The Liberalization of Free Speech: Or, How Protest in Public Space is Silenced

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ABSTRACT

Professor Mitchell examines the liberalization of free speech and examines the new methods of control and limitation that have arisen in the new regime. As free speech jurisprudence has liberalized the focus of control has shifted from what is said to where it is said. This geography of speech has become increasingly important and is a point of contention. Through three case studies Professor Mitchell illustrates the ways in which controlling the geography of speech allows the controlling of the speech itself. – Stanford Agora

* This paper originated from an invitation by Jody Decker in the Geography Department at Wilfred Laurier University to speak at a Humanities Forum on the topic of "silence." It has also been presented in colloquia in the Departments of Geography at the Universities of Dundee, Edinburgh, Glasgow, Lund, Ohio State, North Carolina, and Georgia, and at a public forum sponsored by the Westcott Community Center in Syracuse, NY. I have benefited from audience criticism and suggestions on each occasion. I have particularly benefited from the careful editing of Maria Dodge of the Stanford Law School, who invited me to contribute my ideas on law and space to this issue of *Stanford Agora*.

Introduction

To be silenced is to be kept from being heard. My goal in this essay is to explore how such a silencing – such a keeping from being heard – is accomplished not in the name of the outright suppression of speech, but in the name of its liberalization. In American public spaces, I will argue, the contemporary silencing of dissenting speech is more and more accomplished through a language, and an accompanying set of regulations, that purportedly serves to protect the very rights that are being suppressed. My point is that the line between regulation and suppression is a thin and increasingly faint one, and it is a line that is both drawn and continually crossed through the development and implementation of a liberal theory of speech rights in the US. The regulation/suppression dialectic relies less and less on *what* is said (this is speech's liberalization) than *where* it is said. Silencing is a function of geography. And free speech law in the US is increasingly geographically astute.

To develop such an argument it is helpful to return to an episode in the history of outright suppression, because by doing so we can begin to glimpse how a narrow focus – either by civil libertarians seeking to promote free speech, or others seeking to limit it – on what is said, is insufficient. On Saturday, February 2, 2002, William Epton died of cancer.[1] Epton was a leftist agitator who in 1964 became the first person since 1920 to be convicted under New York's criminal anarchy law. He was convicted of both conspiracy to commit the crime of advocating criminal anarchy and of actually advocating criminal anarchy.[2] It may also be the case that Epton was the one of the *last*

[1]Douglas Martin, *William Epton, 70, is Dead; Tested Free Speech Limits*, N.Y. TIMES, Feb. 3, 2002, at 1.37.

[2] N.Y. Penal Law §§160, 161 outlaw the advocacy of criminal anarchy; § 580 concerns conspiracy; see People v Epton 227 N.E. 2d 829 (N.Y. 1967).

persons convicted in the US for outright revolutionary political speech.[3] As an organizer for the Progressive Labor Party in Harlem, Epton made a series of street-corner speeches at the time of a riot in 1964, saying in one of them (as recorded by an undercover police officer who had infiltrated the Harlem chapter of the party):

> If we are going to be free, and we will not be fully free until we smash this state completely and totally. Destroy and set up a new state of our own choosing and our own liking. And in the process of making that state, we're going to have to kill a lot of these cops a lot of these judges, and we'll have to go against their army. We'll organize our own militia and our own army….[4]

The Appeals Court upheld Epton's conviction, arguing that:

> There is no doubt that Epton intended to inflame the already intense passions of the troubled people of Harlem and to incite them to greater violence. Furthermore, defendant's exhortations calling for organized resistance to the police and the destruction of the State, in the setting of Harlem during the week of July 18th,[5] formed a sufficient basis for the trial court and jury to conclude that his words and actions created a 'clear and present danger' that the riots then rocking Harlem would be intensified or, if they subsided, rekindled.[6]

The last phrase in the previous sentence is important, because the trial court had found a "lack of evidence as to any direct, causal connection between Epton's activities and the Harlem riots of the Summer of 1964."[7] That is to say, there was no evidence of a connection between what Epton said and what happened in Harlem, especially since Epton made most of his speeches *after* the riot had subsided. The Supreme Court, on this and other occasions, refused to consider the legitimacy of New York's criminal anarchy law on the grounds that this was a state rather than a federal matter.

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[3] As will be discussed in the epilogue, the USA PATRIOT Act passed in the wake of the World Trade Center and Pentagon terrorist attacks, along with powers now being suggested for the Department of Homeland Security, may return us to less liberal modes of speech regulation. If so, it will likely be the case that Epton will not longer be the last.

[4] *Epton*, 227 N.E. 2d at 832.

[5] A riot began in Harlem the evening of July 18, 1964, after a police officer shot and killed a 15 year old black youth, Martin, *supra* note 1.

[6] *Epton*, 227 N.E. 2d at 835 (footnote added).

[7] *Id*. at 831.

But, of course, the Supreme Court *had* considered New York's law before – in the 1920s in the famous *Gitlow* case.[8] Then, the Court upheld the conviction of the radical Benjamin Gitlow after Gitlow had published a tract called *The Left-Wing Manifesto*, during the height of the Palmer Raids in 1919. Oliver Wendell Holmes (joined by Louis Brandeis) wrote a famous dissent in the Gitlow case, arguing that Gitlow's pamphlet in no way presented a "clear and present danger" to the state and, therefore, Gitlow's conviction under New York's criminal anarchy law should be overtuned.[9] The majority in this case, however, upheld Gitlow's conviction and in the process affirmed both the constitutionality of the New York law, and the State's right to police some forms of speech. Assuming, first, that the due process clause of the Fourteenth Amendment covered the liberties outlined in the First Amendment, the Court, second, argued that "the freedom of speech and of the press which is secured by the Constitution, does not confer an absolute right to speak or publish, without responsibility, whatever one may choose…."[10] Further, the Court held, "That a State in the exercise of its police power may punish those who abuse this freedom by utterances inimical to the public welfare, tending to corrupt public morals, incite crime, or disturb the peace, is not open to question."[11] Finally, "a State may punish utterances endangering the foundations of organized government and threatening its overthrow by unlawful means."[12]

On much of this Holmes did not disagree. His dissent in *Gitlow* was based in earlier decisions and dissents he had written for the Court in the wake of World War 1.[13] These earlier cases,[14] established the standards for the right that many now consider the

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[8] Gitlow v. New York, 268 US 652 (1925).
[9] *Id*. at 673, Holmes dissenting) (quoting Schenck v. United States, 249 US 47, 52 (1919)).
[10] *Gitlow*, 268 USat 666.
[11] *Id*. at 667.
[12] *Id*.
[13] In particular he cited *Schenck* and *Abrams v. United States*, 250 US 616 (1919).
[14] In addition to *Schenck* and *Abrams*, two other cases are important: *Debs v. United States*, 249 US 211 (1919) and *Frohwerk v. United States*, 249 US 204 (1919).

foundation of contemporary American liberty: the right to free speech. Or more accurately, at the end of World War I, the Supreme Court, with Justice Holmes taking the lead, began to develop the language that allowed for the *regulation* of speech such that it could be protected as an ingredient necessary to the development and the strength of the state. It began to find a way to limit speech, rather than to outlaw it altogether. If the majority in *Gitlow* had not yet come around to this view, later Courts did, finding in Holmes's decisions the language necessary to begin the project of liberalizing free speech in the U.S.[15] This liberalization was predicated on a seeing at the heart of speech a separation – in space and time – between what is said and the effects of utterances. This is the very basis of Holmes's "clear and present danger" test.[16]

Each of the defendants in these cases was convicted for making speeches (or publishing pamphlets) that were deemed to have the possibility of being effective and therefore to portend violence or to undermine the legitimate interests of the state. Each conviction was upheld by the Supreme Court. The irony of free speech jurisprudence in the US, therefore, is that its liberalization is grounded in its repression. This conclusion is doubly obvious, and doubly interesting, when the content of the four convictions is remembered. The prominent socialist Eugene Debs was convicted for merely praising draft resisters for their moral courage.[17] Charles Schenck, an official of the Socialist Party in Philadelphia, was convicted for calling the draft a form of involuntary servitude outlawed by the Thirteenth Amendment, and recommending that men petition the

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[15] Any number of books and reviews could be cited to support this point. Good overviews include: RODNEY A. SMOLLA, FREE SPEECH IN AN OPEN SOCIETY (1992); Geoffrey D. Berman, *A New Deal for Free Speech: Free Speech and the Labor Movement in the 1930s*, 80 VA. L. REV., 291 (1994); David Cole, *Agon at Agora: Creative Misreadings in the First Amendment Tradition*, 95 YALE L.J. 857 (1986); Robert M. Cover *The Left, the Right, and the First Amendment: 1918-1928*, 40 MD. L. REV., 349-88 (1981).

[16] The geography of free speech is explored in Don Mitchell, THE RIGHT TO THE CITY: SOCIAL JUSTICE AND THE FIGHT FOR PUBLIC SPACE (2003); and Don Mitchell, *Political Violence, Order, and the Legal Construction of Public Space: Power and the Public Forum Doctrine*, 17 URB. GEOGRAPHY 158

[17] *Debs*, 249 U.S. at 212-215.

government to object to the draft law.[18] Frohwerk, the editor of a small circulation German-language newspaper, was convicted for writing that the US had no chance of defeating Germany in the war and thus draftees who refused to enlist could not be faulted.[19] And Abrams, along with four fellow Russian radicals, was convicted for throwing leaflets out of a New York window protesting US intervention in Russia following its revolution.[20]

Holmes first laid out his language concerning "clear and present danger" in the Schenck case.[21] "The question in every case," Holmes intoned, "is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about substantive evils that Congress has a right to prevent. It is a question of proximity and degree."[22] He also said a few other things that bear repeating, especially now: "When a nation is at war, many things that might be said in a time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight and no Court could regard them as protected by any Constitutional right."[23] However, Holmes clarified:

> We admit that in many places and in ordinary times, the defendants … would have been within their constitutional rights. But the character of the act depends upon the circumstances in which it is done…. The most stringent protection of free speech would not protect a man falsely shouting fire in a theater and causing a panic. It does not even protect a man from an injunction against uttering words that may have all the effect of force.[24]

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[18] *Schenck*, 249 U.S. at 50-51.
[19] *Frohwerk*, 249 U.S. at 205-208.
[20] *Abrams*, 250 U.S. at 619-623.
[21] *Schenck*, 249 U.S. at 52.
[22] *Id.*
[23] *Id.* While the main purpose of this paper is explore the role of geography – of space – in speech, history – time – is obviously critical too. What happens to Holmes's argument – and to any hope for robust democratic debate, including debate over whether our present form of government is the best form of government – when the "time of war" is potentially endless, as the Bush Administration's current "war on terrorism" seems to be?
[24] *Id*. (Internal citations omitted). *See* SMOLLA, *supra* note 15 (showing, correctly, that the analogy of shouting fire to political speech is in fact a false one).

So, even when not at war, the government may strongly circumscribe speech.

There are two issues that are crucial here to the construction of a fully liberal theory of free speech. The first is that what makes a difference in the nature of speech is *where* that speech occurs. There would be nothing wrong, presumably, with falsely shouting fire, even in a time of war, in the middle of the wilderness, or even on a busy street, if there is adequate room to move. The trick for speech regulation, therefore, becomes – and became for the Court – one of spatial regulation. Regulation of location, or place, becomes the surrogate for the regulation of content.[25] The second crucial point Holmes makes is to distinguish between the content of speech and the possibility that such speech might have an effect.[26] My purpose in the remainder of this essay is to examine the intersection of these two issues to show how contemporary speech laws and policing effectively silence dissident speech in the name of its promotion and regulation. As the Court has moved away from a regime that penalizes what is said – in essence liberalizing free speech – it has simultaneously created a means to severely regulate where things may be said, and it has done so, in my estimation, in a way that more effectively silences speech than did the older regime of censorship and repression.

It could be argued – to put all this another way – that the death of William Epton received the attention it did precisely because the way his speech was policed seems so anachronistic now. It certainly seems a heavy-handed means of silencing opposition. It seems illiberal. A more liberal approach to silencing opposition – to keeping it from being heard – is to let geography, more than censorship, do the silencing. And this is the direction American law is tending. In what follows I will make my argument clear first

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[25] This point is fully analyzed in the context of the three case studies presented below. While the Court typically refers to its regulatory regime of one of "time, place, and manner," often in its jurisprudence, time and manner are reduced to questions of location. "Place" is the master term in this triad. The kinds of behaviors that are or are not appropriate, and the times at which such behaviors are or are not acceptable is a function of where they occur. What constitutes a loud noise, and the hours in which such noises are typically tolerated, depends on where the noises occur.

[26] See *infra* notes 56-66 and associated text.

through a historical geography of First Amendment law and the evolution of the public forum doctrine, and then by looking at three case studies that show how regulating the *where* of speech effectively silences protest. The implication of my argument is that under the speech regime currently being constructed in the United States, dissident speech can only be effective when it is illegal. And, as I will briefly suggest in the Epilogue, that implication may be profoundly important should (as seems quite likely) the Federal Government overlay this liberal regime with a return to more illiberal and repressive means of handling dissidents in the name of "homeland security." Perhaps ironically, the further implication is that a boisterous, contentious, "politics of the street" is more necessary now than ever if any *effective* right to free speech is to be retained.

The Geography of Speech

The First Amendment to the US Constitution is straightforward: "Congress shall make no law respecting the establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people to peaceably assemble, and to petition the Government for a redress of grievances."[27] This has rarely prevented Congress from doing exactly that, and the history of United States Constitutional law is a history (at least in part) of "abridgements" to the right to speak and to assemble. Even more than Congress, however, State and local jurisdictions have rarely felt much compunction about limiting the speech and assembly rights of agitators, labor union members, socialists, and nearly anyone else they didn't

[27] U.S. CONST. amend. I. §1. While the language is straightforward, there is plenty of room to debate just what this Amendment means, and whether it is essentially a populist Amendment protecting the positive rights of "the people" or a restrictive Amendment negatively barring the government from particular actions. *See, e.g.*, AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION (1998).

like.[28] The importance of *Gitlow*, in this context, is that despite upholding Gitlow's conviction, it "marks the beginning of the 'incorporation' of the First Amendment as a limitation on the states."[29] That is, *Gitlow* began the process applying the Fourteenth Amendment to the First, and thereby extending the reach of the latter so as to guard against actions of the States in addition to the federal government. In the words of one commentator, *Gitlow* started a process that "over the next fifty years, resulted in major changes in the modern law of civil liberties, affording citizens a federal remedy if the states deprived them of their fundamental rights."[30]

The *Gitlow* decision, and after it the appeals court decision regarding William Epton,[31] referenced Holmes's words in *Schenck*, and tried to determine just what constituted a "clear and present danger." But "the future embraced the Holmes of *Abrams* rather than the Holmes of *Schenck*."[32] In his dissent in *Abrams*, Holmes wrote this:

> [W]hen men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of

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[28] This is true, too, even as recognition grew that the Fourteenth Amendment "incorporated" the First Amendment against the states (see *infra* notes 29-31 and text). For the history of the evolutions of this recognition and the fierce debates it spawned, see *id*. and its citations. For histories of State and local abridgements of the right to speech and assembly, *see* PHILIP FONER, FELLOW WORKERS AND FRIENDS: FREE SPEECH FIGHTS AS TOLD BY PARTICIPANTS (1981);PHILIP FONER, HISTORY OF THE LABOR MOVEMENT IN THE UNITED STATES (10 Volume series) (1947-1994); MELVYN DUBOFSKY, WE SHALL BE ALL: A HISTORY OF THE INDUSTRIAL WORKERS OF THE WORLD (2nd Edition, 1988). Perhaps the fullest account of Depression-era restrictions on speech and assembly are the 75 Volumes of evidence collected by the La Follette Committee (Subcommittee of the Senate Committee on Education and Labor on Violations of Free Speech and Rights of Labor) together with the Committee's reports. For a geographical analysis of some of these records and reports, *see* DON MITCHELL, THE LIE OF THE LAND: MIGRANT WORKERS AND THE CALIFORNIA LANDSCAPE (1996); and Don Mitchell *The Scales of Justice: Localist Ideology, Large-Scale Production and Agricultural Labor's Geography of Resistance in 1930s California*, *in* ORGANIZING THE LANDSCAPE: GEOGRAPHICAL PERSPECTIVES ON LABOR UNIONISM (A. Herod ed., 1998), 159-194.

[29] Paul L. Murphy, *Gitlow v. New York*, *in* OXFORD COMPANION TO THE SUPREME COURT OF THE UNITED STATES 339 (Kermit L. Hall ed., 1992).

[30] *Id*.

[31] A central irony of *Gitlow* and *Epton* in relationship to "incorporation" is that whereas in the former the Supreme Court begins the process of incorporation, in the latter, covering much the same legal territory and occurring forty years later, the Court evinced little interest in the question of whether New York's criminal anarchy law abridges incorporated First Amendment rights. Douglas's dissent from the denial of certiorari cites (among others) Holmes's dissent in *Gitlow*, the *locus classicus* of First Amendment incorporation, to chastise the majority on this point. Epton v. New York, 390 US 29, 31 (1968).

[32] MURPHY, *supra* note 29 at 339.

> their own conduct that the ultimate good desired is better reached by the free trade in ideas – that the best test of truth is the power of the thought to get itself accepted in the market, and that truth is the only ground upon which their wishes can safely be carried out. That at any rate is the theory of our Constitution. It is an experiment, as all life is an experiment. Every year if not every day we have to wager our salvation upon some prophesy based upon imperfect knowledge. While that experiment is part of our system I think therefore we should be eternally vigilant against attempts to check the expression of opinions that we loathe and believe fraught with death, unless they so imminently threaten immediate interference with the lawful and pressing purposes of the law that an immediate check is required to save the country.[33]

As remarkable and stirring as that passage is, it is also deeply problematic. Its liberal foundation, for example, has no means to recognize differences in power – or even in access to the market, powers that, as we have come to know so well in the current era of media communication, can be absolutely determinant of who can speak and who can be heard.[34]

As importantly, and as I have explored in detail in other work,[35] it is problematic because it puts into place – by implication in Holmes's own words, but later made explicit in a whole series of cases[36] – a distinction between speech and conduct. Even "First Amendment absolutists," like Justice Hugo Black saw nothing wrong with the regulation of peaceful rallies if their *conduct* interfered with some other legitimate interest.[37] This conduct could be widely interpreted.[38] For most of the first half of the twentieth century, conduct that could be prohibited included the mere act of picketing. Courts upheld numerous injunctions against picketing on the basis that the conduct it entailed was

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[33] *See Abrams*, 250 U.S. at 630.
[34] *See generally* ROBERT MCCHESNEY, RICH MEDIA, POOR DEMOCRACY: COMMUNICATION POLITICS IN DUBIOUS TIMES (1999).
[35] *See supra* note 16.
[36] For a useful, critical analysis and a summary of the cases involved, *see* Stephanie M. Kaufman, *Note and Comment, The Speech/Conduct Distinction and First Amendment Protection of Begging in Subways*, 79 GEO. L.J. 1803 1819 (1991) and the citation and references therein.
[37] *See* Gregory v. City of Chicago, 394 U.S. 111, 124 (1969) (Black, J, concurring).
[38] Black makes the capaciousness of regulatable conduct perfectly clear: "I think that our Federal Constitution does not render the States powerless to regulate the conduct of demonstrators and picketers, conduct which is more than 'speech,' more than 'press,' more than 'assembly,' and more than 'petition,' as those terms are used in the First Amendment." *Id*.

necessarily either violent or harassing.[39] Indeed, in one famous case in the 1920s, Chief Justice William Taft wrote of picketing, that its very "persistence, importunity, following and dogging" offended public morals and created a dangerous nuisance.[40] The problem with picketing, Taft thought, was twofold. First, through its combination of action and speech, it tried to convince people not to enter some establishment; second, it tended to draw a crowd.[41] To the degree it did both – that is, to the degree that is successfully communicated its message – it interrupted business and, in Taft's eyes, undermined the business's property rights, and therefore could be legitimately enjoined.[42] Speech was worth protecting to the degree that is was *not* effective. Not until the 1940s did the Court begin to recognize that there might be an important speech right worth protecting in addition to the unprotected conduct.[43]

There is an additional result of Holmes's declaration about the value of speech in *Abrams*. Whereas the First Amendment is silent on *why* speech is to be protected from Congressional interference,[44] Holmes makes it clear that the protection of speech serves a particular purpose: *improving* the state.[45] Indeed, he quickly admits that speech likely to harm the state can be outlawed.[46] And neither he nor the Court ever moved away from the "clear and present danger" test of Schenck.[47] Speech, Holmes argues, is a

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[39] For a review, *see* Diane Avery, *Images of Violence in Labor Jurisprudence: The Regulation of Picketing and Boycotts, 1894-1921*. 37 BUFF. L. REV. 1 (1989).
[40] Am. Steel Foundries v Tri-City Cen. Trades Council, 257 U.S. 184 at 204. This language has since, perhaps inadvertently, been transferred, and is absolutely central, to anti-panhandling laws as they have developed around the United States; *see* Don Mitchell, *Anti-Homeless Laws and Public Space I: Begging and the First Amendment*, 19 URB. GEOGRAPHY 6 (1998).
[41] *American Steel Foundries* 257 U.S. at 205, 210.
[42] *Id.* at 204.
[43] *See* Thornhill v. Alabama, 310 U.S. 88 (1940).
[44] A strong case can nonetheless be made that whatever the silence of the text of the First Amendment, the intent of its authors was to promote a republican political right of the people to speak and to gather so as to change the form of the government if need be. See AMAR, *supra* note 27.
[45] This is quite different from the purpose of *altering* or *abolishing* the government that Amar, *id*., finds in the debates surrounding the framing of the Amendment.
[46] *See Abrams* 250 U.S. at 626, 630.
[47] *Id* at 627.

good insofar as it helps promote and protect the "truth" of the state.[48] There is a large amount of room allowed here for criticism of the state, but it can still be quieted by anything that can reasonably construed as a "legitimate state interest" (like protecting the property rights of a company subject to a strike).[49] According to the *Gitlow* Court (if not Holmes, who did not see in Gitlow's pamphlet enough of a clear and present danger), *any* speech that "endanger[s] the foundations of organized government and threaten[s] its overthrow by unlawful means" can be banned.[50] Note here that speech does not have to *advocate* the overthrow of government; rather, it can be banned if through its persuasiveness *others* might seek to overthrow the government.[51] On such grounds all manner of manifestos, and many types of street speaking, may be banned. And more broadly, as evidenced in picketing cases like *American Steel Foundries*, a similar prohibition may be placed on speech that, again through its persuasiveness (e.g. as to the unjustness of some practice or event) rather than through direct exhortation, may incite people to violence.

Of course, speech (and its sister right, assembly), must take place *somewhere* and it must implicate some set of spatial relations, some regime of control over access to places to speak and places to listen.[52] Consequently, the limits to speech, or more accurately the means of limiting speech, become increasingly geographic beginning in

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[48] *Id*. at 630.
[49] Holmes did not dissent from *American Steel Foundries*, 257 U.S. 184, and so it can be assumed that he did not object to property rights trumping speech rights in that case.
[50] *Gitlow*, 268 U.S. at 667.
[51] In essence, there is a continuity with, rather than a break from, the common law notion of "bad tendency" that guided the policing of speech before the 1920s. Holmes himself had drawn on "bad tendency" doctrine in two cases prior to the World War I espionage cases; *see* Patterson v. Colorado, 205 U.S. 454 (1907); Fox v. Washington, 236 U.S. 273 (1915). He did not shift significantly from this doctrine in his *Gitlow* dissent, merely finding instead that the tendency just wasn't bad enough. *See generally*, Cole, *supra* note 15 at 880-881.
[52] This is no less true of electronically mediated speech: there is always a geography of inclusion and exclusion at both the speech and listening end, a geography over which some actors – whether public or private – will always have greater or lesser degrees of control. We too often forget this simple and indisputable idea and in doing so too often adopt theories of speech that assume it takes place in a vacuum, that it can possible occur *no place*. Such a stance is, literally, utopian.

1939 in the case *Hague v. CIO*, when the Supreme Court finally recognized that public *spaces* like streets and parks were necessary not only to speech itself but to political organizing.[53] The problem is not always exactly *what* is said, but *where* it is said. At issue in *Hague* was whether the rights to speech and assembly extends to the use of the streets and other public places for political purposes, and in what ways that use could be regulated. The Court based its decision in a language of common law, arguing that "[w]herever the title of the streets and parks may rest, they have immemorially been held in trust for use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions."[54] But whatever the roots for such a claim may be in common law, it hardly stands historical scrutiny in the United States, where the violent repression of street politics has always been as much a feature of urban life as its promotion.[55] That makes *Hague v. CIO* a landmark decision: it states clearly for the first time that "the use of the streets and parks for the communication of views on national questions may be regulated in the interest of all … [but] it must not, in the guise of regulation, be abridged or denied."[56] At the same time, the Court made it clear that protected speech in public spaces was always to be "exercised in *subordination* to the general comfort and convenience, and in consonance with peace and good order…."[57] The question, then, became one of finding the ways to regulate speech (and associated conduct) such that order – and even "general comfort" – was always maintained.

The answers to that question were spatial. They were based on a regulation of urban *geography* in the name of both "good order" and "general comfort" and of the

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[53] Hague v. Comm. for Indus. Org., 307 U.S. 496 (1939).
[54] *Id*. at 515.
[55] Besides the references *supra* note 28, *see* WILLIAM PRESTON, ALIENS AND DISSENTERS: FEDERAL SUPPRESSION OF RADICALS, 1903-1933 (2nd ed. 1994).
[56] *Hague*, 307 U.S. at 515-16.
[57] *Id*. at 516 (emphasis added).

rights to speech and assembly. Speech rights needed to be *balanced* against other interests and desires. But order and comfort, it ought to go without saying, suggest a much lower threshold than does "clear and present danger." While recognizing in a new way a fundamental right to speech and assembly, that is, the *Hague* court in fact found a language to severely *limit* that right, and perhaps even to limit it more effectively than had heretofore been possible. To put this another way (and as I will argue more fully below), the new spatial order of speech and assembly that the Court began constructing in *Hague allowed* for the full flowering of a truly liberal speech regime: a regime for which we are all, in fact, the poorer.

The rudiments of this regime are familiar enough. Starting in the 1950s, the Court began crafting what has been called the "Roberts Rules of Order" for public space,[58] but which are formally known as the public forum doctrine.[59] The development of this doctrine has entailed the development of a new metaphor for understanding speech. Where Holmes in the 1920s spoke of a "free trade in ideas," by the 1960s, Justice William Brennan found himself concerned with a "market*place* of ideas."[60] Since all ideas need a place in which they can be expressed, the Court had to pay attention to the nature – the structure as well as the rules governing – that place. "[F]reedom of speech does not exist in the abstract," Brennan argued. "On the contrary, the right to speak can flourish only if it is allowed to operate in an effective forum -- whether it be a public park, a schoolroom, a town meeting hall, a soapbox, or a radio and television frequency."[61] The issue Brennan is raising here is what constitutes an effective forum and how that forum can be "regulated in the interests of all" while maintaining "general

[58] Harry J. Kalven, *The Concept of the Public Forum: Cox v. Louisiana* 1965 SUP. CT. REV. 1 (1965).
[59] For a historical overview *see* MARK GRABER, TRANSFORMING FREE SPEECH: THE AMBIGUOUS LEGACY OF CIVIL LIBERTARIANISM (1991).
[60] Lamont v. Postmaster Gen., 381 U.S. 301, 308 (Brennan, J, concurring), emphasis added.
[61] Columbia Broad. Sys. v Democratic Nat'l Comm., 412 U.S. 94, 193 (1973) (Brennan, J, dissenting).

comfort" and "good order."[62] This is the issue the Court has been grappling with since *Hague*. Its solution has been to establish a set of rules, often the subject of litigation to this day – and of vigorous disagreement among the Supreme Court justices – that allow for the regulation of the time, the place, and the manner of speech, but not the direct regulation of the content of public and political speech. Public forum doctrine has evolved in hopes of assuring that order can be preserved while speech itself, at least formally, is protected.

The Court, therefore, has developed a typology of places. First are "traditional public forums" – like many streets and parks – where political speech has "traditionally" taken place. In these areas, any regulation of speech is subject to "strict scrutiny" – that is, regulation must be shown to *protect* some vital state interest, or to *prevent* some clearly identifiable harm. Speech and assembly may be regulated as to time, place, and manner, just so long as that regulation remains "content neutral." Similarly, any permit system developed to assure that appropriate time, place, and manner restrictions are followed must also be content neutral. The second type of places are "dedicated public forums," which are those spaces specifically designated by a governing agency as available for First Amendment purposes. Examples include public university free speech areas – and perhaps classrooms – or the plazas in front of some government buildings.[63] Use of these spaces for speech and assembly activities may be revoked for everyone (the dedication may be removed), but such a revocation cannot be done on either a case-by-case basis or on the basis of content. The third category is public property that is not a public forum: military bases, the insides of most government

[62] *Hague* 307 U.S. at 515.
[63] *See* Perry Educ. Ass'n v Perry Local Educators' Ass'n, 450 U.S. 37 (1983).

buildings, and, as we will see, airport grounds.[64] Of course, there is also a fourth kind of place – or more accurately property. On private property, except in some very limited circumstances, speech rights simply do not pertain. Such property is of growing importance as more and more public activities occur on publicly accessible private property, like shopping malls, or redeveloped waterfronts whose titles have been ceded to the developers.[65] The implications for speech and assembly of this growth of publicly accessible private property, as we will see below, are profound.[66]

But the point that I want to make is that with the development of public forum doctrine, we can begin to see that the *silencing* of speech – and consequently of protest – is now affected most readily not by its outright ban, as with William Epton, but rather through the regulation of the conduct that accompanies it and the place where it occurs To do so I undertake three case studies. These studies, I think, are emblematic of the ways that, in the name of promotion, speech is silenced in public space. They are not exhaustive, and as will be clear, they indicate that struggle over not only the right to speak, but also to be heard, continues unabated. It is this on-going struggle that has forced the Court into its promotion of a liberal theory of speech, and its concomitant development of public forum doctrine. And it is this on-going struggle that the Court, in the future, will have to continue to contend.

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[64] A good summary of public forum doctrine as it relates to airports is John T. Haggerty, *Begging and the Public Forum Doctrine in the First Amendment*, 34 B.C. L. REV. 1121 (1993) (discussing International Society for Krishna Consciousness, Inc. v. Lee, 505 U.S. 672 (1992)).

[65] There is a vast literature in geography and elsewhere on the relationship between private property and its function as a "public" space. Among others, *see* VARIATIONS ON A THEME PARK: THE NEW AMERICAN CITY AND THE END OF PUBLIC SPACE (Michael Sorkin ed., 1992); SHARON ZUKIN, LANDSCAPES OF POWER: FROM DETROIT TO DISNEYLAND (1991); SHARON ZUKIN, CULTURES OF CITIES (1995); DON MITCHELL, THE RIGHT TO THE CITY, *supra* note 16; Don Mitchell ed., *Public Space and the City*, Special Issues of 17 URB. GEOGRAPHY Vol. 1 & 2 (1996).

[66] The argument made below will be that the growth of private property as the new public space of the city has had a striking impact on the ability of activists to be heard. A parallel argument, beyond the scope of this essay, could be made about the private control over public airways and the growth of corporate power in all forms of the media. *See generally*, McChesney, *supra* note 34.

Changing Geographies of Protest

Case 1: The Privatization of Public Space

The first case study concerns the privatization of public space. Note, in the 1939 *Hague* decision quoted above, the phrase, "wherever the title … may rest."[67] As the geography of the public forum has shifted, that title – that is, the status of space as *property* – has taken on added significance. It is hardly news to point out that privately-owned but publicly-accessible spaces, like malls, shopping centers, and festival market places have become primary gathering places in North American cities.[68] But since public space is not only a space of politics, but also a space of sociable gathering (and, indeed, each has historically been essential to the success of the other[69]); and since political speech has its greatest impact if it occurs where the people are; then while the privatization of public space may not be news, it is nonetheless of incredible importance. This is so, in part, because the Supreme Court has declared that the First Amendment simply does not extend into the space of the mall.[70] The property rights of the owners trump the rights of citizens to political speech.

How the Court got to this determination is interesting, and interestingly geographic. In 1946 the Supreme Court declared in *Marsh v. Alabama* that the right to

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[67] *See Hague* 307 U.S. at 515.

[68] JOEL GARREAU, EDGE CITY: LIFE ON THE NEW FRONTIER (1991); WILLIAM SEVERINI KOWINSKI, THE MALLING OF AMERICA: AN INSIDE LOOK AT THE GREAT CONSUMER PARADISE (1985). Jon Goss, *The 'Magic of the Mall': An Analysis of Form, Function, and Meaning in the Contemporary Retail Built Environment*, 83 ANNALS OF THE ASSOCIATION OF AMERICAN GEOGRAPHERS 18 (1993); Jon Goss, *Disquiet on the Waterfront: Reflections on Nostalgia and Utopia in the Urban Archetypes of Festival Marketplaces*, 17 URB. GEOGRAPHY 221 (1996); Jon Goss, *Once-Upon-a-Time in the Commodity World: An Unofficial Guide to Mall of America*, 89 *ANNALS OF THE ASSOCIATION OF AMERICAN GEOGRAPHERS*, 45 (1999). *See also* the references in *supra* note 65.

[69] For an overview and analysis, *see* JOHN HARTLEY, THE POLITICS OF PICTURES: THE CREATION OF THE PUBLIC IN THE AGE OF POPULAR MEDIA (1992). For debates in political theory, *see* HABERMAS AND THE PUBLIC SPHERE (Craig Calhoun ed., 1992).

[70] Lloyd Corp. v. Tanner, 407 U.S. 551 (1972). For a discussion, *see* Stanley Friedelbaum, *Private Property, Public Property: Shopping Centers and Expressive Freedom in the States*, 62 ALB. L. REV. 1229, 1231-1240 (1999).

distribute religious literature (and by extension to engage in other expressive activity) in a company town could not be revoked.[71] Even though the town was private property – the streets, the buildings, the sidewalks, the open spaces, everything, was owned by a single company – the company could not block all speech it did not like, even when invoking its property claim. Justice Hugo Black wrote the opinion and in it he made it clear that the company had taken on all the functions of a duly constituted government, and thus was, in many ways, bound by the same restrictions as a public government would be.[72]

Twenty-four years later, in 1968, the Court ruled that a labor union had the right to picket outside a store located inside a shopping center, even though by doing so, the picketers were located on private property owned by a third party.[73] This time Justice Black dissented, arguing that the earlier company town case examined a specific, not easily generalizable situation, a situation where *all* the available places for expressive activity were owned as private property. Since the shopping center did not monopolize all space in the region, there were, in Black's view, adequate other places to picket within the city and so there was no reason to undermine the private property right of the shopping center owner.[74] And by 1972, the Court had come around to Black's way of thinking, declaring that anti-war protesters had no right to leaflet inside a mall.[75] Four years after that – in 1976 – the Court reversed its labor picketing decision and banned picketers from privately-owned malls, saying that the original company town decision really did only apply to a company town that "was performing the full spectrum of

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[71] Marsh v. State of Alabama, 326 U.S. 501 (1946).
[72] *Id*. at 507-508.
[73] Amalgamated Food Employees Union v. Logan Valley Plaza, 391 U.S. 308 (1968)
[74] *Id.* at 330-331 (Black, J. dissenting).
[75] *Lloyd* 407 U.S. 551. In *Logan Valley* the Court had left open a door for banning political (as opposed to labor) speech on private property if that speech was not directly related to the business conducted on that private property. 391 U.S. at 320, n. 9. In *Lloyd* the Court walked through that door and put a stop to such political speech. 407 U.S. at 560-561. Specific reference is made to the validity of Black's dissent. 407 U.S. at 562.

municipal powers and stood in the shoes of the state."[76] Because the shopping center is private property, the Court declared, "[w]e conclude, in short, that under the present state of the law the constitutional guarantee of free expression has no part to play…."[77]

At the same time, however, the Supreme Court left open the possibility that the various State constitutions might allow for a less restrictive speech regime in publicly accessible private property. In 1979, therefore, the California Supreme Court held in *Robins v PruneYard Shopping Center* that private shopping center has to allow petition-signature gathering on its property.[78] The California Court based its decision on a number of grounds, including the importance to the State of the petition and referendum processes, but it also noted that since malls invited the public in, for both shopping and social reasons, they created "an essential and invaluable forum for exercising [the] rights" of free speech and petition.[79]

Perhaps most importantly, the California Court held that "[a]ll private property is held subject to the government to regulate its use for the public welfare."[80] Even more explicitly, it held that the state's interest in promoting free speech trumped the rights of property owners "for control over their property."[81]

A year later, to many people's surprise, the U.S. Supreme Court upheld the California Supreme Court's finding.[82] But it did so without invalidating its earlier rulings restricting the *federal* right to speech on private property. The U.S. Supreme Court held that the California Court's decision did not sanction a "taking" of private property under

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[76] Hudgens v. N.L.R.B., 424 U.S. 507, 519 (quoting Lloyd Corp. v. Tanner, 407 U.S. 551, 568-69, which was referring to *Marsh*).
[77] *Hudgens* 424 U.S. at 521. For a fuller evaluation of these decisions, see William Burnett Harvey, *Private Restraint of Expressive Freedom: A Post-PruneYard Assessment*, 69 B.U. L. REV. 929 (1989).
[78] 592 P. 2d 341 (Cal. 1979).
[79] *Id*. at 347.
[80] *Id.* at 344 (quoting Agricultural Labor Relations Board v. Superior Court, 16 Cal. 3d 392, 403).
[81] *Id*. at 347 (making an analogy with the duty of the state to prevent shopping centers from barring members of the public on the basis of the length of their hair, the color of their skin, or their political affiliations).
[82] PruneYard Shopping Center v. Robins, 447 U.S. 74 (1980).

the Fifth Amendment,[83] and that the shopping center, like a city government could institute certain time, place, and manner restrictions that assured that the center's function as a place for shopping would not be interfered with.[84] But it did all this on the grounds that States could institute a *broader* right to freedom of expression under their constitutions than that recognized at the federal level; as long as the provisions of the United States Constitution were not dampened (but were instead amplified) there was no problem with disparity between State and Federal constitutions on such issues.[85]

This is, in some ways, a remarkable result, because as the Supreme Court was restricting the right under the Federal constitution to protest, picket, or pamphlet on private property, it was simultaneously allowing states to expand that right. But the result has to be tempered by the fact that few states, in fact, have found broader protection of speech than that which exists at the federal level.[86] And, indeed, in California, the right to use shopping centers for political activity has pretty much been limited to petitioning and leafleting: actual, physical *speech* – standing up, say, and giving a speech on the need to throw the rascals out of the legislature – can be easily regulated and usually banned.

Consider, in this regard, the case of the Horton Plaza Shopping Center in Downtown San Diego. Horton Plaza Shopping Center is the centerpiece of San Diego's downtown redevelopment.[87] The Shopping Center – a festival marketplace-type mall –

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[83] *Id*. at 83.
[84] *Id*. *See* Friedelbaum *supra* note 70 at 1236-1237.
[85] *PruneYard*, 447 U.S. at 81.
[86] *See* Mark Alexander, *Attention Shoppers: The First Amendment in the Modern Shopping Mall*, 41 ARIZ. L. REV. 1, 26 (noting that "[t]o date only five states have held that citizens may engage in expressive activity in shopping malls; three of these based their decisions on free speech rights" and citing the five relevant cases).
[87] For a fuller discussion of San Diego's redevelopment, Horton Plaza's place in it, and the changing nature of public space in the city, *see* Don Mitchell and Lynn Staeheli, *Clean and Safe? Property Redevelopment, Public Space and Homelessness in Downtown San Diego*, paper presented at the Politics of Public Space Conference, Center for Place, Culture and Politics, City University of New York, February, 2002 (copy available from the author).

was built next to the traditional center of downtown San Diego, Horton Plaza Park.[88] The intent of the mall was to create a new center for downtown, one perceived to be safe and free from the urban problems that were seen by many to plague Horton Plaza Park itself: homelessness, loitering, public drunkenness, and so forth. City planners and the Hahn Corporation – the developer of the mall – hoped that the mall would draw suburbanites and tourists into the urban core and help cement the historic preservation-oriented gentrification of the nearby Gaslamp Quarter. In turn, this would lead to the removal or relocation of the soup kitchens and other social services, the X-rated bookstores, theaters, and cheap bars that served the sailor and transient populations that congregated downtown, and the flophouses and Single Room Occupancy hotels that housed the indigent (and largely elderly) people who were the main residents of the downtown core.[89] The removal and relocation of these sorts of land uses, city planners hoped, would again make downtown inviting for inward investment, middle and upper class residents, and conventioneers. It worked, eventually.[90]

When Horton Plaza Shopping Center opened in 1985, it had the effect of internalizing much of the life of the city, an effect that wasn't really overcome until after

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[88] The name "Horton Plaza" used to belong to the park, a park given to the city by one of its founding elite, Alonzo Horton. Horton deeded the park to the city in the late 19th Century on the proviso that it would remain public forever. When the mall was built next door, the name "Horton Plaza" was legally transferred to the owners of the shopping center, and the park was renamed Horton Park (though it is usually called Horton Plaza Park). Horton Plaza Shopping Center was developed by the Hahn Corporation and run by a subsidiary until it was sold in 1998 to the Westfield Group, one of the largest mall operators in the world. Westfield has now "re-branded" the mall as "Westfield Shoppingtown Horton Plaza" and has even allowed the domain name "HortonPlaza.com" to expire and be taken up by another group. Throughout this section I will distinguish between the park and the shopping center by referring to the former as "Horton Plaza Park," and the latter as "Horton Plaza Shopping Center."

[89] A good social history of San Diego's urban redevelopment remains to be written. Some details of the process, however, may be found in Mitchell and Staeheli, *supra* note 87. Good general works on the types of processes at work in San Diego include: NEIL SMITH, THE NEW URBAN FRONTIER: GENTRIFICATION AND THE REVANCHIST CITY (1996); PAUL ERLING GROTH, LIVING DOWNTOWN: A HISTORY OF RESIDENTIAL HOTELS IN THE UNITED STATES (1994); and THE RESTLESS URBAN LANDSCAPE (Paul L. Knox ed. 1993).

[90] *See* Mitchell and Staeheli, *supra* note 87 at 5-8.

the city emerged from the deep recession of the early 1990s.[91] In the meantime, Horton Plaza Park became a contested zone, with the mall and other nearby property owners continually working, often through the city's redevelopment agency, to find ways to remove the homeless, the poor, and others who would gather there. After all, the park served as the entrance to the mall for most of those who came by foot (which is how most workers in the neighboring skyscraper district would arrive). By 1991, the city had put in place plans, largely related to landscaping, that simply made it impossible to hang out in the park. The benches were removed and the lawns were replaced by prickly plants.[92] The park became a place to pass through, rather than to gather, to the satisfaction of the Horton Plaza Shopping Center management which was intent on making their mall the central gathering point downtown.[93] According to the former president of the Gaslamp Quarter Association (and an original tenant of the mall), even with the successful gentrification of neighboring streets, Horton Plaza Shopping Center remains one of the – if not the – primary public spaces in the city.[94]

In the meantime, however, the developer of the mall, the Hahn Corporation,[95] was determined to clearly regulate just what *kind* of gathering place (what kind of "public" space) it was going to be. In (reluctant) deference to the *PruneYard* decision,[96]

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[91] This analysis is based on a series of interviews conducted in San Diego in 2001 by Professor Lynn Staeheli and myself. Further information was gathered from contemporary new accounts and from planning documents. Details about the interviews and other sources may be found in *id*.

[92] *See* Michael Granberry, *Face-Lift Crew Deposes Park Vagrants*, L.A. TIMES (San Diego Edition), June 21, 1991, at B.1; Barry M.Horstman, *City OKs Removal of Grass, Benches at Horton Plaza*, L.. TIMES (San Diego Edition), October 9, 1990, B.3; Greg Johnson, *City Yanks Benches from Under Undesirables Downtown: Council Adopts Plan to Replace Grass with Flowers, Remove Benches in an Effort to Rout Criminals and Drunks at Horton Plaza*, L.A. TIMES (San Diego Edition), July 3, 1990, at B.2. Anthony Perry, *San Diego At Large: Shop Till You Drop, But Don't Expect a Bench*, L.A. TIMES (San Diego Edition), January 13, 1989, at 2.1.

[93] This claim is based on an interview with a well-placed source connected to the mall and its development who has requested confidentiality (interview conducted January 24, 2001). In addition, see Kathleen H. Cooley, *Bums Out, Shoppers In Downtown's Horton Plaza Park Gets a Shiny New Face*, L.A. TIMES (San Diego Edition), September 6, 1985, at 2.1.

[94] Interview with Bill Keller, (January 26, 2001).

[95] Doing business as the Horton Plaza Associates.

[96] Horton Plaza Assoc. v. Playing for Real Theater, 228 Cal. Rptr. 817, 820 (1986).

Hahn had established a permitting system that allowed groups to use the space of the mall for petitioning and leafleting. Permitted organizations were restricted to one of four small areas where they were given access to a "community cart" (similar to those used by venders) and two chairs. Form these, shoppers could be leafleted or approached and engaged in conversation.[97] Permits had to be requested 72 hours in advance,[98] and no more than two people from the same group could occupy the designated leafleting space at the same time.[99] Finally, no political activity of any type was permitted between Thanksgiving and New Year's Day.

On March 12, 1986, William Phipps applied for a permit from Horton Plaza Shopping Center to perform on mall property a political skit dramatizing the effects of US-sponsored bombings in El Salvador. Phipps applied on behalf of an organization known as Playing for Real Theater and said that there would be eight people performing for about 10 minutes, followed by leafleting. Despite the fact that management of the mall had frequently encouraged street performers to perform at the mall,[100] and that it had played host to concerts and other large gatherings, the manager denied the request to perform a skit (citing congestion problems), but approved the request to hand out leaflets.[101]

Playing for Real and Phipps did not appeal the denial; nor did they take advantage of the opportunity to hand out leaflets. Neither did they ever attempt to circumvent the denial of permission and attempt to perform their skit anyway.[102] Nonetheless, on April 4, Horton Plaza Associates, the legal entity that owned the mall on behalf of the Hahn Corporation, went to court and sued Phipps, Playing for Real, and the

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[97] *Id*. at 819.
[98] *Id*. at 820.
[99] *Id*. at 821.
[100] *Id*. at 820.
[101] *Id*. at 828.
[102] *Id*.

San Diego chapter of the Committee in Solidarity with the People of El Salvador (CISPES), seeking injunctive relieve against trespass, interference with business, and annoyance. The mall sought a temporary restraining order against the defendants to prevent them from performing any skits at the mall. The rationale for seeking relief was that an unnamed police informant had told a detective that the group was planning a protest for April 5, to start outside the mall in Horton Plaza Park and then move inside the shopping center.[103] The mall was granted the restraining order. Through it (in the words of the California Appellate Court decision on the case), Phipps and his associates were specifically enjoined from:

> performing a great variety of expressive acts within the Center, including distributing pamphlets or other literature, soliciting signatures except as permitted by the Center, soliciting money, using furniture or other materials or displays without permission, approaching any patrons, causing a disturbance on the premises, hindering business, "performing any dramatization or any acts or events," or "in any other way impeding, disturbing, or interfering with the commercial activity of the Horton Plaza Shopping Center….[104]

Two weeks later the mall won a preliminary injunction against the defendants, which, in essence, made the temporary restraining order permanent.

In support of the injunction, the management of the mall made its position clear as to why it was imperative to prohibit the kinds of politically expressive conduct Playing for Real engaged in. Karen Lesley Binder, the director of public relations for the mall argued in an affidavit:

> In my opinion, Horton Plaza is particularly subject to being detrimentally affected by unregulated political activity occurring within the center. In this regard, Horton Plaza is, of course, located in downtown San Diego; in order for us to attract customers, we must overcome the public's perception that a downtown environment may not be their first choice for shopping activities. In my opinion, a visitor to this downtown shopping center is more sensitive to being subjected to political demonstrations and solicitations than at a competitive suburban shopping mall. In view of same, my objective at Horton Plaza is to create a relaxed, nonthreatening

[103] *Id*. at 819, 828.
[104] *Id*. at 821 (quoting the temporary restraining order).

> environment, and to have an atmosphere distinctive from the adjacent downtown areas. All promotional activity at the center is designed and regulated to not only entertain our customers, but to encourage shopping activity and specifically avoid any interference with customer traffic and customer shopping. I am particularly concerned that the unregulated activity such as that desired by Defendants would be contrary to those objectives, and substantially interfere with shopping activity at the center.[105]

In addition, since the mall had a program of street performance in place, it was concerned that the public would take a skit performed by a political group to be a part of the mall's own promotional activities and as such to assume that the mall endorsed the political views expressed.[106]

The Court granted the injunction and further held that Horton Plaza Shopping Center's time, place, and manner restrictions were reasonable. In essence, the Court approved "prior restraint" on the defendants' speech acts in the mall, finding in advance that they were unprotected. Both the injunction and this finding were upheld on appeal. Since the California Supreme Court ultimately declined to review the Court of Appeal's decision,[107] the Horton case stands, in California at least, as the final word on what sort of speech is possible in a California mall.

That speech looks like this: The appeals court found that while the state Supreme Court's decision in *PruneYard* protected leafleting and petitioning on publicly open private property, it did not protect "expressive conduct" like performing a play.[108] The court cited a whole series of cases to show that private property could not be considered anything like a traditional public forum. Moreover, according to the Court,

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[105] *Id*. at 821-822.
[106] *Id*. at 821.
[107] In 1986 the California Supreme Court agreed to review the Court of Appeal's decision. Horton Plaza Assoc. v. Playing for Real Theatre, 726 P.2d 1287 (Cal. 1986). Later that term, following the defeat at the polls of several liberal Supreme Court justices, and their replacement by new California Governor George Dukmejian, the Supreme Court reversed itself and decided not to review the case. Horton Plaza Assoc. v. Playing for Real Theatre, 736 P.2d 319 (Cal. 1987)
[108] *Playing for Real Theater*, 228 Cal. Rptr. at 824.

other public forums existed largely because Horton Plaza was located in the city and not in the suburbs:

> Horton Plaza differs from the shopping centers involved in the [other cases where more expansive free speech rights have been upheld] because it is a downtown rather than a suburban shopping center. Decisions such as *Pruneyard* discuss how a suburban shopping center tends to become the only place in a large community where people can be found gathering together on foot; accordingly, such a center is indeed the most conveniently available forum for the dissemination of ideas and solicitation of signatures. Horton, however, lies in the heart of a downtown metropolitan business district where extensive pedestrian traffic occurs on the streets surrounding the center as well as within it. Under these circumstances, the Center owner cannot be said to have a monopoly of pedestrian traffic in the area such as would justify extensive interference with his right to manage his property.[109]

But the court's argument here chooses to ignore the fact that Horton Plaza Shopping Center's whole goal, even to the point of sponsoring the removal of benches in Horton Plaza Park, was to move public life inside, to capture it really, for its own commercial interests.

Such *geographic* strategies on the part of private property owners to control the movements and gatherings of people had little impact on the court. Through such strategies the area where political speech can *be* continues to shrink.[110] Protest is easily silenced when the significant gathering places in a city are private property – unless of course we concede that the only valid form of political speech is that specifically approved of in *PruneYard*, petitioning and leafleting.[111]

Yet this is not to say that protesters will fare any better on public property, as we will see in the next case study.

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[109] *Id*. at 827-828.

[110] *See* Alexander, *supra* note 85. *See also* Don Mitchell, *The End of Public Space? People's Park, Definitions of the Public, and Democracy*, 85 ANNALS OF THE ASS'N OF AM. GEOGRAPHERS 108 (1995).

[111] Though it was never raised *PruneYard* or *Playing for Real*, regulating or banning "political" expressive conduct or speech-making in a mall is a *de facto* content-based ban. Evidence for this is readily available. There are very few malls in America that do not invite choirs onto their property to sing carols at Christmas time. This is expressive conduct, certainly. And many carols carry and explicitly political message: e.g. praying for "peace on Earth and goodwill to Men." Yet these same malls, with the full protection of the Supreme Court and the relevant state courts, can ban the exact same expressive conduct, if instead the choir is singing political protest songs (many of which, of course, are concerned with peace and goodwill).

Case 2: Picketing at an Airport

This second case study concerns a strike. Faced with a contract they were not happy with in late September, 2000, about 85 workers on the automated baggage handling system at Denver International Airport (DIA) voted to go on strike against Phelps Program Management, the subcontractor that operated the baggage machinery on the United Concourse.[112] The union representing the baggage handlers was the same as the one representing United's mechanics, customer service agents, and ramp workers, the International Association of Machinists (IAM). While a number of rank-and-file machinists and other non-baggage handlers said they might cross a picket line if one was established by the baggage handlers, the IAM in Washington said it might call on all its members at DIA to honor the picket line.[113]

Meanwhile, United got the City of Denver to agree to restrict picketing to a rarely-used, empty parking lot some three miles from the terminal and threatened any non-striking worker with disciplinary action if they failed to show up to work as scheduled.[114] The reason this location was chosen was bluntly stated by the airport's spokesman: "We issued a permit for the union to picket in the Mount Elbert parking lot. United's workers won't have to cross the picket line when they get to work."[115] In other words, because picketing might have been effective at a more central location,[116] it was banished, an action that threw the unions at the airport into disarray.

Standard policy among flight attendants and pilots unions is to honor picket lines, but since they would not have to cross the picket line to get to their place of employment,

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[112] My thanks to Lynn Staeheli for alerting me to this strike and some of its spatial implications.
[113] Heather Draper, *United Dreads Sympathy Strike: If 100 Baggage Workers Walk, 4,500 Others May Honor Pickets*, ROCKY MTN. NEWS (Denver), September 23, 2000, at 1B.
[114] Greg Griffin and Jeffrey Leib, *DIA Baggage Union to Strike: Walkout Begins at 5 a.m. Today; Action Could Hit United Service*, DENVER POST, September 26, 2000, at A1.
[115] Quoted in id.
[116] *See* Draper, *supra* note 113.

it was doubtful that many would not show up for work. "Our pilots will probably go to work if no one is picketing at the entrance of the terminal," noted a spokesman for the Air Line Pilots Association.[117] Put in even more of a bind were the brother and sister members of the IAM who worked in other jobs at the airport. The IAM recommended that non-striking workers got to work since they would not have to cross a picket line to get to it.[118]

When the Phelps workers walked off the job at 5 am on Tuesday, September 26, 2000, they acquiesced to the City's restriction and set up their picket line in the distant Mt. Ebert parking lot.[119] And out at that parking lot, the silence was deafening, just as it was meant to be. Even though picketers marched and yelled at Phelps management who (as we will see later) were required to park in the lot, the *Denver Post* reported that "a cold wind blowing across the plains south of Denver International Airport muffled their shouts, and only a handful of groggy reporters witnessed their protests."[120] "Had airport officials allowed Phelps' 85 union workers to picket at the terminal or employee parking lots," the *Post* continued, "they might have brought United to its knees."[121] The question of whether or not Union brothers and sisters should honor the picket line was rendered moot by the removal of the pickets to the Mt. Elbert lot. As the vice president of the Denver Council of the Association of Flight Attendants remarked, "[t]here is no physical picket line for us to cross, so we haven't crossed a lawful picket line."[122]

The case law that made the banishment of the pickets, and hence assured their ineffectuality, is interesting. Labor law allows general contractors at construction sites to

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[117] Quoted in Griffin and Leib, *supra* note 114.
[118] *Id*. and Heather Draper, *United Baggage Handlers to Strike 85 Contract Employees Plan to Picket After Pact Rejected; Other Workers At DIA May Follow Suit*, ROCKY MTN. NEWS (Denver),, September 26, 2000, at 4A.
[119] Heather Draper, *United Says Strike Isn't Affecting DIA Webb Reports Phelps, Baggage Employees Far Apart; Others Still Work*, ROCKY MTN. NEWS (Denver),, September 27, 2000, at 1B.
[120] Greg Griffin and Jeffrey Leib, *Strikers Exiled at DIA Airport's Decision Weakens Pickets*, DENVER POST, September 27, 2000, at A1.
[121] *Id*.
[122] Quoted in Draper, *supra* note 119.

limit picketing against a subcontractor to a designated location, like a secondary gate, so that the business of the general contractor can continue unimpeded.[123] This location becomes the point at which non-striking workers and managers for the struck company must "enter the workplace," so that anyone going to work for the struck subcontractor must pass the picket line. No one else has to. Phelps argued that its position as a subcontractor to United allowed it to do the same thing. Phelps management (and its few non-striking, non-union employees), therefore, had to park in the struck parking lot, but they were the only ones.[124] And since this was now the designated entry point for Phelps workers, picket lines established anywhere else at DIA, if they were effective, could be construed as encouraging an illegal secondary boycott by United employees, since the lines were clearly not set in the way of the Phelps workers, according to a Phelps attorney.[125]

The IAM threatened to file a court injunction to get the picket location changed, but in the first day of the strike did not do so,[126] preferring to try instead to get the airport authority to designate a better site for picketing.[127] In the meantime, the City of Denver issues a permit allowing striking Phelps workers to hand out informational leaflets, but not to picket, at employee parking lots. Only five days into the strike, a reporter for the *Rocky Mountain News* was able to report that "[w]hile a handful of striking baggage workers maintain their picket lines nearly three miles from their place of employment, the public's interest in their strike and Denver International Airport's operations continue

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[123] Griffin and Leib, *supra* note 120 (citing Professor Roberto Corrado, of the University of Denver Law School).
[124] *Id*.
[125] Cited in *id*.
[126] Heather Draper, *Strike at DIA Stays Put Baggage Workers' Union Doesn't Seek Court Remedy*, ROCKY MTN. NEWS (Denver),, September 28, 2000, 2B; Greg Griffin, *Strikers Remain Far Away: DIA Workers Haven't Filed for Closer Area*, DENVER POST, September 27, 2000, at C1.
[127] Heather Draper, *Bag Handlers Threaten Court Action: Union Wants Right to Picket at Terminal*, ROCKY MTN. NEWS (Denver),, September 30, 2000, at 3B

unscathed."[128] The enforced silence of the picketers was having its desired effect, which was, according to the Mayor of Denver, "to keep the airport operating."[129]

In hopes of reviving the public's waning interest, airport workers and the Colorado AFL-CIO staged a solidarity protest at the picket site on the seventh day of the strike.[130] The next day, the IAM finally filed suit against the city in federal court.[131] The suit was filed on First Amendment grounds, and explicitly made the case that picketing was a form of speech that any passer-by was free to ignore: it was not a form of compulsion and hence the city could not claim the denial of a speech right on the grounds of protecting the operation of the airport. This was a difficult argument because both the city and the union agreed that the airport was a "nonpublic forum" and that the city had the right to restrict speech on airport property.[132]

After a hearing, the federal judge, Lewis Babcock, found for the city and ordered the picketers to remain where they were. Babcock's argument is important: "If this case is viewed through the lens of the First Amendment, I see no injury here."[133] The strikers

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[128] Heather Draper, *Bag Workers Strike Raises Legal Issues*, ROCKY MTN. NEWS (Denver),, September 30, 2000, at 3B.
[129] *Id*.
[130] Heather Draper, *City Scolded Over Pickets Pilots, Labor Leaders Hold "Solidarity" Rally to Back Bag Workers*, ROCKY MTN. NEWS (Denver),, October 3, 2000, at 1B; Anne Colden, *Unions Rally at DIA as Strikers Picket in the "Wilderness" Distant Site Annoys Baggage Handlers*, DENVER POST, October 3, 2000, at C1.
[131] Karen Abbott, *Baggage Workers Sue City Strikers Fight Decision to Sideline Pickets*, ROCKY MTN. NEWS (Denver),, October 4, 2000, at 4A; Anne Colden, *Pickets Request More Visible Spot Judge Hears DIA Baggage Handlers' Plea Today*, DENVER POST, October 4, 2000, at C1.
[132] Anne Colden, *Pickets Request More Visible Spot Judge Hears DIA Baggage Handlers' Plea Today*, DENVER POST, October 4, 2000, at C1. In a series of cases in 1992 the Supreme Court declared airports to be "nonpublic forums" and therefore that content-based restrictions on speech were permissible as long as they were both "reasonable" and "view-point" neutral. Distinguishing between "content" and "viewpoint" is, of course, splitting hairs that have already been so thoroughly split as to be impossible to see. Int'l Soc'y for Krishna Consciousness, Inc. v Lee, 112 S. Ct. 2701 (1992); Lee v. Int'l Soc'y for Krishna Consciousness, Inc., 112 S. Ct. 2709 (1992) and Int'l Soc'y for Krishna Consciousness, Inc. v. Lee, 112 S. Ct. 2711. *See generally*, Brett Berg, *Diminishing the Freedom to Speak on Public Property: International Society for Krishna Consciousness, Inc. v. Lee*, 26 CREIGHTON L. REV. 1265 (1993); and Stephen Schutte, *International Society for Krishna Consciousness, Inc. v. Lee: The Public Forum Doctrine Falls to a Government Intent Standard*, 23 GOLDEN GATE U. L. REV. 563 (1993).
[133] Quoted in Heather Draper, *DIA Picket Line Will Stay Put Moving Baggage Workers' Strike Would Likely 'Create Chaos' at Airport, Judge Rules*, ROCKY MTN NEWS (Denver),, October 5, 2000, at 1B. To the best of my knowledge Babcock's decision was never published.

"were given a reasonable time, manner, and place for pickets."[134] Moreover, they had been provided with the opportunity to distribute informational leaflets elsewhere at the airport. Finally, the judge ruled that the probable effect of allowing pickets at the airport would be to "create chaos at DIA" by encouraging a secondary boycott.[135] Indeed, the judge argued that strong circumstantial evidence suggested that encouraging an airport-wide strike was the union's goal in the first place and that the First Amendment argument it was making was a smokescreen.[136]

The argument, then, is that it is both reasonable and good to move strikers to a place where they cannot be effective, where their speech will have no possibility of being heard, if that means protecting the financial and other interests of the city. Or to put it another way, people can speak and protest and picket all they want, just so long as that speaking and protesting and picketing has no chance of being effective. The silencing at work here, though, is not only the silence of banishment through time, place, and manner regulations, and a permitting system that benefits the collective employers (Phelps, United, DIA, other airlines, etc.) over the collective workers (the IAM and the other unions). It is also a silencing accomplished by making the transmission of *intended* messages impossible. This is made clear in one of the last articles the local papers published on the strike.[137] The reporter for the *Rocky Mountain News* noted that "[a]lthough the strike hasn't affected airport operations, it garnered a lot of attention because of its potential to shutdown airport operations, if thousands of other airport

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[134] *Id*.

[135] *Id*. *See also*, Mike McPhee, *No Pickets at DIA Terminal, Judge Tells Baggage Workers*, DENVER POST, October 5, 2000, at C01. The judge's argument about a secondary boycott is, as we have seen, a red herring. The whole point of moving the pickets to the distant site was so as to create the conditions for a secondary boycott that would not have existed if the baggage handlers had been allowed to picket at an ordinary entry point to the airport.

[136] Draper, *supra* note 133.

[137] Heather Draper, *Baggage Handlers Open Talks Negotiations Resume with Union on Strike for 2 Weeks At DIA*, ROCKY MTN. NEWS (Denver),, October 11, 2000, at 4B. The strike was settled on October 23, 2000. Part of the settlement included the Union agreeing to drop its appeal of Judge Babcock's decision. Greg Griffin and Jim Kirksey, *Baggage Contract Approved 'Overwhelmingly' OK Ends Strike at DIA*, DENVER POST, 24 October 2000, at CI.

employees … honored the baggage workers' picket line."[138] If the point of a strike is to gain attention, which in part it is, then the strikers were effective. But if the point of a strike, and the picketing that goes with it, is to apply pressure, and to win demands, then they were not very effective.[139] They were not effective because public forum doctrine, together with loaded labor law, allows for the banishment of strikers when it fits the desires of their employers. If workers had been able to picket at their normal place of work – where employees entered the terminal, or in the normally-used employees' parking lots – then their message would have had meaning. The content of their speech – that there is a strike in progress and it is the obligation of all those who stand for the rights of workers to honor it – would have had a chance of being heard. First Amendment law, in this regard, does not so much promote dissident speech as effectively silence it. It does so by assuring that the appropriate *place* for such speech is only a place that renders speech meaningless. Geography creates *de facto* content restrictions.

But airports, like malls, might in some sense be considered exceptional cases. The airport, after all, is a nonpublic forum,[140] and the mall is private property. What of those traditional public forums that still remain: the streets and parks of the city?

Case 3: Zoning Protest

The third case study therefore returns to the paradigm of public forums, the streets, where protesters now find the city as a whole more and more segregated into a

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[138] Draper, *supra* note 137.

[139] Though it is hard to tell from the news reports, it seems that the workers won little more than what was already on the table before they walked out.

[140] There is, of course, a whole range of criticisms that can be launched against the Supreme Court's designation of publicly-accessible portions of airports as nonpublic forums; *see* Schutte, *supra* note 132. But the point is also larger than that: the very foundation of public forum doctrine – using space to regulate politics – *necessarily* implicates the state in favoring some political content over other political content as much as the Court would like to pretend otherwise.

series of protest and no protest zones – that is, they find a city looking more and more like the forlorn parking lots of Denver International Airport. In the streets, public forum doctrine encourages police and other city, state, and national officials to construct designated "protest zones" and "no protest zones" outside major international meetings, events like the political conventions, and, perhaps most uncomfortably for progressives, outside abortion clinics. What is at work, I will argue, is a form of public space zoning, sometimes temporary, sometimes permanent.[141] As with the City of Denver and its decision to relegate picketers to a distant parking lot, the zoning of public space into areas that allow or disallow protest derives from a desire to "balance" the rights of the protesters with the needs of the event or place being protested.

Perhaps the most intriguing place to examine this dynamic of protest zoning is in Seattle at the height of the demonstrations against the World Trade Organization in November and December, 1999. The creation of a no-protest zone during these demonstrations was less an intentional policy of the city, that an outcome of the city's failure to prevent protest in other ways. As with many cities, Seattle has long has a permitting process for parades and protests. During the WTO meeting, "official" protests had been permitted for a number of areas around town. Labor unions, for example, rallied near the old King Dome; other protesters gathered at the Space Needle. But, on November 30, 1999, some 20,000 un-permitted protesters gathered downtown, many of whom were deployed in a well-organized plan to block key intersections and, it was hoped, to disrupt the ability of the WTO delegates to get to the meeting site. With a small number of protesters smashing windows and engaging in other acts of violence

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[141] A concerted and intriguing, if ultimately deeply problematic, effort to justify public space zoning as a means of regulating homeless people's presence in public space, that also addresses First Amendment issues, is Robert Ellickson, *Controlling Chronic Misconduct in City Spaces: Of Panhandlers, Skid Rows, and Public-Space Zoning,* 105 YALE L.J. 1165 (1996). For a critique, see Don Mitchell, *Postmodern Geographical Praxis? The Postmodern Impulse and the War Against the Homeless in the Post-Justice City*, *in* POSTMODERN GEOGRAPHY: THEORY AND PRAXIS, 57-92 (Claudio Minca ed., 2001).

against property, and with the labor unionists beginning their march to join the protesters downtown, Mayor Paul Schell declared a state of emergency, stopped the labor parade before it reached downtown, and asked the Governor to mobilize the National Guard to clear the streets. The next day, Mayor Schell issued an order that barred any person from "enter[ing] or remain[ing] in a public place" within a 50 block zone downtown. Exceptions were granted for WTO delegates, business owners and employees, residents of the zone, emergency personnel, and, interestingly, shoppers.[142] Protest was quite simply banned from downtown. While order was restored to the streets quickly after the order was issued, it was not rescinded until after the WTO meeting was over.[143]

The city staked the legitimacy of its emergency order on the precedent established in the case *Madsen v. Women's Health Center*.[144] The *Madsen* case, and one that followed it (*Hill v. Colorado*[145]) established the legitimacy of creating "bubbles" around abortion clinics within which protest, picketing, leafleting, and "sidewalk counseling" was either forbidden altogether or severely restricted. The goal, of course, was to protect the rights and safety of women entering the clinics, as well as those of the clinic's employees.

Following *Madsen*, the City of Seattle argued not only that creating a fifty block no-protest zone around the WTO meeting was legitimate as an emergency measure, but also that it was legitimate on its face: it was simply a reasonable time, place, and manner restriction on speech and assembly that was tailored to advance a compelling

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[142] The previous summary is pieced together from numerous news articles and discussion with participants. An excellent legal analysis of the demonstrations and the emergency order is Aaron Perrine, *Notes and Comments: The First Amendment vs. the World Trade Organization: Emergency Powers and the Battle in Seattle*, 76 WASH. L. REV. 635. The emergency order, "Local Proclamation of Civil Emergency Order Number 3 (revised)" is quoted id. at 639.

[143] *Id*. at 640.

[144] 512 U.S. 753 (1994).

[145] 120 S. Ct. 2480 (2000). This case had not been decided by the time of the WTO protests, but it is important to analyzing the emergency order, as Perrine, *supra* note 142, shows.

state interest: protecting the delegates to the WTO from the disruptive protests erupting around them.[146] The nature of this compelling state interest is unclear. While women have a constitutionally protected, if increasingly fragile, right to abortion that the *Madsen* decision seeks to balance against the rights of protesters,[147] it is impossible to guess what right WTO ministers have to traverse the streets and use the public buildings of Seattle without having to encounter protesters.[148] And so, in fact, in its arguments in support of the continuance of the order, the City argued instead that the order was a critical means not only for restoring order, but for maintaining it.

The National Guard and other police forces, armed with the emergency order and their batons, successfully cleared the streets and kept protesters out of downtown on December 1. Here is how one news article reported the scene:

> A crackdown that put National Guard troops, state troopers, and police officers in head-to-toe black on every corner of downtown yesterday all but ended impromptu protests against the World Trade Organization while allowing the group's meetings and permitted processions to go on as scheduled. Standing shoulder to shoulder or marching in unison, Seattle police officers wearing gas masks and carrying batons charged the demonstrators and pushed them out of what was dubbed the "no protest zone" near the convention center where President Clinton addressed the WTO delegates.[149]

The interesting word in that passage, of course, is "impromptu." Seattle officials averred over and over that they had no interest in stopping parades and protests that had been sanctioned through its permitting process. The no protest zone was a response to those – some violent, the vast majority not – who sought to protest without the city's permission: who sought, that is, to exercise their right to assembly without clearing it with the government first.

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[146] Perrine, *supra* note 142, at 640.
[147] For a fuller analysis of the problematic nature of *Madsen* and *Hill* when read "geographically," see Mitchell, THE RIGHT TO THE CITY, *supra* note 16, at Chapter 2.
[148] This argument only makes sense when we remember that the emergency order banning even peaceful protest extended well after order was restored in Seattle – right through to the end of the meetings.
[149] Lynda Gorov, *A Crackdown Calms Seattle Action Taken to Prevent Confrontation*, BOSTON GLOBE, December 2, 1999, at A1 (internal paragraph break omitted).

In the end, a federal judge upheld the city's position, seeing no illegitimate abridgement of protesters' rights in the City's establishment of a no protest zone. The judge stated, plainly enough, that "free speech must sometimes bend to public safety."[150] In this case it had to bend for 50 blocks, and right out of downtown – even though in *Madsen*, the court had found a 36 foot exclusion zone to be reasonable but both a 300 foot zone in which approaching patrons and workers of clinics, and a 300 foot no-protest zone around residences of clinic workers to be *too great* a burden on free speech, ordering a much smaller no-protest bubble to be drawn.[151] Given this sort of spatial specificity in the Supreme Court's decision, it seems unlikely that such a large protest exclusion zone could withstand scrutiny.

But there is another issue at work too. The judge in Seattle supported the City's contention that *sanctioned* protest was acceptable. The no-protest zone was necessary because of *impromptu* protests. But, of course, the very effectiveness of the Seattle protests was their (apparent) spontaneity.[152] That is what caught the media's – and the public's – imagination; and that is what allowed for the massive upsurge of political debate, in the U.S. and around the world, that followed.

Perhaps, tactically, Seattle's "mistake" was to not establish designated protest and no-protest zones in advance of the meetings. Such a move had been effective in the 1996 Democratic and Republican Conventions (and in earlier ones too). And in subsequent years and events it has become standard practice, as with the 2000 National Conventions, the annual meetings of the World Bank and International Monetary Fund in Washington, and the World Economic Forum meeting in New York in February 2002, where protesters are kept out of certain areas by fences, barricades and

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[150] Quoted in Ian Ith, *Court Vindicates City's WTO Riot Measures: Judge Says Schell Acted Appropriately*, SEATTLE TIMES, October 31, 2001, A1.
[151] *Madsen*, 512 U.S. at 773-774.
[152] I say apparent, because, in fact, a great deal of planning, if not always coordination, went into the multitude of protest events that were to take place in Seattle.

a heavy police presence.[153] In the case of the 2000 Democratic National Convention in Los Angeles, it was the protesters who were fenced off, with the City establishing an official "protest zone" in a fenced parking lot a considerable distance from the convention site.[154] The rationale, of course, was "security," a rationale backed by appeals to the authority of the Secret Service. The ACLU, among others, sued the city, eventually winning a decision that invalidated the city's plans. The city was forced to establish a protest zone closer to the convention center, with the judge chiding the City of Los Angeles for failing to consider the First Amendment when it established the rules for protest and security around the event. "You can't shut down the 1st Amendment about what might happen," the judge said. "You can always theorize some awful scenario."[155]

This victory should not be considered very large. Its effect, and the effect of other cases like it, has largely reduced the ACLU and other advocates of speech rights to arguing the fine points of geography, pouring over maps to determine just *where* protest may occur. Protesters are put entirely on the defensive, always seeking to justify why their voices should be heard and their actions seen, always having to make a claim that it is not unreasonable to assert that protest should be allowed in a place where those being protested against can actually hear it, and always having to "bend" their tactics – and their rights – to fit a legal regime that in every case sees protest subordinate to "the general order" (which, of course, really means the "established order").

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[153] It is also standard practice, now, elsewhere in the world, as with the FTAA meetings in Quebec City, the WTO Ministerial in Doha, and, ineffectually, Genoa.

[154] *See*, Jeffrey Rabin, *Panel OKs 3 Convention Protest Marches Politics: Police Commission Requires Demonstrations to End Outside Staples Center Security Zone*, L.A. TIMES, July 19, 2000, at B3; Jeffrey Rabin, *Officials Scramble to Draft New Security Plan Convention: In the Wake of Judge's Ruling, Law Enforcement Agencies Weigh Options That Would Allow Protesters Closer to Staples Center*, L.A. TIMES, July 21, 2000 at B1 and Jeffrey Rabin and Beth Shuster, *Judge Voids Convention Security Zone*, L.A. TIMES, July 20, 2000, at A1.

[155] Rabin and Shuster, *supra* note 154.

In this regard, consider the April 2000 protests in Washington, D.C. against the IMF and the World Bank. The police opened proceedings by shutting down on a pretext (fire code violations) a warehouse that protest groups had rented to serve as a staging area.[156] The police then undertook wholesale arrests of protesters for parading without a permit – only licensed speech was to be permitted.[157] And, of course, the whole area around the World Bank and IMF offices and meeting spaces was simply declared off-limits to protest. The City even went so far as to expand the no-protest zone at the last minute when it was feared that it was not large enough.[158] The no protest zone grew to more than 50 blocks, all set off with metal barricades. The whole purpose, as Police Chief Charles Ramsey made abundantly clear, was to assure that "Seattle" – that is uncontrolled protest – did not occur in Washington.[159] The effect, of course, was to ensure that those who were the target of the protests never had to see or hear them, except perhaps on TV. And the pre-emptive arrests and closing down of gathering places assured that the press would spend less time conveying the message of the protest and more time describing and debating the tactics of the protesters and the police.[160]

Whereas the ghettoization (since that is what it is) of protest was somewhat accidental in the Seattle case,[161] it has become an integral part of the practice of protest and its policing elsewhere – as in Washington, and at the World Economic Forum meeting in New York City, where protesters were corralled into little pens in the middle of

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[156] Among the countless articles on the early days of the April 2000 protests, see John Kifner, *Police Move Against Trade Demonstrators*, N.Y. TIMES, April 16, 2000, at 1.6; Anne Kornblut, *Hundreds are Arrested on Eve of Big D.C. Rally*, BOSTON GLOBE, April 16, 2000, at A31; and Bob Dart and Alex Schultz, *Police Pre-Empt Protest*, Anti-trade Group Demonstrators Deny Raids Turned Up Bomb-Making Material Near Site of D.C. Rally ATLANTA J. AND CONST., April 16, 2000, at 1A.

[157] *See* the references *supra*, note 156.

[158] John Drake and Gerald Mizejewski, *D.C. Police Arrest Hundreds, Then Free Many: Protesters Stranded at Correction Center*, WASHINGTON TIMES, April 16, 2000, at C1.

[159] *Id*.

[160] As any examination of newspaper coverage of the meetings and the protests makes clear.

[161] Despite which, it can still be argued that the emergency order there engaged in prior restraint of protesters' speech rights, *see* Perrine, *supra* note 142 at 657.

the street and never allowed to gather more than three deep, and where a "frozen zone" around the meeting hotel that only residents, employees, and conference goers were allowed to enter.[162]

Fenced off *cordon-sanitaires* have become a staple of the protest landscape, new borders that try to carefully delineate where people have the right to speech and assembly and where they do not. The two complementary ways of policing protest on the streets – zoning protesters out or fencing them in – are usually defended on the grounds that such restrictions are necessary to assure order or to prevent violence. But to make that argument one has to make an *assumption* that protest is inherently violent in nature or disorderly, which has the effect of assuming guilt until innocence is proven, rather than visa versa. Or, one must assume that more finely grained policing tactics – like arresting people within a largely peaceful protest for engaging in violence – and injunctions against specific people already convicted of disorderly or violent behavior, can never be effective.

Furthermore, to make such assumptions simply gives lie to the common law claim upon which public forum doctrine was originally established. If the streets "from time immemorial" have been the place where people debate and discuss, protest and rally, then how is it that now it is only on *some* streets (or even *some parts* of the streets) where this is possible, while on other streets – the streets where the decisions are made that direct our lives – the right to dissident speech is outlawed outright? Indeed, in the end, isn't protest zoning really just a way of controlling the *content* of debate without really acknowledging that that is what is being done, by, for example, privileging the right of WTO ministers to meet and to speak over the right of protest groups to contest that speech? Justice Brennan might long ago have argued that the right to speech implies a

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[162] *See, e.g.* Al Baker, *Police Vow Zero Tolerance for Violence at Economic Forum*, N.Y. TIMES, January 29, 2002, at B1; and Dan Berry and William K. Rashbaum, *Officers, Primed for Demonstrations, Find Few to Police*, N.Y. TIMES, February 1, 2002, at A19.

corollary right to be heard.[163] It seems, according to current policing practices at least, he was simply wrong.

Conclusion: The Liberalization of Free Speech

The *Oxford English Dictionary* indicates that at the time the Bill of Rights was written, to "abridge" meant both to "curtail" and to "cut short; to reduce to a small size." The dual meaning of the term probably did not escape the authors of the Bill. The irony of the Supreme Court's efforts to "incorporate" the First Amendment into the Fourteenth is that it began precisely as a means to curtail, cut short, or at least reduce to a small size the rights of dissenters like Gitlow. Even so, the logic of this incorporation, coupled with the changing politics of the streets and society during the New Deal, forced the Court to liberalize free speech. But in doing so it has found means for it to continue to be abridged it by other means. It is hard to argue that the rights of picketers at Denver International Airport were not very much "reduced to a small size." And as the importance of publicly-accessible private property to public life in the United States has grown, the room to effectively exercise of speech and assembly rights has concomitantly shrunk, it too has been "reduced to a small size."

Such a result was implicit in the very language Justice Holmes used when he launched the project of liberalizing free speech. Since he was concerned with the effects of what people said – how mere talk (or, later, other forms of expressive activity) could constitute a "clear and present danger" – he had to focus not so much on speech itself but on context, both social and geographical. "We admit that in many places and in ordinary times," he wrote, "the defendants … would have been within their constitutional rights. But the character of the act depends upon the circumstances in which it is

[163] Columbia Broad. Sys. v. Democratic Nat'l Comm., 412 U.S. 94 (1973) (Brennan, J. dissenting).

done."[164] And he meant it. This is the real foundation of public forum doctrine, and so therefore of the liberalization of free speech. Or, to say the same thing, it is the precise legal justification for silencing speech – to make it so that it cannot have any effect – through geography.

The prosecution of William Epton in 1964 suggests that concerns about content, and so a perceived need to censor, remained strong amid the social upheavals of mid-century. But the growing liberalization of First Amendment law, a liberalization that has suggested that even the most seditious speech[165] might be protected (just so long as it was ineffectual[166]) has required regulation to develop in new ways. Instead of focusing on exactly what is said (as was the case in the World War I cases), court rulings and police practices since the late 1930s have begun exploring the ways that the meaning of what is said – its effectiveness – is a result of where it is said – its geography. And with this, courts have sought, under the rubric of balancing competing needs and rights, to determine a set of rules for regulating speech. Simultaneously, the privatization of public space, the movement of sociality unto the private property of the mall, as demonstrated with the case of Horton Plaza, shows that the right to speech and assembly can be undermined through something as mundane as changing property regimes.[167]

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[164] *Schenck*, 249 U.S. at 52

[165] *But see* the epilogue below.

[166] The conclusion that the Supreme Court is creating a regime wherein dissident speech is protected to the degree it is ineffectual is broadly consistent with the larger conclusion drawn by Michael J. Klarman about the role of the Court in protecting the rights of unpopular minorities. He argues that the Court has never really been "countermajoritarian." Concerning the First Amendment, he argues: "A cynical, though nonetheless apparently accurate, interpretation of the Court's free speech jurisprudence is that political dissidents become entitled to significant constitutional protection only when they cease to be a serious threat to the status quo…." Michael J. Klarman, *Rethinking the Civil Rights and Civil Liberties Revolutions*, 82 VA. L. REV. 1, 14 (1996).

[167] There are a set of interesting issues here that deserve further exploration. As more and more cities have ceded maintenance, policing, and other responsibilities related to the public streets and sidewalks of the cities to Property-Based Improvement Districts (sometimes also called Business Improvement Districts), such BIDs courts may come to see city streets as what could be called a form of privately-controlled public property. It is quite unclear what such arrangements, codified in law and legally binding contracts, portend for even the now minimal rights that are supposed to accrue to persons wishing to speak or assemble. For

To the degree that the state has learned – or been forced – to restrain itself from regulating just what is said and thought, some rather large (if still tenuous) victories have been won. It is quite possible that a Debs or a Schenk would not now be prosecuted (though an Arab equivalent of a Frohwerk might still be quickly spirited away). But these victories have been steadily eroded through a new legal regime in which courts, rather than Congress, have taken the lead in abridging the rights to speech and assembly by assiduously segregating speech and protest, by zoning it, so that its very effectiveness can be minimized and perhaps eliminated. It is clear that in the U.S., the right to speak does no imply a right to even be potentially effective, to have a chance to make a difference.[168] Dissident speakers have to remain outside the mall that has become the new public space of the city; they must remain at a distance from the politicians and the delegates they seek to influence; they must picket only where they will have no chance of creating a meaningful picket line.

But no matter what the courts say and no matter how carefully police and courts together draw the lines of protest, creating a geography of rights that can be frankly oppressive, Seattle and later Quebec, and perhaps especially events in Genoa, have shown that there are ways to transcend geography, to speak out loudly and insistently, against those who would effectively silence protest in public space. The answer to this geography of censorship will have to come through not a revival of civil protest, but of civil disobedience. For only through civil disobedience will a *liberal* theory of speech and assembly ever be transcended, and replaced with something far more progressive – something concerned less with the "truth" of the state, and more with constantly assuring its justness.

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the beginnings of analysis, albeit in a context related to the policing of homeless people and other "undesirables," rather than First Amendment issues, *see* Mitchell and Staeheli, *supra*, note 87.

[168] Leaving aside, of course, that massive exception the Court has carved out for wealthy corporate "persons" and the media oligarchy.

Epilogue

As the preceding argument has indicated, the liberalization of free speech has not always been progressive. And it has not been progressive in both senses of the term. It has not marched steadily forward, uninterrupted, towards the shining light of freedom, to become ever more liberal, ever more just. Rather, to the degree it has been liberalized, this has occurred in fits and starts, with frequent steps backwards or to the side rather than forward. Like any social history, that is, the history of free speech is not a linear one of ever-expanding enlightenment; like any social history it is a history of on-going struggle. Nor has it been progressive in the sense of necessarily more just, as a close focus on the geography of speech makes clear. Geographical analysis has shown that what sometimes appears as a progressive reinforcement of a right to speech and assembly is really (or is also) in fact a means towards its suppression.[169]

Nonetheless, whatever rights have been won, have been won through struggle and often not by following the law, but by breaking it. Civil disobedience, by labor activists and other picketers, by civil rights marchers, by anti-war protesters, and by Free Speech activists (as with the Free Speech Movement in Berkeley in the sixties), has forced often illiberal theories of speech and assembly to be reconsidered. But against these struggles has to be set a history of governmental recidivism: the Palmer raids and Red Scare of 1919-1920, the Smith Act of 1940, the McCarthy era, and the antics of COINTELPRO in the 1960s and 1970s, are just a few of the more well-known moments

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[169] The relationship between geography and law – and the implications of their intersection for how power works in society – has become the focus of a small but vigorous literature in the discipline of geography. The best treatment of the subject remains NICHOLAS K. BLOMLEY, LAW, SPACE, AND THE GEOGRAPHY OF POWER (1994); but *see also* DAVID DELANEY, RACE, PLACE, AND THE LAW, 1836-1948 (1998). A useful compendium of the geographical literature on law in THE LEGAL GEOGRAPHIES READER: LAW, POWER, AND SPACE (Nicholas Blomley, David Delaney, and Richard Ford eds., 2001).

of repression, often cloaked in law and justified as urgent "legitimate state interests" at a time when serious challenges were being made to the "established order" or when other exigent factors induced panic within the government and the public at large. The history of speech and assembly, that is, can be told as an on-going struggle against recurring illiberalism.

We are, most likely, now reentering an illiberal phase, and if I am right that civil disobedience has always been necessary to winning and securing rights to assembly and speech, there is a great deal to be deeply concerned about. For the closing off of space to protest has made civil disobedience all the more necessary right at the moment when new laws make civil disobedience not just illegal, but potentially terroristic. The witch's brew of Supreme Court spatial regulation of speech and assembly and new anti-terrorism laws portends deep trouble for those of us who think we have a *duty* as well as a right to transform our government when we think it is in the wrong, a duty and a right for which street protest is sometimes the only resource.

Within six weeks of the terrorist attacks of September 11, 2001, Congress had passed, and the President signed into law, the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (USA PATRIOT Act).[170] Among its many provisions, the Act defines as domestic terrorism, and therefore covered under the Act, "acts dangerous to human life that are in violation of the criminal laws," if they "appear to be intended … to influence the policy of a government by intimidation or coercion" and if they "occur primarily within the territorial jurisdiction of the United States."[171] As Nancy Chang argues:

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[170] Public Law 107-56.

[171] USA PATRIOT Act §802 as quoted in NANCY CHANG, SILENCING POLITICAL DISSENT: HOW POST-SEPTEMBER 11 ANTI-TERRORISM MEASURES THREATEN OUR CIVIL LIBERTIES 112(2002). Similar laws, introduced at the behest of the American government, have now been passed by the European Parliament. For an analysis see Thomas Mathiesen, *Expanding the Concept of Terrorism?*, in BEYOND SEPTEMBER 11: AN ANTHOLOGY OF DISSENT 84-93 (Phil Scranton ed., 2002).

> Acts of civil disobedience that take place in the United States necessarily meet three of the five elements in the definition of domestic terrorism: they constitute a "violation of the criminal laws," they are "intended … to influence the policy of a government," and they "occur primarily within the territorial jurisdiction of the United States." Many acts of civil disobedience, including the blocking of streets and points of egress by nonviolent means during a demonstration or sit-in, could be construed as "acts dangerous to human life" that appear to be intended to influence the policy of a government "by intimidation or coercion," which case they would meet the crimes remaining elements…. As a result, protest activities that previously would most likely have ended with a charge of disorderly conduct under a local ordinance can now lead to federal prosecution and conviction for terrorism.[172]

As the space for protest has become more and more tightly zoned, the likelihood that laws will be broken in the course of a demonstration – a demonstration seeking to "influence a policy of government" – increases. And, of course, the very *reason* for engaging in a demonstration is to coerce, even if it is not to directly "intimidate." One should not be sanguine about the "or" placed between intimidate and coerce. It means just what it says: coercion *or* intimidation will be enough for prosecution.[173] Now even civil disobedience can be construed as an act of terrorism.

The intersection of the new repressive state apparatus being constructed in the wake of September 11 with nearly a century of speech and assembly "liberalization" portends a frightening new era in the history of speech and assembly in America. We may soon come to long for those days when protest in public space was *only* silenced through the strategic geography of the public forum doctrine.

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[172] CHANG, *supra* note 171 at 112-113.

[173] *See* Mathiesen, *supra* note 171 at 87 (arguing that similar language in the European case indicates that an expansive rather than narrow definition was aimed at).