

## **SPEECH OUT OF DOORS**

Even in an age characterized by increasing virtual presence and communication, speakers still need physical places in which to exercise First Amendment liberties. This book examines the critical intersection of public speech and spatiality. Through a tour of various places on what the author calls the “expressive topography,” the book considers a variety of public speech activities, including sidewalk counseling at abortion clinics, residential picketing, protesting near funerals, assembling and speaking on college campuses, and participating in public rallies and demonstrations at political conventions and other critical democratic events. This examination of public expressive liberties, or speech out of doors, shows that place can be as important to one’s expressive experience as voice, sight, and auditory function. Speakers derive a host of benefits, such as proximity, immediacy, symbolic function, and solidarity, from message placement. Unfortunately, for several decades the ground beneath speakers’ feet has been steadily eroding. The causes of this erosion are varied and complex; they include privatization and other loss of public space, legal restrictions on public assembly and expression, methods of policing public speech activity, and general public apathy. To counter these forces and reverse at least some of their effects will require a focused and sustained effort – by public officials, courts, and of course, the people themselves.

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# Speech Out of Doors

## **PRESERVING FIRST AMENDMENT LIBERTIES IN PUBLIC PLACES**

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For Brian Tamanaha – scholar, mentor, friend.

*When one allows a political association to place centers of action at certain important points of the country, its activity becomes greater and its influence more extended. There men see each other; means of execution are combined and opinions are deployed with the force and heat that written thought can never attain.*

Alexis deTocqueville, *Democracy in America*

*At the heart of our jurisprudence lies the principle that in a free nation citizens must have the right to gather and speak with other persons in public places.*

*International Society for Krishna Consciousness v. Lee*,  
505 U.S. 672, 696 (1992) (Kennedy, J., concurring)

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## PREFACE

This is a book about the exercise of expressive liberties – speech, assembly, petition, and press – in public places. This may seem an odd time for a book about traditional – some might say “old-fashioned” – public expression. The growth in online discourse has been nothing short of phenomenal. Do protesting and pamphleteering still matter? Haven’t we evolved beyond such seemingly primitive forms of communication? Haven’t speakers already migrated from “meatspaces” to more virtual forums? Who cares whether citizens can engage one another in “bricks and mortar” places when they can reach a potential audience of *millions* online?

The short answer to this last question, at least, is that we should all care about the preservation of traditional First Amendment liberties. In many ways, public places were the birthplaces of American democracy. Our First Amendment was shaped and molded on the ground – by people who gathered out of doors to protest, proselytize about their faiths, and engage fellow citizens and officials on matters of public concern. Further, this sort of public expressive activity – “speech out of doors” – is perhaps the most tangible evidence of popular sovereignty, the idea that under our Constitution it is *the people* who ultimately govern. Public places remain important sites of public politics, contention, and democracy. This is particularly so with respect to poorly financed groups and causes, which, even in an advanced technological era, have little real communicative power. In sum, we all have a stake in the preservation of public First Amendment liberties and the places that facilitate their exercise.

Although this is first and foremost a book about particular First Amendment liberties, the subject matter necessarily touches upon broader themes. Our expressive culture is rapidly evolving. Fundamental terms like “assemble,” “speech,” “petition,” and “press” have taken on new forms and meanings in the digital age. There are many expressive

benefits associated with this transformation. As has been widely observed, speakers can communicate with larger audiences more cheaply and efficiently than ever before. But we ought also to note that the manner in which communication among public citizens occurs is changing in fundamental respects. In general, expression is becoming more virtual (and hence less physical), more distant in both space and time, more private, and more narrowly channeled to audiences based on individualized preferences and interests. These changes signal a critical divide in our expressive culture, between more traditional physical and tangible forms of expression and new virtual forms. Although this book is primarily about more traditional types of expression, its findings and conclusions are connected in important ways to our ongoing expressive evolution.

In conjunction with that dynamic evolution, a consensus seemed to be forming that traditional public expression had ceased to be either prevalent or important to American expressive culture. Although geographers, political scientists, and other social scientists remained intensely interested in public places, with a few devoting special attention to public expression, First Amendment scholars seemed to abandon the field for trendier subjects and agendas. Like the general public, they seemed to have concluded that speech out of doors no longer mattered. To the contrary, I observed first one, then another, and then still another incident in which speakers sought to engage in public expression in the most traditional of places – on public streets and sidewalks, in public parks and squares, and in the personal spaces of public audiences. Many of these speakers were not poorly financed either; they too had access to keyboards and modems. Still, they chose to engage the public in more physical and tangible ways and venues.

Some of these speakers and assemblies were allowed to exercise First Amendment liberties with minimal interference. But in many cases, speakers were denied the opportunity to reach intended audiences or permitted to speak only under the most restrictive conditions. In particular, I noted the frequent physical displacement of speakers and speech. Some of that displacement was owing to public order laws, regulations, and policing practices. Just as often, however, displacement resulted from various architectural, social, and political forces. In any event, my examination indicated that speakers have not, as the conventional wisdom suggests, simply abandoned either traditional forums or traditional forms of public expression.

As I was writing this book, I frequently wondered whether it was to be an obituary for or triumphant celebration of speech out of doors in

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America. The book I have written is ultimately neither of these things. As noted, and as the many examples in this book show, the people have not abandoned public places or traditional public liberties. For those who remain skeptical, I invite you to visit the trove of photographs and videos now available on the Web and execute a simple search for “protest” or “demonstration.” At the same time, much has changed since colonial Americans first took to the streets and public squares to protest taxes and present other grievances against public officials. Most of these changes – architectural, social, political, and legal – have resulted in a vastly diminished “expressive topography.” This book is not a simplistic or naïve call for Americans to “take to the streets” or to reclaim public spaces in some revolutionary sense. It is, however, at once a reminder of the enduring significance of public expressive liberties and a warning with regard to their steady and continuing erosion.

As will become apparent, no single scholarly paradigm can explain something as complex and dynamic as the exercise of First Amendment liberties in public places. This book draws upon research in a host of disciplines, including law, history, geography, sociology, political science, philosophy, anthropology, architecture, and urban studies. As disparate as these disciplines may seem, they all have something important in common – each has devoted systematic attention to place, public protest and contention, or both subjects. Social science scholars have examined the character of public places and the relationship between place and socialization, citizenship, community, and political activism. When they have engaged speech out of doors, legal scholars have focused primarily on narrower doctrinal and theoretical concerns relating to freedom of speech. Although this is primarily a book about First Amendment liberties, interdisciplinary concepts like “place,” “public contention,” and “repression” are critical to the analysis. In brief, the present scope of our public expressive liberties is not solely a function of the content of casebooks, court reporters, and legal treatises. Speech out of doors is a social and political phenomenon; one must draw upon knowledge and information in diverse fields of study to understand it.

Social scientists who study place and public contention will benefit from this book’s insights regarding the manner in which law conceptualizes and shapes public places and public expression. At the same time, lawyers, judges, and legal scholars will better appreciate the many *nonlegal* forces that affect public expressive liberties. The book’s multidisciplinary examination will challenge (or, it is hoped, at least lead to greater reflection concerning) deeply ingrained ideas regarding public expression, free speech theories, and popular sovereignty. Finally, this book will

contribute to contemporary discussions regarding the delicate balance between security and civil liberties. As we shall see, public places and speech out of doors are deeply affected by the prospect of terrorist attacks and other threats to public order and safety.

As a result of this study, I am convinced that speech out of doors remains critical to public life, public discourse, and public politics. It is therefore essential that we preserve adequate “breathing space” for First Amendment liberties in public places. Others may or may not ultimately share my convictions. Regardless, I hope at least to challenge those who believe that public speakers and traditional public expression are relics of little or no relevance to contemporary social, political, or expressive cultures; that public assemblies and speakers are, at worst, dangerous mobs or, at best, unnecessary inconveniences; that speech out of doors must generally be repressed in the name of “security” and “public order”; and that expression prohibited in one place can be just as effectively conveyed someplace else. In addition to addressing these and other fundamental issues, the book offers various proposals for preserving First Amendment liberties in public places. As is entirely fitting in a popular democracy, much will depend upon the people themselves. We are all ultimately responsible for the preservation of the expressive topography and our public expressive liberties.

## ACKNOWLEDGMENTS

I am deeply indebted to scholars in a wide variety of disciplines whose research and ideas influenced my examination of public expression. This book relies upon and incorporates ideas from a range of disciplines. Two groups of scholars were particularly influential: geographers, anthropologists, urbanists, and other social scientists who have elevated space and place to subjects of serious scholarly attention, and political scientists who have studied the various facets of public contention. I have also benefited, of course, from the work of many First Amendment scholars. I would like to specifically recognize the late Harry Kalven, Jr., whose examination of First Amendment liberties during the Civil Rights Era convinced me of the *contemporary* importance of speech out of doors.

The research for this book has occupied me for several years. Although the book was conceived and written as a separate text, some of the central ideas are discussed in previously published articles. These include “Speech and Spatial Tactics,” 84 *Tex. L. Rev.* 581 (2006); “Space, Place, and Speech: The Expressive Topography,” 74 *Geo. Wash. L. Rev.* 439 (2006); and “Clouds, Cameras, and Computers: The First Amendment and Networked Public Places,” 59 *Fla. L. Rev.* 1 (2007).

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