The importance of space to expressive freedom has a long and often unexamined history. As Timothy Zick notes, in American legal decisions concerning expressive freedom, space is often viewed as a “background” rather than a “fundamental” principle (2009b, p. 8). That is especially troubling given that ethical questions about expressive freedom often fall back on legal arguments, but also because ideas about public and private space have long played a role in justifying decisions related to the ethics of expressive freedom. As a result, space is reduced to a background principle not only in legal discussions about expressive freedom, but also in discussions about the ethics of expression.

This background problem increases as citizens, policymakers, and judges attempt to understand the spatiality of freedom of expression in the virtual, digital world through standards that were developed to deal with a physical, analog environment. While spatial problems are not the sole domain of the digital world, the development of digital technologies have made spatial questions ever more important and ever more complicated. As a result, the spatiality of expressive freedom in a democratic society is increasingly becoming an issue citizens ignore at their own peril.

Several examples illustrate how spatial problems complicate issues of expressive freedom in the digital world. In 2006, Lee Siegel, senior editor of The New Republic, was suspended after it was discovered he had anonymously posted messages to his own blog (a blog that was affiliated with the magazine). Siegel was accused of posting messages to his blog (using the alias “sprezzatura”) and defending his articles and assailing his critics. As one blog contributor noted, “sprezzatura appears only to weigh in on (The New Republic) forums to admonish and taunt posters who dislike Lee Siegel” and concluded, “I would say with 99 percent confidence that ‘sprezzatura’ is a Siegel alias.” As an example, “sprezzatura” posted the following comment in reaction to Siegel’s posting about Jon Stewart, at that time the host of “The Daily Show”: “Siegel is brave, brilliant and wittier than Stewart will ever be. Take that, you bunch of immature, abusive sheep” (Aspan, 2006, p. 4).

After his suspension, Siegel admitted he was “sprezzatura” and said, “I’m sorry about my prank, which was certainly not designed to harm a magazine that has been my happy intellectual home for many years.” However, in a New York Times Magazine interview, Siegel was less certain whether he had done anything wrong.
It never occurred to me … that I was doing something wrong. Anonymity is a universal convention of the blogosphere, and the wicked expedience is that you can speak without consequences. What was wrong is that I did it … as a senior editor of the magazine.

(Aspan, 2006, p. 4)

Or take the observations of Ricky Gervais, whose comedy has long pushed and critiqued social norms, about his use of Twitter. Gervais compared using Twitter to “going into a toilet stall and arguing with graffiti” (Marchese, 2019, p. 24). However, he has also acknowledged that he behaves differently on Twitter than he would in other spaces. As he told the New York Times’ David Marchese:

No one would talk to you in the street like they do on Twitter. They’d never come up and say, “Your articles stink.” They’d never do that because they’re normal, but they’re not normal on Twitter because there’s no nuance, no irony, no conversation there.

(Marchese, 2019, p. 24)

As these examples illustrate, how people choose to express ideas and thoughts is to some degree based on assumptions they make about the nature of the space in which that freedom is exercised. In other words, the ethical, expressive behavior of citizens in public places is shaped by the space that they use to express themselves. This chapter examines the relationship between space and the ethics of freedom of expression, and suggests that we can no longer afford to treat space as a background principle when trying to understand the ethics of freedom of expression. Instead, we need to understand the complex and important role that space plays in questions about the ethics of expressive freedom in the digitalized, mediated world.

SPACE, FREEDOM OF EXPRESSION, AND THE PUBLIC FORUM

The idea that space plays a role in understanding the ethics of freedom of expression is not a new idea. As studies from a range of scholars have shown (e.g., de Certeau, 1984; Goffman, 1963; Sennett, 1994), the space that people use often brings with it expectations about what is acceptable. For example, Richard Sennett has written about expressive activities in public places from mid-1700 theater crowds in London and Paris through people’s behavior in coffee houses and public parks in the 1900s. Unexpectedly, Sennett notes, people were allowed to be more “embarrassingly emotional” in more public settings as compared to private settings (1978, p. 73).

In western democracies, the ethics of expressive freedom is often viewed through the lens of the public/private dichotomy. As a result, governmental or societal limits on expression are at least somewhat dependent on where citizens seek to express themselves, with democracies often trying to set aside public space for the exchange of ideas. Often referred to as the idea of the public forum, scholars have long viewed the idea of the public forum as being central to the realization of democracy (Kalven, 1965). However, scholarly discussion about the public forum is most commonly viewed through the lens of legal and policy analyses (see Zick, 2009b), ignoring the many ethical questions embedded in the spatial issues upon which the public forum is constructed. This is especially troublesome because legal discussion about the public forum does not seriously begin until the late 1930s in the United States (see Hague v. CIO, 1939), while popular discourse concerning something called the public forum can be found in the United States at least as early as the 1800s.¹ This suggests that the public forum was a central ethical component of American democratic thought far earlier than recognized by either law or policy.
The ethical, social, and cultural development of the public forum, rather than the legal history, reveals that the ideas that ground the public forum have shifted over time. Rather than there being a single idea about public space in American democratic thought, ideas about the public forum are complex and dynamic, shifting to respond to cultural movements within society. Responding to discourses about the role of public space and democratic life, these shifts brought with them fundamental assumptions about the ethics of public life and the public forum. I refer to those shifts as spatial frameworks in an attempt to capture the connections between expression, the space within which that expression is performed, the regulatory and cultural constraints that are imposed on both expression and space, and the ethical role public space is envisioned as playing in democracy. These spatial frameworks allow us to see that the public forum, rather than being a fixed and stable concept, is an idea that changes along with American culture. It also allows us to see that the public forum, rather than being primarily a legal or policy construction, is a concept that tells us much about the changing ideas about the spatial ethics of public life and expressive freedom.

Research shows that three spatial frameworks have dominated ideas about the public forum in American history (Allen, 2011). The Property Framework, dominant in the United States until about the 1920s, viewed governmental ownership and control of public space as being vital to the creation of virtuous citizens. The Place Framework, achieving prominence in the 1930s, had strong connections to American pragmatism. It viewed public space as being vital to the creation of an active community based on discussion and sought to identify distinct areas where citizens would come together to debate the issues of the day. The Planning Framework dominates much of current thinking about the public forum. It is concerned with the categorization of public expressive space as a forum of social control. The assumptions about public space articulated in each of those spatial frameworks, described below, tell us much about spatial ethics and freedom of expression.

The Property Framework

The Property Framework carved out a role for public space to play in training people to be virtuous citizens. This was accomplished by encouraging citizens to become property owners. Granted constitutional status in 1791 (see U.S. Const., amend. V), property rights were originally viewed as being the central way of protecting all other rights of citizenship (Ely, 1992). As such, property rights were not simply a way of securing the control of space and territory, or of securing financial resources, but also a way of creating more virtuous citizens. In the eyes of people such as Thomas Jefferson and John Adams, it was through land ownership that citizens would feel connected to the land and work to become responsible citizens (Alexander, 1997, pp. 43–59). Property rights also enabled citizens to become involved in public life, allowing them to express their ideas freely (Alexander, 1997, p. 31).

For some, this period was viewed as a period of intense individualism. However, that individualism was also guided by the notion that those private interests were embedded in ideas about the common welfare (Alexander, 1997, p. 29). Property was vital to the realization of that goal, with the free circulation of property being the way for citizens to realize virtue and to have the freedom to participate in public life (Alexander, 1997, p. 31). These ideas brought with them assumptions about how democracy ought to function, where property-owning citizens have freedom of entry with an absence of limits, where social mobility is possible, and, perhaps most importantly, where possessions are used not only for individual gain but also for the creation of the common good (Fisher, 1988, p. 66).
Some have argued that the connections between virtue and property, so central to early American legal thought, diminished by the late nineteenth century, replaced by *laissez-faire* constitutionalism, a doctrine that was far more interested in creating economic freedom for individuals in the marketplace than it was for developing virtuous citizens (see Jones, 1967; McCurdy, 1975). However, more recent scholarship has demonstrated that this movement was more complex than originally thought and that *laissez-faire* constitutionalism still brought with it ideas about the public good (Alexander, 1997, p. 249). That notion was officially recognized by the U.S. Supreme Court when it ruled that the government could regulate private property affected with a public interest. Known as the “affectation doctrine,” it recognized that certain kinds of property helped “maintain a proper social order” within society (Alexander, 1997, p. 263).

Maintenance of that proper social order was achieved through the primary legal tool used to manage public space, the police power. It gave government the right to act in ways that promoted the public welfare (Freund, 1976/1904, p. 3). Much of the discussion of the police power in those years was shaped by the Ernst Freund’s classic work, *The Police Power* (1976/1904). Freund, a progressive University of Chicago law professor who is often credited with beginning the administrative law movement, divided ideas about the police power into three spheres or categories: (1) a “conceded sphere” where ever-increasing levels of regulation affect the safety, order and morals of society, (2) a “debatable sphere” concerned with the regulation of production and distribution of wealth, and (3) an “exempt sphere” where moral, intellectual and political movements are protected by individual liberty (Freund, 1976/1904, p. 11). While Freund admitted that these spheres often overlap, this categorization was intended to make administrative law not only easier for government to use, but also as a way to constrain government. For Freund, “speech and press are primarily free, but that does not prevent them from being subject to restraints in the interest of good order or morality” (Freund, 1976/1904, p. 11). This management of the speech and press was acceptable as long as it was done in a way that was “uniform, impartial and reasonable” (Freund, 1976/1904, p. 521).

Flowing from the police power, parks and streets were viewed as government property, with the government making decisions about what uses would contribute to the creation of a more virtuous citizenry. This is reflected not only in the dominant test of freedom of speech used during this period, the bad tendency test, but also in ideas about the use of public parks. Following the landscape architecture movement in the late 1800s and early 1900s, public space was vital to improving people’s health, but also to providing moral uplift and teaching people how to be better citizens. As a result, Frederick Law Olmsted, after designing the great public space that is New York’s Central Park, instituted a police force to teach people how to properly use the space (Schuyler, 1986, p. 114). This idea is also reflected in the dominant U.S. Supreme Court decision of the era, *Davis v. Massachusetts*, where it was ruled that a city could control its parks much as a homeowner controls his/her house (*Davis v. Massachusetts*, 1897, p. 47).

The Property Framework, then, was built on a number of normative assumptions. While seeing individual property rights as the best way to create more ethical citizens, it also recognized the ethical responsibilities those citizens had as being a member of society. Public space was little more than private space—whether owned by private or governmental parties—that could, for the right purposes, be opened for use by citizens. At the heart of the Property Framework was the idea that citizens would be made better through their engagement with property, whether privately or publicly owned.

The Place Framework

The property-based idea that public space was under the control of an owner, either public or private, was challenged in the early 1900s. Heavily influenced by ideas linked to the Progressive movement and American pragmatism, the purpose of public space was re-imagined. Rather than
simply being seen as a tool for creating better citizens, public space was envisioned as the place where citizens put those hard-earned skills into practice—space where democracy was realized.

This transition required a fundamental redefinition of the very idea of property. Led by Progressive challenges in the early 1900s, property was not simply about some relationship between a person and thing (either tangible or intangible), but rather property involved a bundle of associated rights that went far beyond traditional limits of property. Viewing property as being inherently relational and social (Ely, 1914, p. 96), Progressives argued that property could be used to achieve a variety of public goods. Morris R. Cohen, for example, argued for the elimination of the idea that property existed prior to government. As such, property rights were not a way to wall off government’s intrusion into private life, but a way to empower government to make rules that improved society. Since the idea of property was a creation of government, government had a broad ability to interpret what was meant by property rights (Cohen, 1927, p. 19).

The recognition that government was heavily embedded in the very creation of property rights was also recognized in judicial decisions, with courts increasingly recognizing that all property was embedded with a public interest. This growing awareness of the social component of property also had ties to suspicions about the power of property. For some, property was no longer the way to protect individual liberty, but property, held by both individual and corporate interests, was being used by the powerful to limit the freedom of other citizens (Reich, 1994, p. 772). Within the legal community, this criticism was recognized by the U.S. Supreme Court in 1934, with Justice Owen Roberts arguing that it is difficult to imagine a private property right that does not in some way “affect the public” (*Nebbia v. New York*, 1934, pp. 524–525).

In the late 1930s, a committee of the American Bar Association, led by Grenville Clark and Zechariah Chafee, Jr., set out to change the legal precedents that were central to the establishment of the Property Framework. In an influential legal brief submitted to the U.S. Supreme Court in *Hague v. CIO* (1939), where the Court for the first time recognized the idea of the public forum and the importance of public space to democracy, Clark and Chafee argued that a city, as owner of public space, should not be allowed to prevent labor unions from engaging in public organizing activities. Rather than allowing government to decide how parks and streets ought to be used, they argued that proper use should be determined by how citizens actually used public space. As a way of distinguishing this new definition of public space from the idea of property, Clark and Chafee simply referred to it as “place” (Allen, 2014). As a result, for a short period of time streets and parks were widely opened to expressive activities in the United States.5

By the late 1930s, then, both the legal and ethical foundation of public space had been transformed. Gone was the idea that property ownership was central to creating more virtuous citizens and protecting individual freedom. Gone as well was the idea that exposing citizens to open spaces would lead to moral uplift. It was replaced by the idea that embedded in all property was a social component that invited society to figure out how to best manage that property. Public space was no longer something to be admired from afar, but was something to be used and engaged with. The government’s role in the Place Framework was not to make determinations about what types of activities would create more virtuous citizens, but rather it was to serve as an independent traffic cop, making sure that all citizens and viewpoints had access to public space. Virtue was to be created through discussion and interaction, and public space was the venue where that discussion would take place.

The Planning Framework

As the Place Framework was being established and legitimized within American society, a rival framework was already in its formative years. With roots in ideas about the police power and older notions of property, critics of the Place Framework began to look for answers in the
increasingly popular planning and zoning movements. Zoning can be traced to the late 1800s, but the adoption of a zoning ordinance in New York in 1916 gave the planning movement a significant boost (Hall, 2002, p. 60). While the desire for democratic discourse drove the advocates of the Place Framework, the need for order, organization, and efficiency was at the heart of the Planning Framework. As a result, today’s Planning Framework brings together older notions of control central to the Property Framework, while building on the idea from Place theorists that government ought to play an important role in the management of public space.

Planning and zoning require a clear articulation of not only the space in which expression will be allowed, but also definitions of the expression that will be allowed within that space. As a result, the public forum increasingly came to be defined by the categorization of not only expressive acts, but the space where those acts occurred. The Place Framework neither offered nor required such definitions. Expressive freedom was based more on the use citizens brought to public space. The Planning Framework instead created a public sphere that was heavily managed by government through defined space and rules about how citizens might use that space.

In the Place Framework, public space was envisioned as being transparent and permeable, allowing citizens free access to space to increase the diversity of information. In the Planning Framework boundaries tend to be more secure and far less permeable. Rather than being envisioned as a way to bring groups together, space is viewed as a way to contain dissent to achieve some desired end. This means-end perspective is at the heart of the planning movement itself. Robert Upton has argued that the practice of planning is nothing more or less than “spatial ethics” (2002, p. 254). Scholars have noted the importance of utilitarian thinking to the practice of planning. Or, as Upton writes, planning is a “value-rational approach to assessing the outcomes of various courses of action with a view to maximizing well-being” (2002, p. 256).

The Planning Framework provided not only a spatial organization of society, but also a way to use surveillance as a form of control. As the boundaries of public space became harder and more secure, improving surveillance and control, space became a way to separate those who are engaged in expressive activities from those who are not. The public forum in the Planning Framework was not a place to bring people together but rather a space intended to isolate and control nuisances. As a result, the Planning Framework provides a justification for limits of expression such as free speech zones (Allen, 2011).

The legal foundation for the Planning Framework was established in the early 1970s with the categorization of public space. This categorization, which has come to be called the public forum doctrine, puts forward, in Robert C. Post’s words, a “byzantine scheme of constitutional rules” to determine when citizens can use public space for expressive purposes (Post, 1987, p. 1715). The U.S. Supreme Court formally began the categorization of space in Police Department of Chicago v. Mosley (1972), but the basic categories that exist today were formalized in Perry Educational Association v. Perry Local Educators’ Association (1983). Those categories are: traditional public forum (a place that is by tradition or government fiat open to public assembly and debate), a limited public forum (government space open to some members of the public to discuss a limited range of topics), and a nonpublic forum (government-controlled property that is not open to the public) (Cornelius v. NAACP Legal Defense and Educational Fund, 1985).

As legal scholars have noted, the dominant line of public forum cases suggest that the type of space that a speaker elects to use determines the amount of expressive freedom that citizens enjoy (Zick, 2009b, p. 53). Within these types of cases, value judgments about the expressive act were often not a part of the equation (see Nimmer, 1984). The public forum doctrine frees government, much as it was in the Property Framework, to determine what constitutes the public welfare. As Post sums up the public forum doctrine, “In the end the public realm created by the public forum doctrine is nothing other than a governmentally protected public space for the achievement of private ordering” (Post, 1987, p. 1800).
The Planning Framework draws on many of the same ideas that were central to the Property Framework but also changes them in important ways. Both make explicit moral claims about the purpose of public space within society. However, those moral claims in the Planning Framework are hidden behind a complex, highly rationalized layer of spatial ordering that few can understand. Using the establishment of “value-neutral” categories and boundaries, public life in the Planning Framework becomes little more than a government-shaped arena for the display of individual expression. For many advocates of the Planning Framework, viewing public space as an area capable of bringing people together into a community was little more than naïve idealism.

DIGITAL SPACES AND EXPRESSIVE FREEDOM

The ideas that shaped American public space, and in turn expressive freedom, are filled with ethical assumptions about their role in democracy. Dominant interpretations have changed from being about the socialization of citizens, to the formation of community, to the control and maintenance of individual expressive acts in pursuit of order and efficiency. And while each framework articulates different values central to public life, they share a general assumption about public space. That is, that public space is something that is used by citizens and exists independent of citizens.

What these frameworks fail to capture is what some scholars have long recognized: that citizens not only use public space, but they play an active role in creating or forming that space. Some have attacked the question through the actions of citizens themselves, preferring to find ways to privilege the conditions that citizens need to create democratic space. For example, while John Dewey did not directly address the question of public space in his work, it is clear that his notion of community was not constrained by physical boundaries. Seeing community as constituted through communication, Dewey recognized the constructed nature of both public spaces and the idea of the public itself (Dewey, 1927, p. 142). As Dewey noted, the public is “unorganized and formless,” and is brought into existence only through “associated activity” (Dewey, 1927, p. 67).

Hannah Arendt brought much of the same spatial conception of public space to her thinking—ideas that she traced directly to ancient Greece. For Arendt, the polis was not confined or defined by the physical contours of the city-state. As she wrote, “[I]t is the organization of the people as it arises out of acting and speaking together, and its true space lies between people living together for this purpose, no matter where they happen to be” (Arendt, 1958, p. 198). Arendt noted that this space is constituted through speech and action, differing from physical space because it “does not always exist” (Arendt, 1958, p. 199).

Following Arendt, Jürgen Habermas has offered one of the more complete theories about the role citizens play in constructing their world. In his detailed account of the public sphere, both historical (Habermas, 1989b) and theoretical (Habermas, 1996), he demonstrates how public space is created through the interaction of citizens. For Habermas, the idea of the public sphere as a social space refers “neither to the functions nor to the contents of everyday communication but to the social space generated in communicative action” (Habermas, 1996, p. 360).

This social space is built on a number of ethical assumptions for Habermas. In the ideal speech situation citizens would be motivated not by the desire to win, but by the goal of trying to achieve understanding. And while that goal might be rarely achieved, it is an assumption that enables us to continue to engage in discursive acts (McCarthy, 1988, p. 309). Closely related to the ideal speech situation is the idea of discourse ethics. Here Habermas develops moral principles that serve as a guide for interpreters and actors engaged in discourse. In short, discourse ethics suggests that a norm can only be considered to be valid if all who would be affected have consented to it, after considering consequences and side effects, and if it is universally valid (see
Habermas, 1990, pp. 43–115). All of this presupposes that citizens can reach mutual consent on controversial issues not because of some naïve idealism, but rather because it points us to the ethics that ought to guide our interactions with other citizens. Habermas, then, reminds us that at the heart of the construction of social space are essential ethical ideals. Flowing from those ideas is a discourse, as Habermas notes, that “unfolds in a linguistically constituted public space” (Habermas, 1996, p. 361).

It is important, however, to understand that citizens do not enter into relationships with other citizens simply to create public space. People come together and create space for many reasons. At the root of these interactions is the need to create meaning about their activities, both public and private. As Habermas has noted, meaning is created within discursive communities (Habermas, 1989a, p. 7).

Of course, the challenge facing citizens is that space is not only created through the interaction of citizens, but also through the interaction of citizens and different types of media technologies. Habermas (1989b), Dewey (2008/1922) and Park (1923) have noted how journalism plays an important role in providing space for public discourse, while Wallace’s research demonstrates how newspapers used the architecture of their buildings to “convene a public” (2012, p. 88).

In the digital age, citizens interact with technology to create newer types of space. As Kitchin and Dodge have noted, when “software and the spatiality of everyday life become mutually constituted” something called code/space is created (2011, p. 16). Code/space lacks a fixed ontology, but operates as an unfolding practice. As a result, in comparison to traditional notions of space, code/space is contingent, relational and active (Kitchin and Dodge, 2011, p. 67). Kitchin and Dodge do not see code/space as being inert, or simply good or bad, but rather as productive. As they write, “Software opens up new spaces as much as it closes existing ones” (2011, p. 19). As such, control and surveillance is inherently a part of code/space, just as that process also opens up new venues for democratic opportunities. They note that little thought has been given to the normative ethical questions associated with the rise of code/space, often focusing solely on questions of data collection (2011, p. 254).

While there is disagreement about the relationship between real and virtual space, and whether these spaces exist in opposition to each other or operate in conjunction with each other (see Kellerman, 2014), some have suggested that digital technologies have at the very least offered another venue for citizens. Labeling virtual space as “second action space,” Kellerman suggests that virtual space is more flexible than real space in “both its construction and in moving through it” (2014, p. 151).

Ideas about the way citizens create space through their interactions, through the way space is created by engaging with newer technologies, challenges assumptions about space that are at the root of theorizing about the public forum and expressive freedom. It can no longer be assumed that public space is simply space citizens occupy for a period of time in order to engage in expressive acts, an idea shared by the Property, Place, and Planning frameworks. Rather it is becoming increasing clear that citizens create space through their interaction with other citizens and technology. And while that constructed nature of space has long been recognized, theorizing about the public forum has failed to account for that insight. While the Property, Place, and Planning frameworks shared many differences, they all relied on the ability to permanently fix spatial boundaries and clearly articulate how expression was conducted within that public space. As a result, theorizing about the public forum has been unable to adequately account for the technological changes that have transformed the public forum. Much of the space citizens use for discussion today defies attempts to contain it within physical boundaries and as a result it is not only difficult to control, but societies struggle to articulate ethical standards about the use of that space.
THE CENTRALITY OF SPATIAL ETHICS TO FREEDOM OF EXPRESSION

Moving space from being a background principle to a core issue in understanding the ethics of expressive freedom has important implications for public life. As seen in the earlier discussions about the spatiality of expressive freedom, American democracy is built on ideas that fail to capture the complexity of the digital world. Space does not exist independent of citizens, but is created by citizens, thereby shaping ethical assumptions about those spaces. In being viewed as a background principle in discussions about freedom of expression, space is cast aside. But we need to begin taking those spaces, and the creation of those spaces, seriously to not only protect expressive freedom, but also to understand the ethics of communication within public space.

The idea that citizens play a role in the construction of public space brings with it important questions related to responsibility. If citizens view public space not as just something that they use, but rather as something that they create, it changes questions of responsibility. As a result, making space a central component of public expression challenges notions about the idea that citizens have the ability to say whatever they want, whenever they want in public space. However, unlike earlier frameworks when responsibility for governing expression was transferred to governmental authorities, citizens must increasingly play an active role in that governance. By creating space through our interaction with others and with technology, we bring with that creation a responsibility to understand the needs of others. As Habermas teaches us, the goal is not domination but the search for understanding.

New virtual public spaces for expressive freedom are perhaps best viewed as a double-edged sword: they present wide opportunities for freedom of expression, but also increasingly expose that expression to surveillance by both governmental and corporate actors. As a result, it is imperative that we move beyond viewing expressive freedom solely as a negative liberty where freedom is only triggered when government tries to limit it. As Jack Balkin has argued, expressive freedom needs to move beyond the spatial boundaries articulated by nation states and recognize the importance of democratic culture. Yes, government is important; private institutions, organizations, and individuals are equally vital. As Balkin (2016) writes:

> In a free society, even in one that is not perfectly democratic in its politics—or even democratic at all—people should have the right to participate in the forms of meaning-making that shape who they are and that help constitute them as individuals.

(p. 1061)

Freedom today is dependent upon not only government’s willingness to create public space, but the ability of citizens to understand their own role in constructing that space and the private firms that dominate platforms and technology. A “real democracy” is a society “that puts the development of a democratic public at the center of political life” (Mattson, 1998, p. 5).

One of the things that we should not do is fail to understand the constructed nature of digital space. Too often in the past, as demonstrated in the discussion of the history of the public forum, it was suggested that space existed independent of citizens and as a result citizens had little control over its use. Space was something that existed independent of citizens and as a result it was something that could be used by authorities to govern, manage, and control citizens. But space is increasingly not just something citizens use, but also something that they create through their interactions with others and technology. We should not fall into the same old traps when envisioning digital space. We need to understand that digital spaces such as Facebook, Twitter, and YouTube are constructed by someone for some purpose. These spaces are not “natural,” but rather are constructed. However, as citizens engage with those spaces,
they change them in important ways—ways that programmers of that space struggle to anticipate (Rosenberg, 2008, pp. 147–150). In the end, the construction of these new spaces brings with it some idea of what it means to be an actor within that space, but that does not mean that citizens lack power. In these new code/spaces, as Kitchen and Dodge note, everything is contingent, relational and active.

The Siegel and Gervais examples that began this chapter demonstrate how our outdated understanding of space constrains our ideas about the spatial ethics of freedom of expression. In justifying their expressive freedom, Siegel and Gervais fall back on the idea that their speech in digital spaces is something that exists independent of citizens and that the best citizens can do is adopt the ethical values that dominate those spaces. Neither accepts responsibility for creating and perpetuating the conditions that they criticize yet seem to enjoy. For Siegel, he accepts a constructed online ethic of deception and misleading information as being normal in an online community. Rather than taking responsibility for the “wicked expedience” in helping to perpetuate that community, he chooses to accept and perpetuate that baser instinct.

Gervais falls into the same trap. Twitter, as he notes, is by its very nature like “going into a toilet stall and arguing with graffiti.” Perhaps he is correct; but what he fails to understand is the role that he plays in furthering that culture within that space through his participation. Both resort to the idea that space exists independent of our actions and use perceptions about spatial norms to justify their lack of responsibility for the creation of values within that space. We need to stop thinking of space, and expressive freedom, as being independent of us, but rather understand the role that our expression plays in the construction of democratic space.

NOTES

1. For example, as early as 1882 the Los Angeles Times printed letters to the editor in a section it referred to as the “Public Forum” (Los Angeles Times, 1882, P. 3) In 1891, the Chicago Daily Tribune proposed that a new “art and library structure” constructed for the Chicago World’s Fair be retained as a place for “popular gatherings—a great public forum” (Chicago Daily Tribune, 1891, p. 4). In addition, historian David A. Ryfe has suggested that nineteenth century newspaper coverage of presidential campaigns reflect a cultural value in the “associational assumptions of public life,” a value that is central to the idea of the public forum (2006, p. 67).

2. Several scholars have used the term spatial framework. Timothy Zick has suggested that the Constitution puts forward a spatial framework that “contains troubling extra-territorial and intra-territorial gaps in protection of basic liberties” (2009a, p. 608). Ethan Katsch has argued that one of the advantages of adopting spatial frameworks as an analytical tool is that they do not isolate activities but rather link those activities to other institutional and social changes (1993, p. 412).

3. Freund’s ideas differed greatly from those of another pioneer of administrative law, Felix Frankfurter, who saw administrative law as a way to free government from the oversight of courts (see Ernst, 2009).

4. The bad tendency test allowed government to punish or prevent expressive acts that were deemed by authorities to be potentially damaging to the public welfare.

5. The zenith of the Place Framework was the Court’s decision in Schneider v. State (1939) limiting government’s ability to use the police power to control expressive activities in parks and city streets. Justice Owen Roberts wrote, “We are of the opinion that the purpose to keep the streets clean and of good appearance is insufficient to justify an ordinance which prohibits a person rightfully on a public street from handing literature to one willing to receive it … … [T]he streets are natural and proper places for the dissemination of information and opinion; and one is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place” (Schneider v. State, 1939, p. 163).
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Davis v. Massachusetts, 167 U.S. 43. (1897).


U.S. Const. amend. V.


