).

[63] *See e.g.*, KELLER, *supra* note 10.

[64] DAVID SCHUYLER, THE NEW URBAN LANDSCRAPE: THE REDEFINITION OF CITY FORM IN NINETEENTH-CENTURY AMERICA, 3 (1986).

[65] *Id.* at 7. For example, in a letter to journalist Parke Godwin in 1858, Olmsted termed his design of New York's Central Park "a democratic development of the highest significance & on the strength of which, in my opinion, much of the progress of art & esthetic culture in this country is dependent." SCHUYLER, *id.* at 94.

[66] One exception to this might be Olmsted's design of Union Square in New York. As Joanna Merwood-Salisbury notes, Olmsted and Calvert Vaux were hired to redesign Union Square in 1872. Olmsted's design recognized the square's long use as space for public expression and built into his design an area for public assembly. Merwood-Salisbury argues that this demonstrates Olmsted's "pragmatic side" and his "willingness to accommodate

some traditions of mass culture into landscape design." Merwood-Salisbury, *Patriotism and Protest: Union Square as Public Space, 1832-1932*, 68 J. SOC.'Y ARCHITECTURAL HISTORIANS 540, 545 (2009).

[67] See Geoffrey Blodgett, *Frederick Law Olmsted: Landscape Architecture as Conservative Reform*, 62 J. AM. HIST. 869, 886 (1976).

[68] *See e.g.*, SCHUYLER, *supra* note 64, at 114 (Olmsted instituted a group of keepers in New York's Central Park to maintain order and help educate citizens about the proper uses of public space) and Blodgett, *supra* note 67, at 881 ("Olmsted and his aides wanted to train the keepers' force in the tactics of crowd control to protect the park against 'the shock of an untrained public'").

[69] For a discussion of the bad tendency rule, see RABBAN, *supra* note 52, at 132 (arguing that it permitted the "punishment of publications for their tendency to harm the public welfare").

[70] *Id*. at 132 (arguing that the bad tendency test was the "most pervasive and fundamental approach" to freedom of speech in the years between the Civil War and World War I). *See also Patterson v. Colorado*, 205 U.S. 454 (1907) (Justice Holmes' majority opinion), and *Turner v. Williams*, 194 U.S. 279 (1904) (upholding deportation of visiting English anarchist).

[71] See RABBAN, *supra* note 52, at 247 (arguing that Progressive thought after World War I began to recognize the value of individual speech rights and that those rights "became a fundamental feature of twentieth-century liberalism").

[72] David Kairys, *Freedom of Speech*, in THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE 140, 161 (David Kairys ed., 1982).

[73] JAMES GREEN, DEATH IN THE HAYMARKET 141 (2006) (describing how "Chicago anarchists fell in love with the idea of dynamite as the great equalizer in class warfare" in the late 1800s).

[74] *See* Kairys, *supra* note 72, at 150 (describing free-speech fights by the International Workers of theWorld in the early 1900s as being political fights, not legal fights).

[75] Holly J. McCammon, *From Repressive Intervention to Integrative Prevention: The U.S. State's Legal Management of Labor Militancy, 1881-1978*, 71 SOC. FORCES 569, 571 (1993).

[76] Alexander, *supra* note 25, at 308-309 ("Efficacy replaced virtue as the ideal guiding the lawyer-scholars. . . .").

[77] RICHARD T. ELY, PROPERTY AND CONTRACT IN THEIR RELATIONS TO THE DISTRIBUTION OF WEALTH, 96 (1914) ("The essence of property is in the relations among men arising out of their relations to things").

[78] Morris R. Cohen, *Property and Sovereignty*, 13 CORNELL L. Q. 11, 19 (1927).

[79] 291 U.S. 502 (1934).

[80] *Id.* at 524-525.

[81] Charles A. Reich, *The New Property*, 73 YALE L. J. 733, 772 (1964) ("Property rights were considered more the enemy than the friend of liberty").

[82] GREEN, *supra* note 73, at 123 (describing the Chicago police force's preferred tactic of dispersing crowds with a "sizable, well-trained force of men ready and willing to club protesters into submission").

[83] ZECHARIAH CHAFEE, JR., FREE SPEECH IN THE UNITED STATES, 158 (1964) (1941).

[84] SCHUYLER, *supra* note 64, at 190-191.

[85] FREUND, *supra* note 51, at 150-151. Freund was less willing to grant that status to public parks, arguing that parks were not spaces for "traffic or communication, but for recreation." *Id*. at 155.

[86] In Milwaukee, Wisconsin, for example, socialists created public space (parks and social centers) for recreation and the discussion of political ideas. For a description of this movement, see Elizabeth Jozwiak, *Politics in Play: Socialism, Free Speech, and Social Centers in Milwaukee*, 86 WIS. MAG. HIST. 10 (2002).

[87] For many, this move was highlighted by the Court's decision in *United States v. Carolene Products Co.*, 304 U.S. 144 (1938). In cases affecting property interests it presumed that governmental regulation of commerce was constitutional unless it was shown to be otherwise. However, the Court, in a footnote to Justice Harlan F. Stone's decision, called for a "narrower scope" of review when the first ten amendments to the constitution are involved. *Id.* at 152 n.4.

[88] 307 U.S. 496 (1939) (Roberts, J., plurality opinion).

[89] The Jersey City ordinance prohibited "public parades or public assembly in or upon the public streets, highways, public parks or public buildings of Jersey City . . . until a permit shall be obtained from the Director of Public Safety." *Id.* at 503.

[90] The opinion's power has been reduced because of Roberts' ability to attract only one other justice to join his decision, Justice Hugo Black. Justices who concurred with Roberts, however, seemed not to differ with him on

his definition of public space and its relationship to democracy, but rather on Roberts' dated understanding of the Fourteenth Amendment. In short, Roberts argued that freedom of expression was protected by the privilege and immunity clause of the Fourteenth Amendment and guaranteed only to citizens of the United States. Justice Stone, in a concurring opinion, argued that speech was protected by the due process clause of the Fourteenth Amendment and available to all people, whether citizens or not. *Id.* at 519. Richard T. Pfohl has argued that because of Roberts' reliance on a nineteenth-century view of the privileges and immunities clause, Stone's concurring opinion is the real foundation of modern expression law. Pfohl, Hague v. CIO *and the Roots of Public Forum Doctrine: Translating Limits of Powers into Individual Rights*, 28 HARV. C.R.-C.L. L. REV. 533, 560-565.

[91] Hague, 307 U.S. at 505-506.

[92] Justice Roberts noted, for example, that the legislation at issue in *Davis* was not solely aimed at controlling expressive activities, while the ordinance in *Hague* clearly had that as its goal. *Id.* at 515. As a result, the *Hague* decision did not overrule the precedent set in *Davis*. However, in *Jamison v. Texas*, 318 U.S. 413 (1943) the Court rejected a city's use of the *Davis* precedent. As Justice Black wrote, "This same argument, made in reliance upon the same decision, has been directly rejected by this Court." *Id*. at 415-416. In *Fowler v. Rhode Island*, 345 U.S. 67 (1953), the Court refused to resolve questions about whether the *Davis* decision was still good law. Justice William Douglas, for the majority, wrote that that since city officials allowed other religious organizations to use a park they could not prohibit members of the Jehovah's Witnesses from using it. As he noted, "We put to one side the problems presented by the *Davis* case and its offspring"). *Id*. at 69.

[93] *Hague*, 307 U.S. at 515-516.

[94] This point was first made by Stone, *supra* note 56, at 238 (he notes it in passing and does not develop the argument in any depth). See also Calvin Massey, *Public Fora, Neutral Governments, and the Prism of Property*, 50 HASTINGS L.J. 309, 314 (1999) (suggesting a connection between Justice Roberts' opinion and the idea of prescriptive easements).

[95] The common law of adverse possession, and its related idea of prescription, calls on courts to take seriously common usage of property. Adverse possession allows an owner to lose possession of his or her land if trespassers are not ejected quickly enough, under the assumption that the owner was no longer using the property. Prescription builds on the idea that the property owner has dedicated some right of way to the public. However, as Carol Rose explains, these doctrines have traditionally been applied very narrowly, usually only to roadways. She

notes that courts were and still are reluctant to approve of claims of adverse possession by the general public. See Rose, *supra* note 57, at 724. Prescription, rather than adverse possession, is the more common claim, where the public relies on evidence or usage to demonstrate that the property has been dedicated to the public's use. See Paula R. Latovick, *Adverse Possession Against the States: The Hornbooks Have It Wrong*, 29 U. MICH. J. L. REFORM 939 (1996).

[96]Stone, *supra* note 56, at 238.

[97] Rose, *supra* note 57, at 726.

[98] The committee was chaired by Grenville Clark, but it is clear that Zechariah Chafee, Jr., played an important role in the formulation of the brief. See DONALD L. SMITH, ZECHARIAH CHAFEE, JR.: DEFENDER OF LIBERTY AND LAW 197 (1986). *See e.g*. Brief for the Committee on the Bill of Rights, of the American Bar Association as Amicus Curiae, *Hague v. Comm. Indus. Org.*, 307 U.S. 496 (No. 651) [hereinafter Brief for the Committee]. Chafee included large portions of the brief in his book, FREE SPEECH IN THE UNITED STATES. CHAFEE, *supra* note 83, at 415-428. Portions of the brief can also be found in *Association's Committee Intervenes To Defend Right of Public Assembly*, AMER. B. ASSOC. J. 7 (1938).

[99] *See e.g*., Brief for the Committee, *supra* note 98, at 14 (Parks must be open "for all public meetings at reasonable times and places and must provide proper police protection to prevent disturbances").

[100] *Id*. at 18.

[101] *Id.* at 4 ("It is the Committee's position that the right of assembly lies at the foundation of our system of government and that the right to hold open-air meetings in cities forms an important part of this right of assembly.").

[102] *Id.* at 18-19 ("[T]he right of a city in respect of its parks resembles other governmental rights in that it must be administered for the benefit of the public and not in an arbitrary manner").

[103] *Id*. at 15 ("[A]s a practical matter a city has a virtual monopoly of every open space at which a considerable outdoor meeting can be held."). *See e.g*., *id*. at 19 ("The danger of the private ownership theory of public property . . . becomes particularly impressive at a time like the present when acquisitions of large amounts of property are being made by government and it is carrying on enormous activities, such as those conducted by the Tennessee Valley Authority").

[104] 310 U.S. 296 (1940).

[105] *Id*. at 301.

[106] While Roberts was the first justice to apply time, place, and manner to expression, the phrase has long been used in legal discourse in the United States. The phrase is used in the U.S. Const. art. I § 4 ("The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; . . ."). Prior to 1940, it had been used in a wide range of judicial discourse. In 1900, the U.S. Supreme Court spoke of "regulating the time, place and manner of inflicting a death penalty." Davis v. Burke, 179 U.S. 399, 399 (1900). In 1907, in a case involving a contested will, the Court said a marriage would not be considered invalid even if there is no evidence of "the time, place and manner of the celebration of the marriage." Travers v. Reinhardt, 205 U.S. 423, 437 (1907). In a patent case in 1912 the Court wrote that a patentee can restrict the "time, place or manner of using a patented machine." Henry v. A.B. Dick Company, 224 U.S. 1, 11 (1912). In 1926, in an immigration case, the Court wrote of an alien's entry into the country in "respect to time, place, manner and the like." United States v. Commissioner of Immigration, 273 U.S. 103, 110 (1927). And in 1930, in an opinion by Justice Holmes, the Court referred to the "time, place and manner of holding elections." United States v. Wurzbach, 280 U.S. 396, 398 (1930). In 1868, Thomas M. Cooley in discussing government's police powers, wrote that "the state has also the authority to make extensive and varied regulation as to the time, mode, and circumstances in and under which parties shall assert, enjoy or exercise their rights. . . ." COOLEY, *supra* note 41, at 597. Ernst Freund, commenting on the police power in 1904, noted that while bans on public assemblies would be unreasonable, public gatherings can be "restrained as to time and place, and number of duration of meetings." FREUND, *supra* note 51, at 515.

[107] *Cantwell*, 310 U.S. 296, 303-304 (1940).

[108] *Id*. at 304.

[109] *See* Pfohl, *supra* note 90, at 566 (arguing that the Roberts time, place, and manner test has a central feature of the modern public forum doctrine and has "formed the basis of its core philosophies").

[110] An article in *American Law Magazine* in 1844, by an unknown writer, noted five factors that should be used to regulate public assemblies: if a meeting contemplates an illegal measure, where a meeting was assembled, whether the people involved are armed, whether banners are displayed that hold any class or portion of the community up to ridicule or contempt, and whether any movement of a violent nature is attempted. *Riots, Routs, and Unlawful Assemblies*, 3 A. L. MAG. 350, 356-357 (1844).

[111] 308 U.S. 147 (1939).

[112] *Id.* at 163.

[113] TIM CRESSWELL, IN PLACE, OUT OF PLACE: GEOGRAPHY, IDEOLOGY, AND TRANSGRESSION (1996) (arguing the importance of place as being judged as "transgressive acts" that violate societal standards). This becomes obvious in Justice Roberts' decision in *Valentine v. Chrestensen*, 316 U.S. 52 (1942), deciding whether the City of New York could prohibit a man from distributing leaflets advertising tours of a World War I submarine. The city was concerned about the leaflets causing a sanitation problem. When the man was told that he could only distribute leaflets devoted to "information or public protest," he prepared a double-faced leaflet: on one side an advertisement for the submarine tours and on the other a protest against the city not allowing his submarine to dock at a city pier. A unanimous Court, led by Roberts, found that the political message was just a way of "evading the prohibition of the ordinance." While the distribution of political messages was an appropriate use of public space, the distribution of advertising messages was not a transgressive act. As Roberts wrote, "We are equally clear that the Constitution imposes no such restraint on government as respects purely commercial speech." *Id*. at 55.

[114] This notion of place, as articulated in the *Hague* decision and more fully in the brief of the ABA Bills of Rights Committee, follows closely Chafee's theory of free speech. As Chafee wrote: "The First Amendment protects two kinds of interests in free speech. There is an individual interest, the need of many men to express their opinions on matters vital to them if life is to be worth living, and a social interest in the attainment of truth. . . ." CHAFEE, *supra* note 83, at 33.

[115] Susan J. Drucker and Gary Gumpert note that planning and zoning are not synonymous. Zoning constitutes the separation of a municipality into distinct districts based on use, as well as how buildings are constructed and designed. Planning is a broader term "designed to promote the common interest of a community." *Public Space and Communication: The Zoning of Public Interaction*, 1 COMM. THEORY 295, 307 n. 11 (*citing* E.C. YOKLEY, ZONING LAW AND PRACTICE (4th ed. 1978)). In short, zoning is an instrument used to achieve planning decisions.

[116] *See e.g*., Alfred Bettman, *Constitutionality of Zoning*, 37 HARV. L. REV. 834 (1924).

[117]Dep't of Commerce Advisory Comm. on Zoning, A Standard State Zoning Enabling Act: Under Which Municipalities May Adopt Zoning Regulation (1926).

[118] John F. Hart, *Colonial Land Use Law and Its Significance for Modern Takings Doctrine*, 109 HARV. L. REV. 1252, 1259 (1996).

[119] *Id*. at 1272.

[120] *Id*. at 1273.

[121] *Id*. at 1275.

[122] A contributing factor to this movement was the Court's rejection of its decision in *Lochner v. New York*, 198 U.S. 45 (1905). Considered the highpoint of *laissez-faire* constitutionalism, the Court in *Lochner* rejected a New York law that regulated working conditions and sanitary standards for bakeries. The Court's majority saw the regulations as interfering with liberty of contract as protected by the Fourteenth Amendment. The *Lochner* era is generally considered to have ended with the Court's decision in *West Coast Hotel Co. v. Parish*, 300 U.S. 379 (1937) (upholding the constitutionality of minimum wage legislation in state of Washington).

[123]SEYMOUR I. TOLL, ZONING AMERICAN 158 (1969).

[124]Bettman, *supra* note 116, at 840.

[125]*Id*. at 842.

[126] Village of Euclid v. Ambler Realty Company, 272 U.S. 365, 395 (1926).

[127] *Id*. at 388.

[128] Eric R. Claeys, *Euclid Lives? The Uneasy Legacy of Progressivism In Zoning*, 73 FORDHAM L. REV. 101, 105 (2004).

[129]*Id*. at 110.

[130]*Id*.

[131]UPTON, *supra* note 34, at 299.

[132]For discussions about the role of categories and boundaries see Andrew Abbott, *Things of Boundaries*, 62 SOC. RES. 857 (1995); Reece Jones, *Categories, borders and boundaries*, 33 PROGRESS IN HUM. GEOGRAPHY 174 (2009); Reece Jones, *The spatiality of boundaries*, 34 PROGRESS IN HUM. GEOGRAPHY 263 (2010); and Michele Lamont and Virág Molnár, *The Study of Boundaries in the Social Sciences*, 28 ANNU. REV. SOCIOL. 167 (2002). On categories and the law, see Kathleen M. Sullivan, *Post-Liberal Judging: The Roles of Categorization and Balancing*, 63 U. COLO. L. REV. 293 (1992), and Joseph Blocher, *Categoricalism and Balancing in First and Second Amendment Analysis*, 84 N. Y. U. L. REV. 375 (2009).

[133] The establishment of what has been called the public forum doctrine has been widely chronicled in the legal literature. Harry Kalven, Jr. is generally credited with constructing the modern contours of the doctrine. See Kalven, *The Concept of the Public Forum:* Cox v. Louisiana, 1 SUP. CT. REV. 1 (1965). For a good review of the doctrine, see ZICK, *supra* note 8.

[134] Robert C. Post, *Between Governance and Management: The History and Theory of the Public Forum*, 34 UCLA L. REV. 1713, 1715 (1989).

[135] 408 U.S. 92 (1972).

[136] 460 U.S. 37 (1983).

[137] *See* Cornelius v. NAACP Legal Defense and Educational Fund, Inc., 473 U.S. 788, 803 (1985).

[138] *See* ZICK, *supra* note 8, at 53 ("The scope of a speaker's public liberties would henceforth vary according to the type or category of forum she occupied").

[139] *See e.g.*, MELVILLE B. NIMMER, NIMMER ON FREEDOM OF SPEECH: A TREATISE ON THE THEORY OF THE FIRST AMENDMENT (1984) (suggesting that there are two lines of competing thought at the root of the public forum doctrine: those that rely on the type of property that is used, and those that rely on assessments of the type of speech and its relationship to the property). The public forum doctrine tends to focus on making assessments about the type of property that is used for expressive purposes. *See* Post, *supra* note 135, at 1735.

[140] *Id*. at 1800.

[141] *Id*.

[142] The ample alternatives test was first articulated in Virginia *Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976). As Justice Harry Blackmun wrote in limiting a state's ability to control pharmaceutical drug advertisements:

> There is no claim, for example, that the prohibition on prescription drug price advertising is a mere time, place, and manner restriction. We have often approved restrictions of that kind provided that they are justified without reference to the content of the regulated speech, that they serve a significant governmental interest, and that in so doing they leave open ample alternative channels for communication of the information.

Id. at 771.

[143] This move began in *Kovacs v. Cooper*, 336 U.S. 77 (1949), where the Court upheld the constitutionality of an ordinance prohibiting the use of sound trucks emitting loud and raucous noises on city streets. For the majority of the Court, the ordinance was constitutional because speakers had other ways to express themselves. As Justice Stanley Reed wrote for the majority, "There is no restriction upon the communication of ideas or discussion of issues by the human voice, by newspapers, by pamphlets, by dodgers." *Id*. at 89.

[144] Young v. American Mini Theatres, Inc., 427 U.S 50, 63 (1976) (Justice John Paul Stevens, in his opinion for court, wrote: "[T]he regulation of the place where such films may be exhibited does not offend the First Amendment"). In a concurring opinion, Justice Lewis Powell recognizing the importance of the Court's actions in *Young*, noted that this was the first time the Court had decided a case where expression was "implicated by a municipality's commercial zoning ordinances." *Id*. at 76. Powell concluded his opinion with a warning: "Although courts must be alert to the possibility of direct rather than incidental effect of zoning on expression, and especially to the possibility of using the power to zone as a pretext for suppressing expression, it is clear that this is not such a case." *Id*. at 84.

[145] Linmark v. Willingboro, 431 U.S. 85, 93 (1977) (Marshall, J., opinion for the court: "Although in theory sellers remain free to employ a number of different alternatives, in practice realty is not marketed through leaflets, sound trucks, demonstrations, or the like").

[146] Heffron v. International Society for Krishna Consciousness, Inc., 452 U.S. 640, 654 (1981). In the case, ISKCON argued that being restricted to a specific location violated one its religious rituals—going into public places to distribute literature and solicit donations. *Id*. at 645. Justice Byron White, in his opinion for the Court, noted that members of the group were allowed to engage in these activities outside of the fairgrounds, providing them with an ample alternative. *Id*. at 654-655. Justice William Brennan noted, however, the importance of the Court's interpretation on the public:

> By prohibiting distribution of literature outside the booths, the fair officials sharply limit the number of fairgoers to whom the proselytizers and candidates can communicate their messages. Only if a fairgoer affirmatively seeks out such information by approaching a booth does [the rule] fully permit potential communicators to exercise their First Amendment rights.

Id. at 660 (Brennan, J., dissenting).

[147] Clark v. Community For Creative Non-Violence, 468 U.S. 288, 293 (1984).

[148] That is not to say that courts have always gone along with government's desire to do so. *See e.g.*, Bay Area Peace Navy v. U.S., 914 F.2d 1224 (9th Cir. 1989) (holding that the inability of protesters to reach their intended audience did not meet the ample alternatives test) and Long Beach Area Peace Network v. Long Beach, 522 F.3d 1010 (9th Cir. 2008) (holding that a twenty-four hour advance notice requirement for a demonstration "fails to provide ample alternative means of communication for people wishing to participate in spontaneous expressive events").

[149] *See e.g.*, Boardley v. U.S., 615 F.3d 508 (D.C. Cir. 2010) (ruling that free speech zones located within national parks are limited or designated public fora, but that not all national parks are traditional public fora).

[150] *See e.g.*, Members of City Council v. Taxpayers for Vincent, 466 U.S. 789, 812 (1984) (deciding that alternative modes of communication might be inadequate if the ability of the speaker to "communicate effectively is threated").

[151] *See e.g.*, Menotti v. City of Seattle, 409 F.3d 1113, 1134 (2005) (deciding that a restrictive zone in Seattle, Washington, during a World Trade Organization conference did not violate the constitution).

[152] 430 F.2d 873 (5th Cir. 1970).

[153] *Id.* at 878

[154] 36 C.F.R. § 2.51 (e).

[155] *See* 36 C.F.R. § 2.51 (e) 1-5 (expression areas can be closed if activities would: "(1) cause inury or damage to park resources; or (2) [u]nreasonably impair the atmospheres of peace and tranquility maintained in wilderness, natural, historic, or commemorative zones; or (3) [u]nreasonably interere with interpretive, visitor service, or other program activities, or with the administrative activities of the National Park Service; or (4) [s]ubstantially impair the operation of public use facilities or services of National Park Service concessionaires or contractors; or (5) [p]resent a clear and present danger to the public health and safety").

[156] Galvin v. Hay, 374 F.3d 739 (9th Cir. 2004) (holding that the U.S. Park Service's dispersal of protesters violated the constitution, it did not reach a conclusion on whether the First Amendment area constituted an ample alternative).

[157] *Id.* at 756.

[158] Service Employee International Union v. Los Angeles, 114 F. Supp. 2d 966, 968 (C.D. Cal. 2000).

[159] *Id.* at 972.

[160] As a result, Los Angeles city officials agreed to create a public assembly area in a parking lot in front of the Staples Center, about 750 feet closer to the arena than the original free speech zone. As civil rights attorney Carol Sobel said, "From our clients' viewpoint, it's a good opportunity to reach the delegates. The only thing between them and the delegates is the mesh fence. It puts us within shouting distance, just two traffic lanes away." Beth Barrett, *New Protest Area: At Dems' Doorstep*, DAILY NEWS OF L.A., July 29, 2000, http://www.lexisnexis.com/lnacui2api (last visited Sept. 14, 2010).

[161] *Coalition*, 327 F. Supp. 2d 61, 66 (D. Mass. 2004) (the city imposed restrictions on the number of people who could be in the soft zone, as well as vehicles, tables, and chairs).

[162]*Id*. at 67 (quoting Judge Woodlock).

[163]*Id*. at 77 (Judge Woodlock called it "inadequate space").

[164]*Id*. at 75.

[165]*Id*.

[166] Bl(A)ck Tea Society v. City of Boston, 378 F. 3d 8, 14 (1st Cir. D. 2008).

[167] *See e.g*., *Coalition* 327 F. Supp. 2d 61, 68 (D. Mass. 2004) (the city relocated the demonstration zone upon the request of the American Civil Liberties Union and National Lawyers Guild to place protesters within "sight and sound" of delegates) and American Civil Liberties Union of Colorado v. Denver, 569 F. Supp.2d 1142, 1154 (2008) (noting that "[w]ater stations and sanitary facilities will be provided with the Zone" as well as an amplification system).

[168] *Id*.

[169]*Id*. at 1150

[170] The term "Public/Demonstration Zone" is the term used by Judge Krieger. As she notes, the government preferred the term "public access area," while plaintiffs in the case preferred "free speech zone" or "freedom cage." Judge Krieger noted that the slash was intended capture the "multiple purposes the Zone is intended to serve." *Id*. at 1153, n. 8.

[171]*Id*. at 1154.

[172] *Id*.

[173]*Id*. at 1156.

[174] Trial Exhibit 46, *id*. at 1155.

[175]*Id*. ("[T]he zone was not designed to provide unobstructed views of the Pepsi Center building itself").

[176] *Id*. at 1163.

[177] *Id*. at 1180.

[178] *Id*. at 1181.

[179]*Id*. at 1181-1182. Judge Krieger noted that the expert also testified that it would be difficult for delegates to separate out voices from a chorus of protesters. However, she argued that this would be just as difficult at any distance for delegates. *Id*. at 1181, n. 28.

[180] Judge Krieger noted that some plaintiffs had hoped to turn their backs to the Pepsi Center and walk away. *Id*. at 1182.

[181] *Id*. at 1183.

[182]*Id.*

[183] *Id*. at 1184. The media are sometimes used as a way for government to meet the ample alternatives test. *See e.g.*, Citizens For Peace In Space v. Colorado Springs, 477 F.3d 1212, 1225 (10th Cir. 2007) (holding that protesters were able to interact with media outside of a security zone during a meeting of the defense ministers of the North American Treaty Organization).

[184] *See e.g*., David S. Allen, *Merging Ethics and Law: Discourse Legal Theory and Freedom of Expression in* Hurley, 4 COMM. L. & POL'Y 403 (1999), and Madhavi Sunder, *Cultural Dissent*, 54 STAN. L. REV. 495 (2001).

[185] *See e.g*., RICHARD SENNETT, THE CRAFTSMAN 229 (2008) (describing the importance of locating public space at the boundaries of neighborhoods as a way of encouraging interaction among citizens from different communities).

[186] *See e.g*., DeLuca and Peeples, *supra* note 12, at 144 (noting that "symbolic protest violence is often a necessary prerequisite to highlight the non-violent elements of a movement that might otherwise be marginalized in the daily struggle for media coverage").

[187]*See e.g*., Ronald Dworkin, *Is the Press Losing the First Amendment?* in A MATTER OF PRINCIPLE 381, 389 (1985) ("[A]ppeals to the general welfare of the public invite the reply that in some cases the public's real interest would be better served, on balance, by censorship than by publication").