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Speak & Space: How the Internet is Going to Kill the First Amendment as We Know It

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I. Introduction

1. The muddle that is free speech jurisprudence in this country has reached a sort of critical mass. The rigid, categorical approach that has come to dominate the free speech cases is being stretched beyond its usefulness by a rapidly changing society in which modes of communication bear scant resemblance to the prior analogs. The

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impending explosion is likely to produce interesting results — a drastic change of course in the way we think about the speech guarantees of the First Amendment — that are bound to inject greater intellectual coherence into the doctrine.

2. It is the contention of this Article that the current understanding of the First Amendment is unsalvageable and that the worst possible solution would be to prop up a bankrupt regime with a band-aid solution. The legal crisis that will inevitably follow from new technology pushing the boundaries of extant formalistic rules is essential to toppling a bad framework in the search for something better.

3. I proceed with this analysis in four phases. First, I consider the intellectually unsatisfying origin of the public forum as grounded in the twin impulses of history and tradition, looking for a more compelling justification for protected speech fora. Second, I loosely track the instability of the Court's speech cases with an eye to the potential problems cropping up. Third, I specifically consider the Internet as the means of communication that will break the First Amendment. Finally, I reject numerous piecemeal solutions that would try to preserve the Court's current framework.

II. Where Aren't We Going? Where Haven't We Been?

A. The Public Forum

4. The notion of a protected forum for the exercise of speech rights sprang from the opinion of Justice Roberts in *Hague v. Committee for Industrial Organization*[1] when he remarked:

> Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions. Such use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens.[2]

5. The Court's justification in *Hague* for limiting the power of the government to exclude individual speakers from these spaces was that the land itself belonged to the people and was merely overseen by the government to protect the resource. The streets, parks, and sidewalks that compose the traditional public fora do so because, as Roberts notes, of tradition and history. In this basic mode, public forum analysis descends to us today, albeit with certain excisions and addendums as required over

[1] 307 U.S. 496 (1939).
[2] *Id*. at 515.

the years,[3] but the basic premise survives: roads, sidewalks, and parks are the sacred cows of free expression.[4]

6. Of course, even a cursory inspection of the factors that determine whether a particular space is a public forum or not exposes problematic structural weaknesses in the doctrine. Many principles of law now repugnant to civilized society enjoyed centuries of widespread acceptance, including slavery,[5] discrimination,[6] coerced confessions,[7]

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[3] Of course, the distinctions between different kinds of spaces have rigidified during this time period and are discussed *infra* Part III.B (discussing the categorical approach adopted in *Perry*).

[4] *See* Frisby v. Schultz, 487 U.S. 474, 479-80 (1988).

> To ascertain what limits, if any, may be placed on protected speech, we have often focused on the "place" of that speech, considering the nature of the forum the speaker seeks to employ. Our cases have recognized that the standards by which limitations on speech must be evaluated "differ depending on the character of the property at issue." Specifically, we have identified three types of fora: "the traditional public forum, the public forum created by government designation, and the nonpublic forum."
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> The relevant forum here may be easily identified: appellees wish to picket on the public streets of Brookfield. Ordinarily, a determination of the nature of the forum would follow automatically from this identification; we have repeatedly referred to public streets as the archetype of a traditional public forum. "[T]ime out of mind" public streets and sidewalks have been used for public assembly and debate, the hallmarks of a traditional public forum.
>
> …
>
> … [W]herever the title of streets and parks may rest, they have been held in trust for the use of the public.

Id. (citations omitted).

[5] As Justice Marshall noted in his concurrence in *Regents of the University of California v. Bakke*,

> Three hundred and fifty years ago, the Negro was dragged to this country in chains to be sold into slavery. Uprooted from his homeland and thrust into bondage for forced labor, the slave was deprived of all legal rights. It was unlawful to teach him to read; he could be sold away from his family and friends at the whim of his master; and killing or maiming him was not a crime. The system of slavery brutalized and dehumanized both master and slave.
>
> The denial of human rights was etched into the American Colonies' first attempts at establishing self-government ….
>
> ... [T]he colonists themselves were implicated in the slave trade, and [the] inclusion of [a statement in an earlier draft of Declaration of Independence denouncing the King's participation in the slave trade] might have made it more difficult to justify the continuation of slavery once the ties to England were severed. Thus, even as the colonists embarked on a course to secure their own freedom and equality, they ensured perpetuation of the system that deprived a whole race of those rights.

438 U.S. 265, 387-89 (1978) (footnote omitted).

[6] *See*, *e.g.,* Cotter v. City of Boston, 193 F. Supp. 2d 323, 327-28 (D. Mass. 2002).

> As a society we acknowledge and bewail our deeply troubled racial history — the horrors of slavery, the tawdry (and frequently violent) legacy of Jim Crow, the subtle (and not so subtle) resistance to conferring genuine equal rights and equal opportunities upon all Americans. When we attack racial discrimination head on, problems of racial definition rarely arise because they are subsumed in the proof that a particular person or group has, in fact, been the victim of discrimination on the basis of racial animus.

Id.

[7] *See* Choi Chun Lam v. Kelchner, 304 F.3d 256, 268 (3d Cir. 2002).

> Historically, a coerced confession was considered to be unreliable but concrete evidence discovered with the aid of that confession was reliable and thus admissible. Over the years, however, a sense of "fair play and decency" has led courts to exclude not only the coerced confession but the real evidence discovered by virtue of the coerced confession.

Id. (citation omitted).

and unreasonable searches.[8] Each of these now curtailed practices can be fairly grounded in history and tradition.

7. Justice Roberts' rationales are subject to further critique on the basis of the difficulty in assessing when an emerging forum has met the requisite elements of history and tradition. How much time must pass before a particular space meets the requirements? For that matter, do constitutional protections accrue to a specific place (like Central Park in New York City) or to the broader class of space (such as parks in general)? While the answers to these questions may seem obvious, courts have had substantial difficulty answering them and have produced some very odd results along the way.[9]

8. My efforts in this section focus on placing these public fora in the context of critical spatial theory as a tool for understanding why the court has followed the jurisprudential road we are on and where it is leading us.

B. Space

9. At least since the *Hague* Court's codification of space, the constitutional power to speak has been inextricably bound to the spaces in which that speech can occur.[10] This linkage has grown stronger over time as the micro-management of space has become the dispositive means of resolving speech claims. To illustrate this point, one

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[8] The Fourth Amendment was adopted to combat the historical British practice of utilizing general warrants to raid houses. *See* Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 669 (1995).

> The *Carroll* Court's view that blanket searches are "intolerable and unreasonable" is well grounded in history. As recently confirmed in one of the most exhaustive analyses of the original meaning of the Fourth Amendment ever undertaken, … what the Framers of the Fourth Amendment most strongly opposed, with limited exceptions wholly inapplicable here, were general searches — that is, searches by general warrant, by writ of assistance, by broad statute, or by any other similar authority. … Although, ironically, such warrants, writs and statutes typically required individualized suspicion, … such requirements were subjective and largely unenforceable. Accordingly, these various forms of authority led in practice to "virtually unrestrained," and hence "general," searches.

Id. (citations omitted).

[9] *See*, *e.g.*, Chad v. City of Fort Lauderdale, 861 F. Supp. 1057, 1061 (S.D. Fla. 1994).

> The Supreme Court has recently reaffirmed that a traditional public forum is one in which its principal purpose is the free exchange of ideas. A public forum is a place that has "immemorially been held in trust for the use of the public and, time out of mind," has been "used for purposes of assembly, communicating thoughts between citizens, and discussing public questions."
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> Given the above standard, the court concludes that plaintiffs have not established that either the sidewalk east of Highway A1A or Ft. Lauderdale's beach constitute a forum for public communication by tradition or designation. The sidewalk is new and small; it does not even extend the full length of the beach. It was created to accommodate traffic to and from the beach and, only having been built two years ago, has not been a traditional site for expressive conduct. Plaintiffs have not established the sidewalk is indistinguishable from others in Fort Lauderdale.

Id. (citations omitted). The ludicrousness of this analysis is worth additional note. If the "newness" and "size" of the sidewalk were dispositive in resolving First Amendment disputes, cities could simply break up the old concrete and pour new sidewalks in order to limit speech.

[10] *See supra* note 4.

need look no further than the Court's decision in *Perry Educators Association v. Perry Local Educators Association*,[11] where the power to speak turned on the characterization of a sub-unit of public space: teacher mailboxes.[12] *Perry* is particularly instructive for the purposes of our consideration of space and will be discussed in more detail below.[13] Suffice it to say, for the moment, that if we are willing to think of *Hague* as a jumping off point for our understanding of the impact of space on speech (and vice-versa), *Perry* is the bottomless pit into which we dive; while *Hague* comfortably divides the world into undeniably public spaces (parks and roads) and non-public spaces (presumably everything else), *Perry* forces us to continually subdivide space in an effort to give it meaning.

10. But to really understand the constitutional import of these spaces, we have to step back and consider the social meanings of these spaces. In truth, the two are probably not substantially different, but legal formalism sometimes obstructs the view. So I turn to a brief discussion of theoretical interpretations of space as a critical departure for placing the Court's evolving speech doctrine in context.

1. A Brief Overview of Critical Spatial Theory

11. Henri Lefebvre's seminal work, *The Production of Space*, is the touchstone for any discussion of critical spatial discourse. In that text, Lefebvre asserts the importance of space as a tool for understanding cultural interactions,[14] resisting semiotics as the monolithic tool for analyzing society.[15] Lefebvre's fundamental argument is that

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[11] 460 U.S. 37 (1983).

[12] *Id.* at 45-48.

[13] *See infra* Part III.B.

[14] *(Social) space is a (social) product.* This proposition might appear to border on tautologous, and hence on the obvious. There is good reason, however, to examine it carefully, to consider its implications and consequences before accepting it. Many people will find it hard to endorse the notion that space has taken on, within the present mode of production, within society as it actually is, a sort of reality of its own, a reality clearly distinct from, yet much like, those assumed in the same global processes by commodities, money and capital. Many people, finding this claim paradoxical, will want proof. The more so in view of the further claim that the space thus produced also serves as a tool of thought and action; that in addition to being a means of production it is also a means of control, and hence of domination, of power; yet that, as such, it escapes in part from those who would make use of it. The social and political (state) forces which engendered the space now seek, but fail, to master it completely; the very agency that has forced spatial reality towards a sort of uncontrollable autonomy now strives to run it into the ground, then shackle and enslave it.

HENRI LEFEBVRE, THE PRODUCTION OF SPACE 26 (Donald Nicholson-Smith trans., Blackwell Publishing 1991) (1974).

[15] Semiology raises difficult questions precisely because it is an incomplete body of knowledge which is expanding without any sense of its own limitations; its very dynamism creates a need for such limits to be set, as difficult as that may be. When codes worked up from literary texts are applied to spaces — to urban spaces, say — we remain, as may easily be shown, on the purely descriptive level. Any attempt to use such codes as a means of deciphering social space must surely reduce that space itself to the status of a *message*, and the inhabiting of it to the status of a *reading*. This is to evade both history and practice.

Id. at 7.

space is bi-directional; that is, space is produced by society and that space then shapes the society that produced it.[16] Because he views space as a product of society, he rejects the notion of Cartesian space — mathematically produced geometric space — as a useful philosophical tool because it necessarily ignores the real physical linkages of people living in a society.[17] Put simply, the erection of a building, like a skyscraper, creates a certain kind of space that then defines how people will act inside it.

12. Lefebvre's spatial feedback loop is important because it is useful for developing a model to explain societal interactions. In particular, he is interested in viewing space on a historical continuum, noting the ways in which uses of space change over time, particularly in the urban context.[18] Within the urban setting, Lefebvre is concerned with a rupture in the modes of representation of spaces that emerges at the turn of the twentieth century.[19] That rupture is the proliferation of abstract spaces, as Lefebvre calls them, that stand in opposition to more traditional, historical spaces.

13. What concerns Lefebvre about abstract space is its emphasis of function over form, spaces produced by capitalism to be infinitely replicable,[20] empty geometric forms.[21]

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[16] In Lefebvre's view,

> ([s]ocial) space is not a thing among other things, nor a product among other products: rather, it subsumes things produced, and encompasses their interrelationships in their coexistence and simultaneity — their (relative) order and/or (relative) disorder. It is the outcome of a sequence and set of operations, and thus cannot be reduced to the rank of a simple object. At the same time there is nothing imagined, unreal or 'ideal' about it as compared, for example, with science, representations, ideas or dreams. *Itself the outcome of past actions, social space is what permits fresh actions to occur*, while suggesting others and prohibiting yet others. Among these actions, some serve production, others consumption …. Social space implies a great diversity of knowledge.

Id. at 73 (emphasis added).

[17] Creating the distinction between real spaces and imagined spaces, Lefebvre suggests that "[t]he quasi-logical presupposition of an identity between mental space (the space of philosophers and epistemologists) and real space creates an abyss between the mental sphere on one side and the physical and social spheres on the other." *Id.* at 6.

[18] *See generally id.* at 73-79.

[19] The historical forces of the twentieth century have necessarily pushed us toward an abstraction of spaces due to "agrarian reforms and peasant revolutions [that have] reshaped the surface of the planet. A large portion of these changes served the ends of abstract space, because they smoothed out and in a sense automatized the previously existing space of historic peoples and cities." *Id.* at 55.

[20] > There is no need to subject modern towns, their outskirts and new buildings, to careful scrutiny in order to reach the conclusion that everything here resembles everything else. … On the contrary. It is obvious, sad to say, that repetition has everywhere defeated uniqueness, that the artificial and contrived have driven all spontaneity and naturalness from the field. … Repetitious spaces are the outcome of repetitious gestures (those of the workers) associated with instruments which are both duplicatable and designed to duplicate. … At all events, repetition reigns supreme.

Id. at 75.

[21] > This abstract space took over from historical space, which nevertheless lived on, though gradually losing its force, as substratum or underpinning of representational spaces. Abstract space functions 'objectally', as a set of things/signs and their formal relationships: glass and stone, concrete and steel, angles and curves, full and empty. Formal and quantitative, it erases distinctions, as much those which derive from nature and (historical) time as those which originate in the body (age, sex, ethnicity). The signification of this ensemble refers back to a sort of super-signification which escapes meaning's net: the functioning of capitalism, which contrives to be blatant and covert at

In turn, these spaces are produced for capitalism to be efficient conduits for the movement of machines and materials. Furthermore, Lefebvre asserts that the fractal-like nature of these spaces is essentially repressive — designed to erase difference, discourage conflict, and most importantly, encourage consumerism. In his words,

> [a]bstract space works in a highly complex way. It has something of a dialogue about it, in that it implies a tacit agreement, a non-aggression pact, a contract, as it were, of non-violence. It imposes reciprocity, and a communality of use. In the street, each individual is supposed not to attack those he meets; anyone who transgresses this law is deemed guilty of a criminal act. A space of this kind presupposes the existence of a 'spatial economy' closely allied, though not identical, to the verbal economy. This economy valorizes certain relationships between people in particular places (shops, cafés, cinemas, etc.), and thus gives rise to connotative discourses concerning these places; these in turn generate 'consensus' or conventions according to which, for example such and such a place is supposed to be trouble-free, a quiet area where people go peacefully to have a good time, and so forth. As for denotative (i.e., descriptive) discourses in this context, they have a quasi-legal aspect which also works for consensus: there is to be no fighting over who should occupy a particular spot; spaces are to be left free, and wherever possible allowance is to be made for 'proxemics' — for the maintenance of 'respectful' distances. This attitude entails in its turn a logic and a strategy of property in space: 'places and things belonging to you do not belong to me'. The fact remains, however, that communal or shared spaces, the possession or consumption of which cannot be entirely privatized, continue to exist. Cafés, squares and monuments are cases in point. The spatial consensus I have just described in brief constitutes part of civilization much as do prohibitions against acts considered vulgar or offensive to children, women, old people or the public in general. Naturally enough, its response to class struggle, as to other forms of violence, amounts to a formal and categorical rejection.[22]

14. Because the basic function of these spaces is to limit resistance and to ensure the steady stream of production and consumption, governments have a powerful interest in propagating and maintaining these kinds of spaces as a means of maximizing their power.[23] In turn, the best means of maintaining this power is the rationalization of

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one and the same time. The dominant form of space, that of the centres of wealth and power, endeavours to mould the spaces it dominates (i.e. peripheral spaces), and it seeks, often by violent means, to reduce the obstacles and resistance it encounters there.

Id. at 49.

[22] *Id.* at 56-57.

[23] The state is consolidating on a world scale. It weighs down on society (on all societies) in full force; it plans and organizes society 'rationally', with the help of knowledge and technology, imposing analogous, if not homologous, measures irrespective of political ideology, historical background, or the class origins of those in power. … This modern state promotes and imposes itself as the stable

spaces. Lefebvre suggests that "[t]he dominant tendency fragments space and cuts it up into pieces. It enumerates the things, the various objects, that space contains. Specializations divide space among them and act upon its truncated parts, setting up mental barriers and practico-social frontiers."[24]

15. In turning from Lefebvre's principle, that abstract space operates in the urban environment as a check on the disruption of capital, to the ramifications of this concept on public forum theory, it is useful to consider the evolution of the critical sites for free expression in a broader historical context.

2. In the Park

16. There can be little doubt that the historical tradition that the *Hague* Court drew upon in establishing its notion of the public forum is that of Hyde Park. Numerous subsequent opinions of both the Supreme Court and other courts imply that the kind of speech that occurred in Hyde Park is the prototype for our modern legal understanding of speech in the public forum.[25] Indeed, that space was a fecund locus for speech given its central geographic location in London as well as its centrality as a social location to see and be seen.[26]

17. The history of the park certainly tracks our contemporary understanding of speech rights. In the 1850s, a number of riots broke out in the park after police attempted to quiet speakers engaging in political speech.[27] Several years later, after substantial

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> center … of (national) societies and spaces. … It enforces a logic that puts an end to conflicts and contradictions. It neutralizes whatever resists it by castration or crushing.

Id. at 23.

[24] *Id.* at 89.

[25] *See* Lehman v. City of Shaker Heights, 418 U.S. 298, 304 (1974) (suggesting that the quintessential model for the public forum is Hyde Park: "Were we to hold to the contrary, display cases in public hospitals, libraries, office buildings, military compounds, and other public facilities immediately would become Hyde Parks open to every would-be pamphleteer and politician. This the Constitution does not require."); Chicago Acorn v. Metropolitan Pier & Exposition Authority, 150 F.3d 695, 699 (7th Cir. 1998) (noting that "[u]nlike public streets or the speakers' corner in London's Hyde Park, the exhibition, convention, and meeting facilities of Navy Pier are not traditional sites for public assembly, demonstrations, or debate. They thus are not what in the jargon of free-speech law are called 'traditional public forums.'").

[26] *See* JOHN ASHTON, HYDE PARK FROM DOMESDAY-BOOK TO DATE 50-57 (1896) (noting that "the chief use of the park as a place of fashionable relaxation was driving within its precincts, and especially in the 'Ring' …. The practice seems to have obtained as soon as the Park was thrown open to the public, and we have already seen how, in the Commonwealth time, a charge was made for the entrance both of carriages and horses …. From that time to the present the Park has always been a fashionable drive.").

[27] The first series of these riots occurred in early July of 1855 when, despite the government's insistence that assemblage would not be allowed, some 150,000 people congregated in Hyde Park to protest Lord Grosvenor's "Sunday Trading Bill." *Id.* at 177-78. A second set of riots occurred in October of the same year, in which protestors again used the park to rail against "the present high price of bread" and other matters. *Id.* at 179. Reporting on the incident, *The Times* wrote on October 29:

> Yesterday … another unseemly assemblage of persons congregated in Hyde Park, partly under the auspices, and at the bidding of a small knot of individuals who, under the pretext of agitating for cheap bread, really seek to disseminate political doctrines, which the people of this country, including almost every class of them, have long since, and over and over again, refused to endorse ….

protest and agitation by the prominent barrister, Edmond Beales, the government acceded and recognized that the park was in fact a space in which public meetings could be held.[28]

18. Indubitably, part of what made Hyde Park such an attractive space in which to exercise speech rights in the mid-nineteenth century was the likely audience of the speech: the wealthy, the powerful, the movers-and-shakers of British society were as likely as not to be parading the grounds within earshot of the soapbox. It was, in short, an efficient, if unreliable, space for transmitting and receiving the *vox populi*.

19. It can be seen from this admittedly brief historical overview that the space which is Hyde Park evolved as a specific contextual locus for free speech and that the right to speak within its specific boundaries was achieved only through resistance, struggle, and ultimately, acquiescence of the dominant power. With this understanding, it is difficult to see how the experience of Hyde Park and its protestors can be generalized to explain the necessity of parks as a space for the dissemination of speech in the United States. This is true for a number of reasons.

20. First, for strict originalists, the First Amendment was penned almost half a century before British recognition of Hyde Park as a public forum for speech.[29] Whatever understanding the Framers had about the speech guarantee, it did not include the understanding that parks constituted special spaces in which speech rights were afforded particular protection. In fact, the Framers probably understood public spaces in the same way that then Massachusetts Supreme Court Justice Holmes did — as privately owned property that the government had as much a right to exclude individuals from as the homeowner who refused to allow a speaker to deliver a lecture in his living room.[30] Thus, the *Hague* Court's opinion is particularly puzzling as a historical extrapolation of the specific experience of Hyde Park to the general site of the park in the United States.

21. Second, to the extent that the notion of the park as a forum for free speech made sense at a particular time or in a particular place, that understanding has long since lost its socio-cultural significance. While New York City's Central Park or the Mall in Washington, D.C., may resound culturally in a manner similar to that of Hyde Park — given their geographic centrality, their lengthy history as spaces for protest, and the relative socioeconomic and political power of the individuals who might overhear speakers — most parks have no such cultural significance.

Id. at 183. In both instances, the police violently and forcibly removed protestors in an effort to break up the congregation.

[28] *Id.* at 209.

[29] The First Amendment was adopted in 1791 as part of the Bill of Rights while Hyde Park was opened as a space for free speech in the mid-1860s, and appears to be the first space of its kind in the western world.

[30] As Holmes suggested in *Commonwealth v. Davis*, "[f]or the legislature absolutely or conditionally to forbid public speaking in a highway or public park is no more an infringement of rights of a member of the public than for the owner of a private house to forbid it in the house." 39 N.E. 113, 113 (Mass. 1895), *aff'd*, 167 U.S. 43 (1897).

22. In fact, most parks operate in a very different sense, as generic spaces, with little recognition of geographic, temporal, and cultural differences.[31] What defines our modern notion of a park is not its social significance, but rather, the swing set, the baseball diamond, the picnic bench. These are not spaces of protest, but spaces of simulated leisure,[32] created to deliver a sense of urban escapism without removing the worker from the urban environment, closer to the modes of production and the capital that drives them.[33]

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[31] Lefebvre's view of parks, although somewhat different from mine, gets to the same point: that these spaces are increasingly marginalized in favor of roads, which are the next subject of my discussion. In his view, roads increasingly dominate green spaces because of their particular usefulness to capitalism while parks are pushed into the background. This is, perhaps, part of the reason why parks are less useful spaces for speech. The natural corollary to this argument is that the net decrease in the quantity and quality of parks is balanced or, perhaps, overwhelmed by the concomitant increase in the number of roads. As I argue later, this possibility does not ultimately bear fruit because the time, place, and manner restrictions placed on roads tend to be more onerous than those for parks. As a result, the power to disrupt the flow of commerce through speech is effectively negated with respect to roads. In Lefebvre's words,

> [o]wners of private cars have a space at their disposition that costs them very little personally, although society collectively pays a very high price for its maintenance. This arrangement causes the number of cars (and car-owners) to increase, which suits the car-manufacturers just fine, and strengthens their hand in their constant efforts to have this space expanded. The productive consumption of space — which is productive, above all, of surplus value — receives much subsidization and enormous loans from government. This is just another way of barring all escape from a cruel spiral which optimists like to refer to as a 'regulatory system'; such 'systems' unquestionably play a 'self-regulating' role for society — provided that society is prepared to accept the side-effects. Enough said. As for 'green areas' — trees, squares that are anything more than intersections, town parks — these obviously give pleasure to the community as a whole, but who pays for this pleasure? How and from whom can fees be collected? Since such spaces serve no one in particular (though they do bring enjoyment to people in general), there is a tendency for them to die out. Non-productive consumption attracts no investment because all it produces is pleasure.

LEFEBVRE, *supra* note 14, at 359.

[32] Lefebvre speaks of the nature of these kinds of leisure spaces, suggesting that,

> [a] remarkable instance of the production of space on the basis of a difference internal to the dominant mode of production is supplied by the current transformation of the perimeter of the Mediterranean into a leisure-oriented space for industrialized Europe. As such, and even in a sense as a 'non-work' space … this area has acquired a specific role in the social division of labour. … The quasi-cultist focus of localities based on leisure would thus form a striking contrast to the productive focus of North European cities. The waste and expense, meanwhile, would appear as the end-point of a temporal sequence starting in the workplace, in production-based space, and leading to the consumption of space, sun and sea, and of spontaneous or induced eroticism, in a great 'vacationland festival'.

Id. at 58.

[33] Although the authors are more optimistic than I am about the potential of the park as a space for transformation and democracy, the basic point is well made in Ash Amin and Nigel Thrift's recent book, CITIES: REIMAGINING THE URBAN. They argue that the city space can act as a kind of dynamic testing ground for democracy by virtue of the temporality of the city — its rhythms and pace.

> Sennett … is right to warn of the dangers of a new brand of 'vigorous' capitalism, marked by the frenzy of achievement, multiple existence and ever-encroaching work demands. These pressures are acutely felt in the city and test the capacity of people as reflective and social beings. City spaces — parks and other open spaces, sites of learning and recreation, centres of socialization — possess some potential here, in helping to slow down time and providing a fixed point of orientation. In fact, 'vigorous' cities … have started to introduce innovative urban time-management schemes (such as flexible office and childcare times) to help busy working people regain their personal and social space.

ASH AMIN & NIGEL THRIFT, CITIES: REIMAGINING THE URBAN 155-56 (2002).

23. Third, most parks, with a few exceptions are not efficient conduits for the dissemination of information.[34] While leafleteers and stump orators might once have sought the park as the most efficient means of conveying their message to as many people as possible, the contemporary environment is hardly conducive to this kind of speech.[35]

24. But there are other reasons why most parks make little sense as fora for speech. Among these is the fact that the park provides no context for the speech it allows. A person protesting a corrupt government official makes sense standing in front of the government building in which the official works. The same protest placed in a park is necessarily lessened in force by virtue of the disjunction between the message and the space. In this sense, all parks, even our idealized Hyde Park, exists as a means of warehousing speech, diminishing the value of the message by removing it from its most relevant spatial context.

25. The stark realization in the modern age of communication is that in order to effectively convey a message one must either harness the conduits of communication, using them to convey the message, or violently disrupt those modes of production in order to do the same. The park's relative inability to achieve either of these objectives suggests that we must look to other spaces that might have this kind of potential. It is with this in mind that we turn to the other traditional public forum elucidated by the *Hague* Court: the street.

3. In the Street

26. It requires no great leap of faith or logic to recognize that street space is very different from park space. Obvious physical differences exist between the two kinds of spaces; among these, the streetscape is defined by concrete, brick, and steel—punctuated by green, organic spaces. In the park, the opposite is true. These are inverse spaces; while streets are designed to move people and cars, parks actually impede traffic, requiring that traffic be routed around the impediment.

27. So why should these radically different spaces both emerge as historical sites for speech?

28. Parks, as we've discussed, can be explained, in part, by the symbolic and legal significance of Hyde Park in London as a forum for free speech. In addition, parks are

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[34] Unlike a few major parks in urban centers, most parks exist on the periphery of cities, or are located in suburban pockets of cities, away from the commercial zones. Thus, the potential of attracting "customers" in these spaces is relatively small.

[35] This is true for at least two reasons. First, contemporary American society does not generally use the park as a place to obtain information in the same way that a Hyde Park was used. Second, to the extent that parks still serve a purpose as sites for assemblage, time, place, and manner restrictions have undercut the spontaneity and vivacity of this right. *See* Thomas v. Chicago Park District, 534 U.S. 316 (2002) (upholding a neutral time, place, and manner ordinance requiring a permit for events involving 50 or more persons as constitutional without requiring additional regulations).

particularly well suited to gatherings of large numbers of people for rallies or demonstrations. But no particular street resonates historically as a situs for speech in the way that Hyde Park does.[36] The answer lies, perhaps, in the nature of the street itself as a conduit for the movement of people, goods, services and in the potential of speech to disrupt the flow of these instrumentalities of capitalism in a way that essentially amplifies speech in that forum. The remainder of this section considers this possibility.

a. What's a Street For?

29. Arguably, no space is more essential to the growth and maintenance of capitalism than the street. As spatial theorist Edward Soja points out:

> The intensification of land use in the urban centre redefined the form of the city and instigated a remarkable — and more opaque — social and spatial ordering of urban life. Accommodative technologies of transport and building (for example, the railway and the lift) accelerated this intensification and its associated wellspring of agglomeration economies. Rippling out from the Central Business District and employment nucleus was a zoned built environment of residentiary rings and radical sectors gridded to contain the attenuated daily journeys to work (for the urban proletariat) and the daily journeys to control workers (for the industrial bourgeoisie). The zonation was largely a matter of class, as the antagonistic structure of competitive industrial capitalism became spatialized in segregated and socially homogenous urban compartments and enclosures.[37]

30. To Soja, the "grid" of the city is the vascular system of late-stage capitalism, the essential space for moving the requisite widgets from place to place, the fundamental conduit of control. This sentiment is a reflection of Lefebvre's argument that roads cut through otherwise open spaces, fragmenting the landscape and dividing the city into discrete, manageable chunks.[38]

31. Without the street, or a street-like substitute, capital would become hopelessly viscous, resistant to the natural movements of production and re-production.[39] Given

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[36] *See* David M. Rabban, *The First Amendment in Its Forgotten Years*, 90 YALE L.J. 514, 555 (1981) (discussing various early court decisions denying speech rights in the streets because "[a] man has many constitutional and legal rights which he can not lawfully exercise in the streets of a city") (quoting Fitts v. City of Atlanta, 121 Ga. 567, 570 (1905)).

[37] EDWARD SOJA, POSTMODERN GEOGRAPHIES: THE REASSERTION OF SPACE IN CRITICAL SOCIAL THEORY 177 (1989).

[38] There are two ways in which urban space tends to be sliced up, degraded and eventually destroyed by this contradictory process: the proliferation of fast roads and of places to park and garage cars, and their corollary, a reduction of tree-lined streets, green spaces, and park, and gardens. The contradiction lies, then, in the clash between a consumption of space which produces surplus value and one which produces only enjoyment — and is therefore 'unproductive'.
LEFEBVRE, *supra* note 14, at 359.

[39] Discussing the nature of the flow of capital, Lefebvre remarks,

the importance of the street as a space for the proper functioning of capitalism, there can be no doubt that disruptions to this control system would necessarily require attention from a government whose primary interest is in self-perpetuation and the minimization of violent upheavals.[40] Bearing this in mind, we turn to the question of speech itself and how it operates in this environment.

b. Speech in the Street

32. By design, speech acts in the public forum interfere with the efficient transport of goods, services, and people. From the parade to the blockade to the leafleteer to the soapbox orator, each tolerated speech act diminishes the ease of movement between locations. Obviously, each of these activities levies a different cost on capital flow;[41] furthermore, the specific location of the speech will tend to increase or decrease the substantiality of the effect.[42]

33. Nevertheless, the disruptive potential of speech is evident — a daily parade through certain parts of major metropolitan areas could cause sustained damage to both the local and national economies.[43] In this sense, speech activities in public spaces compete with the "proper" use of these spaces[44] and must be limited to the extent that speech threatens to quash other activities or, for that matter, speech.[45] The question

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> [c]omparable observations, of course, might be made apropos of the whole street, a network of ducts constituting a structure, having a global form, fulfilling functions, and so on. Or apropos of the city, which consumes (in both senses of the word) truly colossal quantities of energy, both physical and human, and which is in effect a constantly burning, blazing bonfire.

Id. at 93.

[40] *See supra* note 22 and accompanying text.

[41] For instance, a parade will tend to have a more disruptive effect generally than a blockade, but the blockade may be particularly harmful to a specific business.

[42] A parade through Times Square in New York City will likely affect many more persons and businesses than one in downtown Iowa City.

[43] This is undoubtedly why most ordinances require consideration of:

> whether the proposed parade will substantially or unnecessarily interfere with traffic in the area contiguous to the route, whether there are available sufficient city resources to mitigate the disruption, whether there are available a sufficient number of peace officers to police and protect lawful participants and non-participants from traffic related hazards in light of the other demands for police protection, and whether the concentration of persons will prevent proper fire and police protection or ambulance service.

MacDonald v. City of Chicago, 243 F.3d 1021, 1026 (7th Cir. 2001) (internal quotations omitted).

[44] *See* Randall P. Bezanson and William G. Buss, *The Many Faces of Government Speech*, 86 Iowa L. Rev. 1377, 1473 (2001) (noting that "[t]he fundamental reason why government property, generally, is not open for speech purposes by all individuals is a practical one. The government would simply be unable to perform its proper functions if it had to work with and around a wide range of speech uses competing for government space.").

[45] One traditional justification for time, place, and manner restrictions is that they increase rather than decrease the amount of speech that can occur in a particular space by preventing conflicting uses. As the Court noted in *Thomas v. Chicago Park Distric*t,

> The picnicker and soccer player, no less than the political activist or parade marshal, must apply for a permit if the 50-person limit is to be exceeded. And the object of the permit system (as plainly indicated by the permissible grounds for permit denial) is not to exclude communication of a particular content, but to coordinate multiple uses of limited space, to assure preservation of the park facilities, to prevent uses that are dangerous, unlawful, or impermissible under the Park District's rules, and to assure financial

for government, then, is what activities should be allowed in the public forum and how these activities should or should not be regulated. The answers that courts have provided in response to these questions will be considered in detail in the following section.

III. Already Spoken For

34. What is evident from our discussion thus far is a mere adaptation of Lefebvre's basic concept, that people create space and that space subsequently defines the individuals that operate within the space.[46] For our more specific purpose, we have glanced at the ways in which the notion of speech spaces are created and how those spaces affect the speech that can occur within them. The previous section concentrated on the second half of this equation — on the notion that spaces like parks and streets have differing impacts and that those sites of speech are not pure but, rather, carved out of commercial spaces in either a literal (in the case of parks) or metaphysical (in the case of streets) sense.

35. This section concentrates on the space creation half of the equation, how courts have engaged in an ever-tightening project of spatial rationalization. And in this process of persistent fracturing of space, I argue that the notion of free speech, too, has become compartmentalized and weakened beyond repair.

A. The End of the Beginning

36. What *Hague* began in dicta, *Schneider v. New Jersey, Town of Irvington* codified as law.[47] Striking down an ordinance prohibiting leafleting on streets, the court declared:

> Municipal authorities, as trustees for the public, have the duty to keep their communities' streets open and available for movement of people and property, the primary purpose to which the streets are dedicated. So long as legislation to this end does not abridge the constitutional liberty of one rightfully upon the street to impart information through speech or the distribution of literature, it may lawfully regulate the conduct of those using the streets. For example, a person could not exercise this liberty by taking his stand in the middle of a crowded street, contrary to traffic regulations, and maintain his position to the stoppage of all traffic; a group of distributors could not insist upon a constitutional right to form a cordon across the street and to allow no pedestrian to pass who did not accept a tendered leaflet; nor does the guarantee of freedom of speech or of the press deprive a

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accountability for damage caused by the event. As the Court of Appeals well put it: "[T]o allow unregulated access to all comers could easily reduce rather than enlarge the park's utility as a forum for speech."
534 U.S. 316, 322 (2002) (citing Thomas v. Chicago Park District, 227 F.3d 921, 924 (7th Cir. 2000).

[46] *See supra* note 16 and accompanying text.

[47] 308 U.S. 147 (1939).

> municipality of power to enact regulations against throwing literature broadcast in the streets.[48]

37. In this sense, the very creation of the streets as a public forum has always been judicially viewed as a spatial niche carved out of the dominant purpose of the space — "the movement of people and property."[49] Early on, the Court recognized that the unfettered speech acts of cordoning the street, blocking traffic, were too disruptive to justify granting them constitutional status. Instead, it sought to limit the range of speech activities available within a space by creating it as non-confrontational space.

38. Although this distinction, between open spaces in which speech activities may be limited and closed spaces that define the speech activities themselves, may seem trivial, it makes sense in light of the Court's evolving spatial understanding of speech guarantees as described in the following section. More importantly, it suggests that these public fora, often lauded as zones of freedom and vigorously defended by contemporary scholars,[50] are actually spaces of co-option. These spaces provide a token sense of resistance without posing any real threat to the dominant ideology precisely because those kinds of threats are necessarily excluded by the judicial definition of those spaces.

39. This reasoning is readily evident in the Court's decision two years later in *Cox v. New Hampshire*.[51] In *Cox*, the Court upheld the conviction of a group of Jehovah's Witnesses marching in single file on a sidewalk in violation of a state statute prohibiting parades without a license.[52] In its decision, the Court noted:

> Civil liberties, as guaranteed by the Constitution, imply the existence of an organized society maintaining public order without which liberty itself would be lost in the excesses of unrestrained abuses. The authority of a municipality to impose regulations in order to assure the safety and convenience of the people in the use of public highways has never been regarded as inconsistent with civil liberties but rather as one of the means of safeguarding the good order upon which they ultimately depend. The control of travel on the streets of cities is the most familiar illustration of this recognition of social need. Where a restriction of the use of highways in that relation is designed to promote the public convenience in the interest of all, it cannot be disregarded by the attempted exercise of some civil right which in other circumstances would be entitled to protection.[53]

40. The diction used in *Cox* is remarkably similar to that used in *Schneider*, as both decisions remark upon the necessity of preserving the orderly movement of people

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[48] *Id.* at 160-61.
[49] *Id.* at 160.
[50] *See infra* Part V.
[51] 312 U.S. 569 (1941).
[52] *Id.* at 578.
[53] *Id.* at 574.

and property along streets. But where *Schneider* invalidated an ordinance banning leafleting in the interest of preventing littering, the *Cox* Court found that marching in rank lacked some ineffable First Amendment characteristic that would serve to protect it.

41. The ultimate distinction that we must draw between the two cases is the same observation mentioned earlier: parades are more disruptive to an urban capitalist system than a lone leafleteer.[54] Or, put differently, the governmental purpose of limiting littering is unacceptable because it diminishes the appearance of resistive speech while the limitation on parading at issue in *Cox* was acceptable precisely because the expressive activities in question were disruptive to the flow of commerce.

42. This is not to say that the actions of the Jehovah's Witnesses in *Cox* were truly problematic in a physical sense; at least one commentator has noted the weakness in this line of argumentation.[55] Rather, the disruption produced a metaphysical separation between the pretextual permission of the government to engage in speech (the public forum space) and the actual need of the government to limit dissent and encourage consumption (the commercial space).

43. What all of this points toward is the inevitable movement of the Court toward a more precise means of regulating space, one that suits the complexities of government's need to amplify certain messages while muting others. This evolution came to fruition in *Perry*.[56]

B. Perry: The Beginning of the End

44. Whatever importance the character of spaces had before the Court's decision in *Perry*, that case marked a radical expansion in the judiciary's micro-management of space. Before *Perry*, there were traditional public spaces and the mysterious "other."[57] *Perry* drew astonishing new lines that effectively controlled who could speak, where they could speak, and what could be spoken.

45. The *Perry* case involved two rival unions, the Perry Education Association (PEA) and the Perry Local Educators' Association (PLEA), each of whom had previously

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[54] *See supra* note 42.

[55] C. Edwin Baker, *Unreasoned Reasonableness: Mandatory Parade Permits and Time, Place, and Manner Regulations*, 78 NW. U. L. REV. 937, 998 (1984).

[56] Perry Education Association v. Perry Local Educators' Association, 460 U.S. 37 (1983).

[57] Although the decisions discussed *supra* clearly demarcate the boundaries of the traditional public forum, the Court only flirted with a more categorical approach prior to *Perry*. As Justice Brennan notes in his dissent,

> [T]his Court has not always required content neutrality in restrictions on access to government property. We upheld content-based exclusions in … [these cases because they] involved an unusual forum, which was found to be nonpublic, and the speech was determined for a variety of reasons to be incompatible with the forum. These cases provide some support for the notion that the government is permitted to exclude certain subjects from discussion in nonpublic forums.

Perry, 460 U.S. at 60 (Brennan, J., dissenting) (citations omitted).

represented some of the members of the Perry school district.[58] After an election was held to determine which of the two unions would acquire sole responsibility for negotiating on behalf of union members, the victorious PEA was granted sole access to distribute its materials via the school district's internal mail system.[59] The PLEA brought an action to gain access to this internal mail system on the grounds that the denial of access amounted to viewpoint discrimination in violation of its First and Fourteenth Amendment rights.[60]

46. Before resolving the PLEA's claim, Justice White's majority opinion sought to frame the question spatially. In doing so, he remarked that "[t]he existence of a right of access to public property and the standard by which limitations upon such a right must be evaluated differ depending on the *character of the property at issue.*"[61] He went on to develop the three-tiered structure that governs our modern conception of speech in public spaces: the traditional public forum, the designated public forum, and the non-public forum.[62]

47. The traditional public forum, as discussed in previous sections, refers to streets and parks — spaces that have traditionally and historically been open for public speech.[63] Within these spaces, a state may only "enforce a content-based exclusion [if] it . . . [can] show that its regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end" or if it uses content-neutral regulations to achieve a "significant government[al] interest, and leave[s] open ample alternative channels of communication."[64]

48. White described the designated public forum as an overarching category containing two distinct subdivisions. The first subcategory that he defined was the designated open public forum.[65] This division governed spaces which "the State has opened for use by the public as a place for expressive activity" with no additional limitations.[66] These spaces are governed by the same rules as the traditional public forum so long as the government chooses to leave the space open.[67] The second subcategory is the limited designated public forum.[68] Limited designated public fora are opened by the government in a narrower manner than the designated open public forum because the limited designated public forum can discriminate either by group[69] or by subject.[70] In selecting the group or subject, the government may permissibly refuse to allow

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[58] *Id.* at 39.
[59] *Id.* at 40.
[60] *Id.* at 41.
[61] *Id.* at 44 (emphasis added).
[62] *Id.* at 45-46.
[63] *Id.* at 45 (citing Hague v. CIO, 307 U.S. 496, 515 (1939)).
[64] *Id.*
[65] *Id.*
[66] *Id.*
[67] *Id.* at 46.
[68] *Id.* at 46 n.7.
[69] *See* Widmar v. Vincent, 454 U.S. 263 (1981).
[70] *See* City of Madison Joint Sch. Dist. v. Wis. Public Employment Relations Comm'n, 429 U.S. 167 (1976).

certain persons or subjects to be excluded; however, if one is a member of an included group or is speaking on an included subject, the same constitutional principles described above apply.

49. The third category is the non-public forum, which is the catchall category for government-owned spaces that do not fit into the first two categories.[71] So long as the government does not suppress free expression on the basis of viewpoint in these spaces, it will not run afoul of the Constitution.[72]

50. After determining that the school mailboxes fell into the third category,[73] the majority determined that the school board's decision to exclude the PLEA did not constitute viewpoint discrimination but, rather, discrimination on the basis of the "*status* of the respective unions."[74] That is, the elected union could be given access to the mailboxes to perform its duties without discriminating against the views of the rival union that lacked the need to access that space.[75] Relying on this analysis, the Court reversed the Seventh Circuit's decision and refused to grant relief to the PLEA.[76]

51. For our purposes, the significance of *Perry* is twofold. First, the judicial creation of zones of space is relevant to understanding how these spaces affect speech. True to Lefebvre's understanding of the impact of spatial relations on society, the creation of three kinds of governmental spaces enunciated in *Perry* defines how individuals can act within those spaces. Furthermore, these interactions are prescribed in more than just a legal sense, but in a social sense as well. These spaces exert social pressures that create legal norms and are subsequently reinforced by them. By way of example, the space in which the school board meets exerts pressures on the individuals present to discuss issues that pertain to the school board,[77] but when this system of social regulation breaks down,[78] law intervenes to define the space in a manner that is consistent with the underlying social control mechanism.[79] In this manner, the threat of disruption to commerce is minimized.

52. In *Perry*, the critical issue was managing potential disruption. Both the majority and the dissent noted that no *actual* disruption had resulted during the time in which both unions had access to the mailboxes.[80] The majority's justification for restricting

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[71] *Perry*, 460 U.S. at 46 ("Public property which is not by tradition or designation a forum for public communication is governed by different standards").
[72] *Id.*
[73] *Id.*
[74] *Id.* at 49 (emphasis in original).
[75] *Id.*
[76] *Id.* at 55.
[77] *See* LEFEBVRE, *supra* note 14, at 26 (describing how Lefebvre views space as both a means of production as well as control).
[78] *City of Madison*, 429 U.S. 167, 171 (1976).
[79] *See Id.* at 172-74.
[80] *See Perry*, 460 U.S. at 52 n.12 ("[T]here is no showing in the record of past disturbances stemming from PLEA's past access to the internal mail system or evidence that future disturbance would be likely."); *Id.* at 70 (Brennan, J., dissenting) (noting that "there is no evidence on this record that granting access to the respondents would result in

speech instead hinged on the *potential* disruption of the "property's intended function."[81] Justice White makes this clear when he notes:

> The differential access provided PEA and PLEA is reasonable because it is wholly consistent with the district's legitimate interest in "preserv[ing] the property … for the use to which it is lawfully dedicated. …" Moreover, the exclusion of the rival union may reasonably be considered a means of insuring labor-peace within the schools. The policy "serves to prevent the District's schools from becoming a battlefield for inter-union squabbles."[82]

53. In a footnote from that concluding sentence, White continues by stating that "[w]e have not required that such proof be present to justify the denial of access to a non-public forum on grounds that *the proposed use may disrupt the property's intended function*."[83] The irony is that until the Court created the relevant space, the intended function was the issue in dispute.

54. But more than just the question of how to *classify* space is at issue in *Perry*. The more important and perhaps more invidious concern is the rationalization of space by micromanagement. What the court nonchalantly endorses in *Perry* is the subdivision of speech spaces into smaller and smaller parts. The problem with this approach is that it effectively allows the government to break public spaces down into small enough units against which it can essentially discriminate on the basis of viewpoint without triggering strict scrutiny. By combining the notion of a small, discrete space with the *Perry* Court's status doctrine, government can lawfully engage in unlawful discrimination so long as it is careful about its means of doing so.

55. In effect, the Court's ongoing production of increasingly rationalized spaces has stretched free speech jurisprudence to the breaking point in terms of real, physical spaces. In the next section, I discuss the ways in which new spaces, like the Internet, have begun to crack the spatialized theoretical constructs of free expression and how they will ultimately force a re-examination of extant speech doctrine.

IV. Emerging Spaces

56. The progression of technology brings new legal problems for which courts must find answers. This has never been more relevant than it is in contemporary society. Experts predict that within the next two years, one billion people will be connected to the Internet.[84] As the population of this virtual community continues to grow

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labor instability. … In addition, there is no reason to assume that the respondents' message would be any more likely to cause labor discord when received by members of the majority union than the petitioner's messages would when received by the respondents.").

[81] *Id.* at 52 n.12.

[82] *Id.* at 50-52.

[83] *Id.* at 52 n.12 (emphasis added).

[84] *At Large Study Committee Releases First Discussion Paper on ICANN*, BUS. WIRE, July 13, 2001. "The Internet needs to be structured to serve users with diverse needs in every country and in a variety of languages, and it needs

exponentially, new legal issues will emerge. But at the same time, areas in which the law is more settled will also face disruption as they come into contact with this new environment. Nowhere will this disruption be more evident than in the area of free speech jurisprudence. This is true for at least two reasons.

57. First, although the Supreme Court has demonstrated its willingness to provide particular protection to the Internet as a protected space for speech, it has been entirely unclear about why this space is entitled to protection, or even what makes up the space.[85] In his majority opinion in *Reno v. American Civil Liberties Union*, Justice Stevens remarked:

> [A]nyone with access to the Internet may take advantage of a wide variety of communication and information retrieval methods. These methods are constantly evolving and difficult to categorize precisely. But … [t]aken together, these tools constitute a unique medium — known only to its users as "cyberspace" — located in no particular geographical location but available to anyone, anywhere in the world, with access to the Internet.[86]

58. Although the Court in *Reno* does not explicitly state that the Internet is a public forum in striking down the Communications Decency Act (CDA),[87] it seems to rely on that premise in making its decision. Furthermore, other than the uniqueness rationale, the Court provides no warrant for extending public forum protections to this space. The reason the Court fails to do so is that the twin justifications of history and tradition would not apply to the relatively short public life of the Internet. Justice Stevens, in fact, passively dismisses the question in distinguishing between the regulations upheld in *FCC v. Pacifica Foundation*[88] and the CDA when he notes that

> The Commission's order [in *Pacifica*] applied to a medium which as a matter of history had "received the most limited First Amendment protection," in large part because warnings could not adequately protect the listener from unexpected program content. The Internet, however, has no comparable history.[89]

59. The Court's move here is exceedingly clever in avoiding the issue. Instead of requiring that the space have acquired a history of promoting free speech, it develops

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to be able to accommodate future growth and technical innovations. So too does ICANN. There were over 400 million Internet users worldwide at the end of last year … 67% of these users are outside of the U.S. and about 52% of them are non-native English speakers. With projections over 1 billion Internet users by the end of 2005, and with most of the growth coming from Asia, Latin America and Eastern Europe, it is even more critical that ICANN be structured to represent the interests of the world's Internet users." *Id*.

[85] *Reno v. ACLU*, 521 U.S. 844 (1997).

[86] *Id*. at 851.

[87] *Reno,* 521 U.S. 844.

[88] 438 U.S. 726 (1978).

[89] *Reno*, 521 U.S. at 867.

an inverse theory that the *lack of regulation* is dispositive in ensuring speech rights.[90] The analytical pitfall of this approach is that any space that has not historically been subject to regulation should now be open. This is clearly not the case. The inherent problem is that if the Court had been forced to categorize this emerging technology in the old spatial understandings, it would have faced an impasse: either the old rules must change or the new medium must suffer.

60. Second, even if the Court wanted to find a way to leverage its old spatial analysis into the new media, it would face a Herculean task: how to do it. If the Court wanted to conceive of the entirety of cyberspace as a sort of parallel universe in which human beings interacted, it would be faced with extremely difficult questions: What are public spaces in this world? What spaces are private? How would spaces be divided?

61. There are no firm answers as of yet, but the legal storm clouds on the horizon paint an ominous picture, which I consider in more detail in the next section.

A. Dissecting Cyberspace

62. In striking down the CDA as a facially overbroad regulation of speech, the Court sent a strong message that the Internet is entitled to particular protection that arguably exceeds what is available in the physical world.[91] The justification for providing this elevated protection is best encapsulated in Judge Dalzell's supporting District Court opinion in the same case. He distinguished the Internet from traditional mass media in four ways:

> First, the Internet presents very low barriers to entry. Second, these barriers to entry are identical for both speakers and listeners. Third, as a result of these low barriers, astoundingly diverse content is available on the Internet. Fourth, the Internet provides significant access to all who wish to speak in the medium, and even creates a relative parity among speakers.[92]

63. The thrust of Dalzell's argument is that the Internet provides a leveling of the playing field for speakers that has never before existed.

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[90] Justice Stevens continues this analysis when he remarks:

> Neither before nor after the enactment of the CDA have the vast democratic forums of the Internet been subject to the type of government supervision and regulation that has attended the broadcast industry. Moreover, the Internet is not as "invasive" as radio or television. The District Court specifically found that "[c]ommunications over the Internet do not 'invade' an individual's home or appear on one's computer screen unbidden."

Id. at 868-69.

[91] For instance, a valid time, place, and manner restriction would have no trouble combating a person who sought to display placards containing pornographic images from a web site in Central Park, while the government could not legitimately shut down the offensive web site.

[92] ACLU v. Reno, 929 F. Supp. 824, 877 (E.D. Pa. 1996) (Dalzell, J., supporting opinion).

64. But in spite of the generally speech-supportive nature of the Court's decision in *Reno*, aspects of the case intimate that the Internet is not so much open as the CDA was badly drafted. The majority opinion enforces this view when it opines that:

> [I]n contrast to *Miller* and our other previous cases, the CDA thus presents a greater threat of censoring speech that, in fact, falls outside the statute's scope. Given the vague contours of the coverage of the statute, it unquestionably silences some speakers whose messages would be entitled to constitutional protection. That danger provides further reason for insisting that the statute not be overly broad. The CDA's burden on protected speech cannot be justified *if it could be avoided by a more carefully drafted statute*.[93]

65. The majority's implication is that a future statute that is more carefully drafted may be able to effectively limit speech in the forum.

66. The probable form of such future regulations is essentially mapped out by the dissent in *Reno*. Although Justice O'Connor concedes in her opinion that portions of the existing statute are overbroad and "stray from the blueprint our prior cases have developed for constructing a 'zoning law' that passes constitutional muster,"[94] the bulk of her decision focuses on converting cyberspace into geographic space that is analogous to the physical world. In doing so, she remarks:

> Cyberspace undeniably reflects some form of geography; chat rooms and Web sites, for example, exist at fixed "locations" on the Internet. Since users can transmit and receive messages on the Internet without revealing anything about their identities or ages … however, it is not currently possible to exclude persons from accessing certain messages on the basis of their identity. Cyberspace differs from the physical world in another basic way: Cyberspace is malleable. Thus, it is possible to construct barriers in cyberspace and use them to screen for identity, making cyberspace more like the physical world and, consequently, more amenable to zoning laws. This transformation of cyberspace is already underway. … Internet speakers (users who post material on the Internet) have begun to zone cyberspace itself through the use of "gateway" technology. Such technology requires Internet users to enter information about themselves — perhaps an adult identification number or a credit card number — before they can access certain areas of cyberspace, much like a bouncer checks a person's driver's license before admitting him to a nightclub.[95]

67. The problems inherent in this approach are numerous. First, O'Connor's misunderstanding of the nature of the technology undercuts her analysis. While she argues that the spaces for speech on the Internet occur in "fixed 'locations,'" this is

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[93] *Reno*, 521 U.S. at 874 (emphasis added).
[94] *Id.* at 886 (O'Connor, J., concurring in the judgment in part and dissenting in part).
[95] *Id.* at 890.

not always true.[96] For instance, many chat rooms occur using peer-to-peer technology, which is essentially decentralized and allows individual users to connect directly to each other without going through a fixed intermediary.[97] Peer-to-peer connections such as these may last seconds or hours; furthermore, as users log on and off of the Internet, the physical address[98] of their computers will often change.[99] As a result, the location of chat rooms, and even Web sites, are essentially ephemeral. Because the growth in the use of Internet services requires increasingly sophisticated methods for distributing bandwidth loads, the future of network interactions will continue to tend toward peer-to-peer technologies. In this kind of environment, where spaces are constantly shifting, O'Connor's notions of fixed spaces that can be zoned tend to break down.

68. Second, O'Connor argues that "[c]yberspace is malleable."[100] What she appears to mean by this is that the Internet, because it essentially operates at a lower cost than brick and mortar enterprises, can more easily develop barriers to limit access to certain individuals (presumably minors). In doing so, she ignores the findings of fact from the District Court as well as the explicit concern of the majority that establishing checkpoint systems in cyberspace "would impose significant [financial] burdens on noncommercial sites, both … because the cost of creating and maintaining such screening systems would be 'beyond their reach.'"[101] The logical outcome of this kind of system would probably have the opposite effect of what O'Connor intends, effectively forcing sites to turn commercial or pull their material, resulting in the same number of commercial, pornographic Web sites while decreasing access to the messages of organizations like "the ACLU, Stop Prisoner Rape or Critical Path AIDS project."[102]

69. But O'Connor's most severe oversight is her presumption that technology will somehow catch up and make her zoning scheme practicable. She grudgingly admits: "[a]lthough the prospects for the eventual zoning of the Internet appear promising, I agree with the Court that we must evaluate the constitutionality of the CDA as it applies to the Internet as it exists today. … Given the present state of cyberspace, I

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[96] *Id.*
[97] As a representative example, see Abbott Systems, Inc., *AbbottChat Peer-to-Peer IM*, *at* http://www.abbottsystems.com/atchat.html (last visited Aug. 25, 2003).
[98] For an explanation of the technical aspects of how Internet addresses work, see John Brogan, *Much Ado About Squatting: The Constitutionally Precarious Application of the Anticybersquatting Consumer Protection Act*, 88 IOWA L. REV 165, 167-68 (2002).
[99] Most Internet Service Providers (ISPs) take advantage of the Dynamic Host Configuration Protocol (DHCP) as a means of efficiently allocating IP addresses to end-users. "One feature of DHCP is the ability to dynamically 'lease' IP addresses: an address is leased for a specified time, rather than permanently assigned. This reduces the number of unique IP addresses required to the maximum number of network devices that need to be operating simultaneously." Oregon State University Information Services, *Bootp/DHCP General Overview*, *at* http://www.net.oregonstate.edu/internet_applications/bootpdhcp/bootp.general.html (last visited Dec. 12, 2002).
[100] *Reno*, 521 U.S. at 890.
[101] *Id.* at 856-57.
[102] *Id.* at 857 n.23.

agree with the Court that the 'display' provision cannot pass muster."[103] The problem is that the constantly evolving technical developments that drive various communicative technologies on the Internet will always remain one step ahead of the technologies that filter them. Filtering gateways will always struggle to catch up with new technology, or for that matter, the sheer size of the Internet itself. Implementing technical blockades would be a Sisyphean task at best.

B. Rationalizing Cyberspace

70. The most invidious aspect of O'Connor's dissent, however, is not her notion that the Internet can be effectively checkpointed, but rather, that it can be divided in the same way that the physical world is. This is an essential element of the spatial model that governs the First Amendment, because without clearly defined spaces, fixed rules cannot apply. If the Court cannot engage in the first step of its analysis — determining the space in which the alleged speech activity is taking place — it cannot proceed with the existing analysis. To move forward, it must either abandon its approach of applying the rules of the physical world to cyberspace and fashion new rules or it must force cyberspace to look more like the real world. In either case, the rules that govern the speech guarantees, as we understand them, will be broken.

71. This rupture is inevitable. The current Court is already deeply divided over the spatial interpretation of the First Amendment. Nowhere is this division more clear than in *Denver Area Educational Telecommunications Consortium, Inc. v. FCC*.[104] Of the six opinions written in this case,[105] Justice Breyer's somewhat incomprehensible majority opinion nevertheless describes the growing rift accurately.

> Like petitioners, Justices Kennedy and Thomas would have us decide these cases simply by transferring and applying the literally categorical standards that this Court has developed in other contexts. For Justice Kennedy, leased access channels are like a common carrier, cable cast is a protected medium, strict scrutiny applies, [the statute] fails this test, and, therefore, … is invalid. For Justice Thomas, the case is simple because the cable operator who owns the system over which access channels are broadcast, like a bookstore owner with respect to what it displays on the shelves, has a predominant First Amendment interest. Both categorical approaches suffer from the same flaws: They import law developed in very different contexts into a new and changing environment, and they lack the flexibility necessary to allow government to respond to very serious practical problems without sacrificing the free exchange of ideas the First Amendment is designed to protect.[106]

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[103] *Id.* at 891 (footnote omitted).
[104] 518 U.S. 727 (1996).
[105] Justice Stevens and Souter each concurred; Justice O'Connor concurred in part and dissented in part; Justice Kennedy, joined by Justice Ginsburg, concurred in part and dissented in part; and Justice Thomas, joined by Justice Scalia, and Chief Justice Rehnquist, concurred in the judgment in part and dissented in part. *Id.*
[106] *Id.* at 739-40 (citations omitted).

72. Breyer is concerned with the compartmentalized spatial analysis that has defined the Court's path through the First Amendment for most of the last century. In questioning this legacy approach, Breyer is certainly correct. But at the same time, his effort to develop an *ad hoc* approach tailored to provide flexibility in a new environment has been subject to intense criticism[107] largely because it seeks to pick-and-choose from the palate of judicial options.[108]

73. Without delving into the actual issues of cable regulation, which would exceed the scope of this article, it is worth noting that the issues facing cyberspace are, potentially, even more fraught with complications than cable regulation, largely because ownership of the whole Internet, or any part thereof, is even more complex than cable systems. Although the Court managed to evade the issues raised in *Denver* in deciding *Reno*, the issues have not disappeared. These issues will continue to re-emerge until the Court is forced to make a choice between the current, hopelessly confusing spatialized analysis and a new approach. Given this eventuality, the best possible course of action for speech advocates may be to wait for the dust to settle. The worst approach, on the other hand, may be to push piecemeal solutions that prop up this dying regime and delay its impending collapse. In the final section, I discuss some representative proposals of this variety before concluding.

V. Not Putting the Pieces Together

74. Conventional wisdom suggests that the best way to protect the Internet as a forum for free speech is to find ways to make it like the fora that receive special protection in the physical world. This notion is bolstered by the general method by which courts work — the adding or removing of protections incrementally — but not in one fell swoop; to do so would risk undermining the legitimacy of the Court, and as a consequence, the rule of law.

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[107] *See, e.g.,* David Tobenkin, *The Supreme Court's Denver Nondecision and the Need for a New Media Speaker Paradigm*, 7 S. CAL. INTERDIS. L. J. 205 (1998).

[108] Justice Breyer's decision clearly indicates his interest in avoiding rigidity when he notes:

> This tradition [of treating different mediums differently] embodies an overarching commitment to protect speech from government regulation through close judicial scrutiny, thereby enforcing the Constitution's constraints, but without imposing judicial formulas so rigid that they become a straitjacket that disables government from responding to serious problems. This Court, in different contexts, has consistently held that government may directly regulate speech to address extraordinary problems, where its regulations are appropriately tailored to resolve those problems without imposing an unnecessarily great restriction on speech. Justices Kennedy and Thomas would have us further declare which, among the many applications of the general approach that this Court has developed over the years, we are applying here. But no definitive choice among competing analogies (broadcast, common carrier, bookstore) allows us to declare a rigid single standard, good for now and for all future media and purposes. That is not to say that we reject all the more specific formulations of the standard--they appropriately cover the vast majority of cases involving government regulation of speech. Rather, aware as we are of the changes taking place in the law, the technology, and the industrial structure related to telecommunications, we believe it unwise and unnecessary definitively to pick one analogy or one specific set of words now.

Denver, 518 U.S. at 741-42 (citation omitted).

75. This strategy, as applied to the Internet, however, would be exactly backward, and would produce negative consequences in two ways. First, the continual strategy of cobbling free speech guarantees together quiesces the need to re-evaluate the existing structure. That is, while new technologies, as Justice Breyer notes in *Denver*, require new solutions rather than the imposition of the same, tired strategies, the inverse is also true.[109] New technologies also force us to reconsider whether or not the basic doctrine has lost its force.

76. Even more worrisome is the potential that the rigid classification scheme will somehow be converted and effectively institutionalize speech in the way that Justice O'Connor seems to hope for in *Reno*.[110] In that case, the Internet will cease to be a site of potential resistance and will instead be converted into another space in which Lefebvre's criticism rings eerily true: a commercial space like a street, a space of simulated leisure like a park. And should cyberspace begin to be divided in the way that the Court has demonstrated it prefers to manage space, then there is little hope of the value of alternative communications urged by people like Lawrence Lessig, who urge us to do things like blog in order "to develop a rich and serious alternative mode of addressing these issues that's sometimes outside of the control of existing media. Blogging is one of the most important opportunities we have for finding alternative channels to discuss these things."[111]

77. A number of scholars have suggested various means by which cyberspace can be physicalized in ways that preserve the linkages of the physical world. Among these, Noah Zatz has carefully considered the importance of liminal spaces (like sidewalks outside buildings) as spaces of resistance and discussed how those spaces might be replicated on the Web.[112] Without addressing the specifics of his proposal, he misses the forest for the trees. In an environment in which the Internet is receiving a great deal of protection for speech throughout the space, subdividing a portion of it to receive special protection is likely to usher in Justice O'Connor's vision of a "zoned" Internet. Likewise, other scholars' suggestions that the Web be treated like a city in which certain areas are designated by the government for speech fall victim to the same intellectual pitfall.[113]

78. Rather than adopting piecemeal technological or legal solutions to the future problems that speech on the Internet will face, the better solution may be to wait-and-see. Given the divisiveness of the Court's current analysis of free speech, the coming challenges are liable to force a systemic re-evaluation of speech doctrine.

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[109] *Id*. at 739-40 (citation omitted).
[110] *Id.* at 760-66 (Part IV of opinion).
[111] *See* Eric Hellweg, *Lawrence Lessig Talks Copyright and the Supreme Court*, South by Southwest, *at* http://www.sxsw.com/interactive/tech_report/recent_interviews/l_lessig/ (last visited Dec. 13, 2002).
[112] Noah D. Zatz, *Sidewalks in Cyberspace: Making Space for Public Forums in the Electronic Environment*, 12 HARV. J. L. & TECH. 149 (1998).
[113] *See, e.g.,* David J. Goldstone, *A Funny Thing Happened on the Way to the Cyber Forum: Public vs. Private in Cyberspace Speech*, 69 U. COLO. L. REV. 1 (1998).

VI. Conclusion

79. A spatialized understanding of the First Amendment is, perhaps, the greatest threat to free speech. Because the Court has always thought of speech as a secondary, tolerably interfering aspect of dominant (i.e. commercial) space, it has been subject to numerous regulations on the basis of spatial rationalization (as in *Perry*) and allegedly content-neutral time, place, and manner restrictions. As such, the government has had substantial power to control space and, in doing so, to control speech within those spaces.

80. The Internet resists these kinds of categorizations, however, and in doing so offers real potential for resistance. Nascent efforts at regulating this space, like the CDA, have been struck down by the Court. Additional attempts will come. Hopefully, these new efforts will force the Court to re-work a spatial model that has long since grown sterile, and in doing so, provide the potential for truly open discourse.

8 Va. J.L. & Tech. 6 (2003), *at* http://www.vjolt.net