
Controlling the Commons: How Public Is Public Space?

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Abstract

In this paper, I outline and test a framework for analyzing control and freedom in urban public space. The framework, based on a model of the commons developed by legal scholar Lawrence Lessig, assesses control across three layers: physical, code, and content. I deploy the framework in a case involving a controversial proposal to erect a six-foot-high iron fence around Philadelphia's iconic Independence National Historical Park. The framework proves a robust conceptual and operational means for analyzing how intended actions impact personal and group freedoms.

Keywords

public space, commons, urban design, control, security

How Public Is Public Space?

Some urban scholars argue that prioritizing security and private interests over broader social concerns can threaten civil liberties and diminish diversity in public space, transforming public spaces into highly regulated sites of consumption-based activity (Graham 2010; Low and Smith 2006; Németh and Hollander 2010a). Associated curbs on behavior are seen to limit civil liberties, like the right to protest, dissent, make decisions, be heard, be homeless, or not consume (Mitchell 2003); others show how regulatory practices

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often homogenize, sanitize, and exorcise difference from public space (Sorkin 1992). Much of the critique is leveled at recent policies that either transfer ownership and control of public space from the broader community to private actors (Kayden and New York City Department of Planning & Municipal Art Society 2000; Kohn 2004; Miller 2007) or use antiterrorism security concerns to justify the closure of entire downtown districts (Coaffee 2009; Németh 2010). Associated legal, physical, and cultural practices serve to control who uses public space and how, threatening the notion that public space is for all to enjoy.

The principal argument is that when a public space is privatized or securitized it ceases to exist as a truly public forum, characterized by (relatively) open access, unmediated deliberation, and shared participation. Most critics decry this “death of the public realm” along one of three axes: fairness, innovation, and democracy. With regard to *fairness*, U.S. legal tradition stipulates that when a resource risks private capture, it must remain in the public forum, lest a private owner unfairly monopolize it. Since some of our most vibrant public spaces are privately owned malls and corporate plazas, profit-minded owners and managers can now limit access and behavior in these spaces to produce a desirable public composed of well-heeled consumers and absent of, say, loitering teenagers (Németh 2009).

On the other hand, dynamic public spaces can encourage *innovation*, as patrons use space in creative and unintended ways. Take Philadelphia’s LOVE Park, a drab Modernist plaza appropriated by street skateboarders in the early 1990s who discovered that its marble pavers, steel rails, and drained fountain provided a world-class skateboarding experience far superior to any officially sanctioned purpose-built skate park. LOVE Park is now featured in video games, on magazine covers, and in hundreds of skateboarding videos. It was also the site of the 2001-2002 X-Games, netting the city \$80 million in profit. In 2003, however, skateboarding was banned in the square, spurring large protests and even some scholarly attention (Howell 2005; Németh 2006).

The balance of critical attention condemns the diminution of *democracy* and its attendant rights of speech and assembly. Urban space is the playing field for protest and dissent, so closing or limiting access to an appropriate public challenges these First Amendment rights and liberties, just as post-9/11 security policy in the United States has helped justify the “repression and control of mass citizen political mobilization in cities” (Warren 2002, 614-15). Public space ideally promotes active citizenship by encouraging exchange and dialogue, where users deliberate opposing viewpoints and diverse parties find “renewed centrality [in] places of encounter and exchange” (Lefebvre 1968, 179; cited in Mitchell 2003).

These categories are admittedly coarse, and it is worth noting several caveats. First, not all space can or should be public, such as private homes in which marginalized “counterpublics” can meet without threat of further oppression (Fraser 1991). Second, some form of control is often required or desired, else a “tragedy of the commons” arises whereby each actor advances her own position at the expense of others and only the fittest survive (Hardin 1968). Third, publicness is always subjective: whereas some might feel a space full of homeless persons is “truly public,” this sight might drive other users away. In fact, such an idealized public space may have never existed, as even the Greek *agora* was constituted through the exclusion of women and minorities (Ruddick 1996). Since public space is never homogeneous, “the dimensions and extent of its publicness are highly differentiated from instance to instance” (Smith and Low 2006, 3).

Although publicness is a difficult concept to measure, a number of scholars have made strong attempts, which suggest the importance of this pursuit. A simple metric might examine public space freedom vis-à-vis access and behavior, where free access means space legally open and accessible to all without permission of anyone else. When permission must be granted, it must be done so neutrally and without prejudice (Lessig 2001). With regard to free behavior, actions should fall within the law of the locality in which the space is located, and all regulations should be applied objectively. In this regard, public space is *conditionally* free: assuming a patron meets legal norms or the expectations of managers, he or she is allowed to occupy the space. And yet it is these *conditions* placed on public access and behavior that limit who uses a space and how.

According to Varna and Tiesdell (2010), attempts to conceptualize publicness can be categorized into inductive/external and deductive/internal approaches. Inductive approaches seek to understand “what is out there,” external to the person. Studies in this camp might base assessments on ownership regimes alone, assuming privately owned spaces are more controlling of behavior than their publicly owned counterparts, a claim disproven in recent work (see Day 1999; Schmidt, Németh, and Botsford 2011). Along these lines, Madanipour (1999) interprets a framework by Benn and Gauss (1983) that examines publicness across three dimensions: access, agency, and interest. Access includes the ability to occupy a place and the activities contained within. Agency refers to the locus of control and decision-making present (see also Carr et al. 1992), and interest refers to the targeted beneficiaries of decisions impacting use of, and behavior within, a space (Madanipour 1999). Kohn (2004) defines publicness with regard to three core criteria: ownership, accessibility, and intersubjectivity, or the encounters

and interactions facilitated by a space and its features. Németh and Schmidt (2011a) outline a framework for assessing publicness on three axes: ownership, management, and uses/users. Varna and Tiesdell (2010) introduce the Star Model to measure publicness along five axes: ownership, physical configuration, control, civility, and animation.

Deductive approaches seek to investigate the socially constructed meanings of public space, acknowledging that publicness is in the eye of the beholder (Varna and Tiesdell 2010, 578). In this vein, Staeheli and Mitchell (2008) theorize publicness as a set of relationships between property and the people who inhabit, use, and create it. To them, the key determinant of publicness is access, a feeling conditioned by receptivity, welcome, and comfort (p. 116). Concerned more with how citizens struggle for different forms of publicness, Iveson (2007) points to three ways in which a space might be “made public”: by becoming a venue for public address, an object of public debate itself, or a means to understanding “who belongs” in any definition of the public.

On their own, inductive and deductive approaches are useful starting points for conceptualizing publicness, but “the production of spaces owes as much to the conceptual realm as to material activities” (Elden 1998, n.p.). Thus, I would argue, any model of publicness must account for both the material and the conceptual realms, for the physical space itself and the ways in which meanings are transmitted by different social actors. Where might we find such a thing?

In recent years, the public space of the Internet has grappled with similar challenges to publicness. Kohn (2004) notes that although the Internet was originally intended to facilitate the free transfer of information and undermine any attempts at hierarchal modes of control through its rhizomatic “web” of communication, it began to experience significant privatization pressures in the late 1990s and early 2000s. Legal and communications scholars like Lawrence Lessig, Yochai Benkler, and Cass Sunstein similarly note that although the Internet removes a layer of intermediation between writers and readers, empowering individuals to customize their online experience and the types and sources of information they receive, this benefit may have paradoxically negative consequences for democracy and community: the ability to discount, even dismiss, alternative viewpoints may “impoverish the diverse experiences that sustain a pluralistic culture” (Kohn 2004, 211). In particular, Lessig argues in *The Future of Ideas: The Fate of the Commons in a Connected World* (2001) that increased regulations meant to facilitate corporate control over the user experience stifle innovation and expression and undermine political solidarity. This communication system,

he maintains, is under threat from “a bias in favor of control, pushed by those whose financial interests favor control” (p. 15).

These critiques are strikingly similar to those made by public space advocates about the commodification, commercialization, and privatization of physical space. These parallel trajectories, as well as some identifiable bridges formed recently between electronic and physical domains (Aurigi and De Cindio 2007; Townsend 2008), suggest each field might view the other as a useful analytical resource. Indeed, communications theorists have even adopted a built environment lexicon, using words like “architecture,” “domains,” and “rooms.” Of course, many substantive differences exist between the two domains, especially with regard to how individuals form community, how we measure physical versus virtual proximity, how to assess the strength of personal ties, and how privacy is enacted in each domain, but the similarities merit attention.

Lessig, a law professor, refers to the Internet as a “commons,” a notion more customary to material space: “if you’ve used the word *commons* before, you’re likely to think of a park, as in the Boston Commons” (2001, 19). Indeed, the term has a long lineage in debates about public space and in political theory more generally. Conceptually, a commons can be tangible (land, libraries, natural resources) or intangible (public information, education, publicly funded research). Thematically, commons can be environmental (air, oceans, polar ice caps), cultural (literature, radio, heritage sites), virtual (open source software, public data, the Internet), or material (sidewalks, infrastructure, parks).

I adopt a definition of the commons drawn from both Lessig (2001) and the *Oxford English Dictionary* (Simpson and Weiner 1989). In this paper, a commons is any collectively owned resource held in joint use or possession to which anyone has access without obtaining permission of anyone else. This suggests that in the material context, a commons refers both to physical site and the property rights governing it. A commons of this sort implies both “open access and shared participation without the shadow of the state . . . [*as well as*] a space for community assembly apart from the hard sell of the market” (Blackmar 2006, 49-50).

What is clear, Elizabeth Blackmar warns, is that in recent years some have deployed the term “commons” to discount publicly owned space and “affirm the essential benevolence of private property and, by extension, capital” (2006, 50). Bollier (2002) suggest that many of our resources traditionally held in the commons are, indeed, in danger of “enclosure,” or the conversion of a common resource into private property. These warnings extend to the virtual world: the recent emergence of virtual initiatives such as Wikipedia,

Creative Commons, WikiLeaks, and the Open Source Movement, as well as struggles for material space like the Right to the City movement, suggest the privatization and control of common resources is a major concern for scholars and citizens alike. The central contention behind these movements is that commonly held resources best serve society insofar as they lead to fairer, more innovative, and more democratic institutions (Ostrom 1990; Benkler 2000).

In his quest to “think empirically” about these whether certain resources are in fact in the commons, Lessig (2001) developed a heuristic that might offer us a more holistic model for capturing the publicness of material space. His model asserts that the virtual space of the Internet consists of three constructive “layers”: physical, code, and content. The *physical* layer is the medium across which communication travels; this layer includes the actual hardware, wires, and wireless spectra that transmit information. The *code* layer includes all protocols, processes, programming languages, and legal standards, and the *content* layer includes the actual information transmitted from producer to consumer and back.

Lessig very briefly attempts to transfer these categories to material spaces. He shows that the Speakers’ Corner section of London’s Hyde Park, known for its colorful, no-holds-barred Sunday speech sessions, is a commons across all three layers, including the physical layer (the park), the code layer (the language used), and the content (what gets uttered). He then asserts that New York City’s Madison Square Garden is *not* a commons: its content and code layers remain free, but its physical layer is controlled since its owners—Madison Square Garden, L.P.—are not obliged to allow universal entry.

What we learn from these simple illustrations is that, left as is, Lessig’s model falls somewhat short when extended to the material world. In reality, Hyde Park’s physical features include access controls to prohibit vehicles and all gates are shut between midnight and 5:00 A.M. when the park closes each night. The park’s code is also quite controlled, as its rules and regulations are defined by policymakers and enforced by the police. The content of the speech acts made by Speaker’s Corner participants might not be controlled to the extent it is in other parks, but threats of personal harm to others are still grounds for arrest and prosecution. The Madison Square Garden arena application is even more problematic. The code of the space—especially the rules and regulations governing its use—is governed and enforced by a “Code of Conduct” that includes restrictions on foul or offensive language, obscene gestures, or any behavior “detrimental to the experience of other guests” (thegarden.com). Any signs held by fans cannot be derogatory and must not contain foul language. Clearly, communication is not free, nor is use of the space.

Table 1. Lessig's Layers as Applied in Physical Space

	Components	Possible Analytical Methods
Physical	Programming, spatial relationships, location, adjacencies, mobility, physical access restrictions, aesthetics/style	Mapping, access/mobility studies (e.g., Space Syntax), design audits
Code	Laws, regulations, policing techniques, opening hours, cultural norms, behavioral norms, design guidelines, governance, authority, language	Plan review, document analysis, observation, interviews
Content	Use, behavior, symbolism, monuments, meaning, interaction, relationships	Behavior studies (e.g., Whyte 1988), REAP analyses (e.g., Low et al. 2005), participant observation, ethnographies, interviews, focus groups, public comment review

Thus, if we *are* to adapt this framework to the material context, we must first reconceptualize these categories. I do so in Table 1, but recognize that what is listed are just some of the many factors one might include. What is immediately clear is that the layers are not mutually exclusive: for example, in which category would one put monuments since they are physical artifacts but also convey deeper meaning to observers?

How well might this enhanced model function if applied in an actually existing space? How does making these categorical distinctions help us understand the data we encounter? What does this approach offer that others do not? And what are the implications for transferring this framework to the physical world? To answer these questions, I pilot-test the framework in a controversial case centered on multiple, subjective interpretations of contested concepts like freedom and liberty, making it a valuable examination of the framework's utility. I chose this case because of the centrality of the issue of publicness and freedom as well as the availability of more than 300 public comments displaying the concerns of some affected parties to the proposal to erect a permanent iron fence bisecting an iconic National Park. The intent of the ensuing analysis is not just to understand *this* case—although we make some inroads—but to show how this framework might be used and adapted for future studies. I outline the case below.

Securing Independence National Historical Park

On September 12, 2001, the 500 block of Chestnut Street in Philadelphia was closed to vehicular traffic. This block of Chestnut Streets encircles Independence National Historical Park (INHP), a complex operated and maintained by the National Park Service (NPS). The park spans 54 acres and most notably houses the Liberty Bell and Independence Hall, two prominent monuments related to the ideals of freedom and democracy, and the site at which the Declaration of Independence and the Constitution of the United States were debated and signed.

The closure was not unusual: In the days and weeks following 9/11, an unparalleled number of security measures were implemented at public and private buildings by federal, state, and municipal agencies. Most federal action took place in response to President Bush's Homeland Security Presidential Directive 7, a post-9/11 policy forged in response to the September 11 attacks that places the onus of protecting the country's national icons on the U.S. Department of the Interior.

But the INHP securitization did not cease with the closure of Chestnut Street. On January 30, 2002, in accordance with a threat assessment conducted under the auspices of the NPS, the agency created a vast swath of security zones around the park and made the temporary closure of Chestnut Street permanent. These actions were soon reversed under sustained pressure from a cadre of citizen groups and the City of Philadelphia—INHP's landowner of record—and on April 1, 2003, the street was reopened.

Nine months later, NPS implemented a screening operation near the new Liberty Bell Center and instituted a "safe street" crossing at Chestnut Street. A private security company was hired by NPS to administer this crossing, which removed the need for a double-screening process. In 2005, the Secretary of the Interior approved a plan to concentrate antiterror measures at two screening locations—one at Liberty Bell Center and the other inside Old City Hall. NPS implemented these screening facilities and other temporary measures, including bicycle barricades and private security personnel.

The following year, in reaction to public disapproval of these temporary measures, and recognizing that the security threat was not diminishing, NPS decided to implement a permanent security plan. Since NPS is a federal agency, and since all federal agencies are required to fulfill requirements of the National Environmental Policy Act (NEPA) any time a planned action may adversely affect the environment, the agency released an Environmental Assessment (EA) for public review. The EA evaluated three actions, including a "no-action"

alternative, which called for leaving the temporary measures in place for ten years, at which time further threat assessments would determine if they should be removed. Most importantly, the “Preferred Alternative” highlighted in the EA called for the construction of a six- to seven-foot-high wrought iron fence along the major East–West walkway fronting Independence Hall.

NPS received approximately 300 communications from the public, all but five of which overwhelmingly rejected this Preferred Alternative. As opposed to traditionally rote EA public review process, a political uproar ensued, one that played out in the local and national media and ultimately necessitated that NPS extend the required public comment period. NPS revised its INHP security proposal, recognizing that although security fencing around the park was able to “protect the national icons from a person-delivered backpack bomb,” it did not do so “in a user-friendly way that is compatible with American ideals of freedom and democracy as symbolized by Independence Hall and the Liberty Bell” (NPS 2007, 3).

Responding to positions advanced in the public comments, NPS put forth a Modified No Action Alternative (MNAA), which would replace the security fence with a less intrusive, waist-high system of period-appropriate, moveable chains-and-bollards. The MNAA also incorporated simple bag check stations at all sensitive entry points, doing away with the temporary screening facilities at Independence Hall and the Liberty Bell Center. Notably, the MNAA called for the implementation of “new technological measures that will provide effective, yet less obtrusive, security” (NPS 2007, 5). All measures were implemented in 2008-2009.

Pilot Testing the Framework in INHP

My brief analysis of this case consists of four activities: mapping, direct observation, document analysis, and content analysis. First, I used Google Earth to understand its spatial context and how mobility and access might be affected by the fence proposal. Second, I conducted direct observations during an October 2009 visit to the site. I spent one day alone recording visitors’ behavior using photos and short videos and diagramming how people entered and exited the park, their paths through the site, and where they congregated. Third, I reviewed newspaper articles, official NPS documents, editorials, and blog posts to extract the essence of the discourse surrounding the fence proposals. Fourth, I used QSR’s NVivo8 software to analyze the manifest content (i.e., what was actually said) of 300+ public comments from interested individuals, civic groups, and national and local politicians.

Table 2. Comments on EA Proposing Security Fence Around INHP

Concerns	Count	Categories
Sacrificing freedom, liberty, independence in name of security	72	Content
Limits physical access, everyday use, mobility	64	Physical
Wasteful expense because threats are unsubstantiated and physical solution provides no additional security	54	Physical/Content
Historic preservation: maintain views of cultural resources	45	Physical/Code/Content
Visual/aesthetic impact (how the fence would look)	21	Content
Compromising values of country's founders	14	Content
Process itself does not enable adequate participation	11	Code
Illegal to erect fence outside NPS property	10	Physical/Code

Although the pilot test methods reveal some shortcomings with regard to, for example, interobserver reliability, the primary intention of this elementary pilot test is to tease out both the various components of an enhanced framework and the implications of transferring Lessig's schema to the physical world. To that end, I conclude each section below with suggestions for a more complete empirical analysis of each layer.

Table 2 presents comments made most frequently by the public in reaction to the fence proposal. The middle column provides the number of respondents mentioning the phrases or individual ideas in the left column. In the right column, I attempt to place these most popular comments into one of the three layers. Interestingly, most comments fit in more than one layer, providing further evidence of the interplay between these layers.

Physical Layer

A detail map of the proposal (Figure 1) shows how the fence would limit access and mobility in and around INHP, as it would connect with an existing

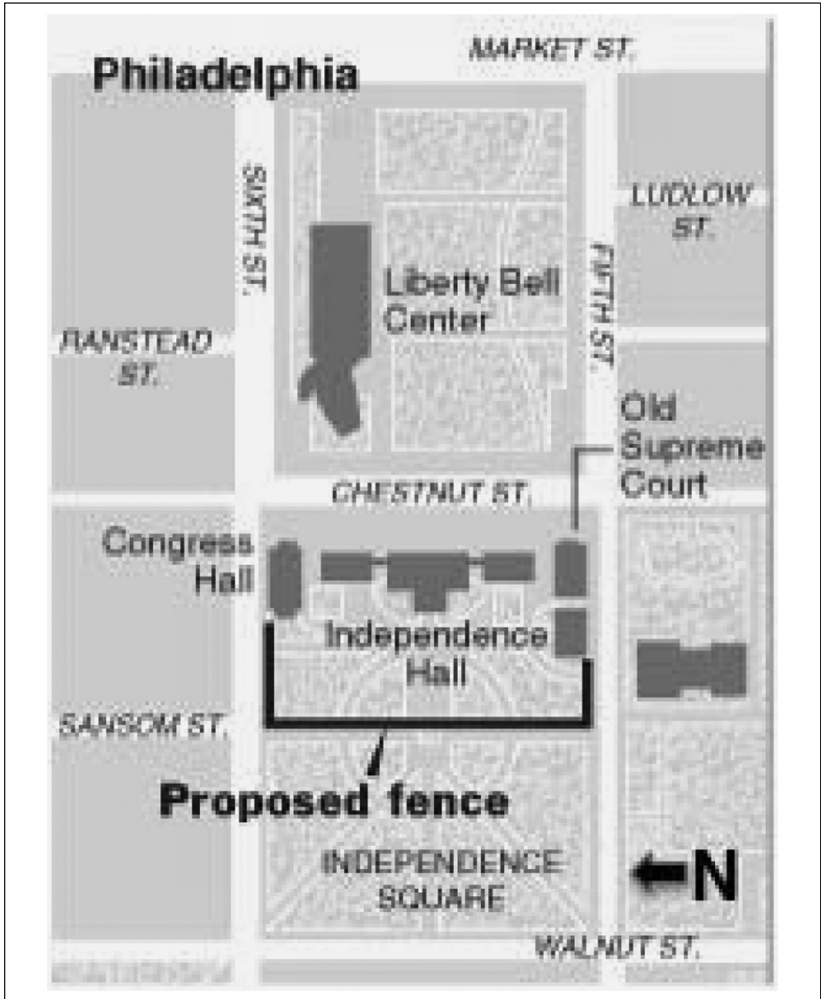


Figure 1. Detail map showing proposed fence location
Source: nytimes.com.

brick wall on either side to provide a continuous barrier to North–South movement. This barrier would also obstruct views of Independence Hall, Congress Hall and the Old Supreme Court buildings; Figure 2 shows how a temporary three-foot-tall bike rack affects views and forces users to stand a



Figure 2. Temporary three-foot-tall bike fence outside Independence Hall; the National Park Service proposed a six- to seven-foot iron fence in its place
Source: nytimes.com.

distance from Independence Hall. The proposal also calls for a new “corral” area to be created in front of Independence Hall to collect visitors and allow for inspection of all individuals and their belongings, again threatening visual and pedestrian access to the Hall itself. In addition, all previously temporary screening facilities—including one on the west wall of the Liberty Bell Center and another within Old City Hall itself—would become permanent, having a significant visual and physical impact on the space. Finally, a quick look at Figures 1 and 3 shows that the fence would detract from the formal design of Independence Square itself, truncating the square into two smaller units and rid the square of its formal symmetry—a central concern of American Institute of Architects’ representatives who examined this proposal (see NPS 2007).

Such concerns were also voiced by a number of public respondents, many of whom were local residents and workers in the surrounding Society Hill neighborhood. Several members of the Society Hill Civic Association voiced concern that the fence proposal would also compromise the commercial

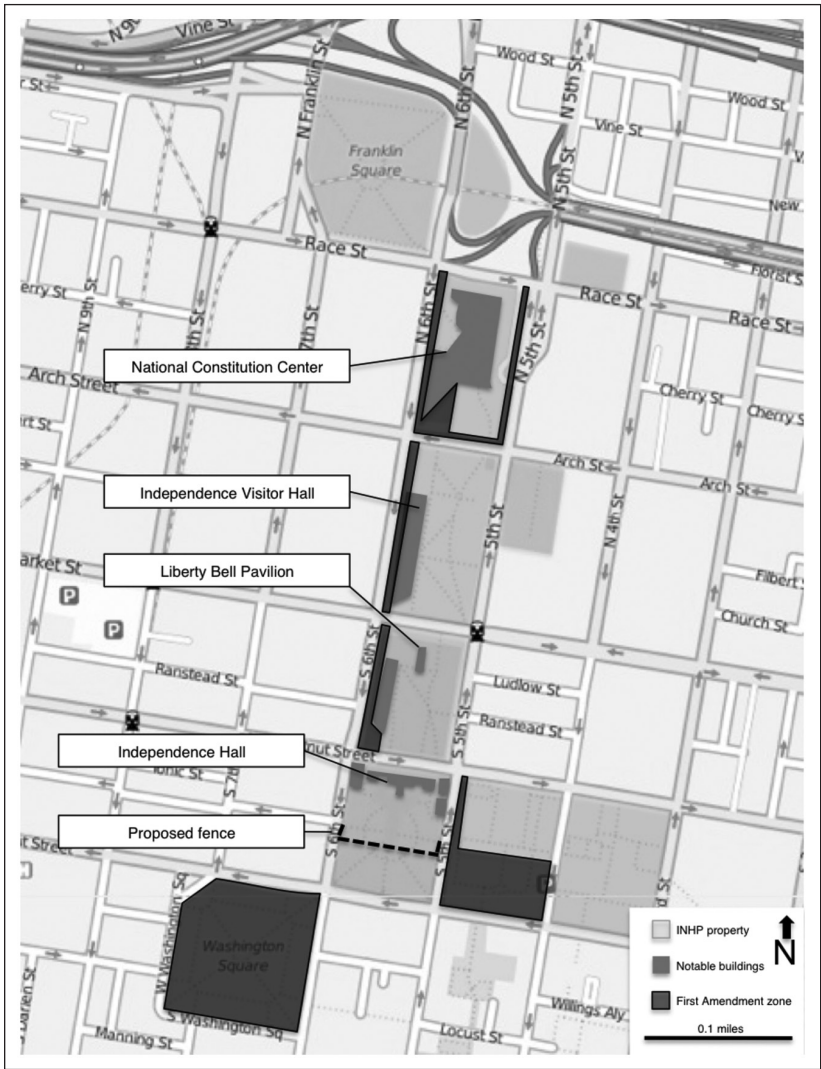


Figure 3. Map of the Independence National Historical Park showing approximate First Amendment areas
Base map source: Open Street Map; First Amendment areas source: http://www.nps.gov/inde/parkmgmt/upload/INDE_First_Amendment_map_copy.pdf.

viability of neighborhood establishments by limiting vehicular and pedestrian traffic. Since INHP is located in a dense central area full of traditional parks and public squares (Figure 4), several respondents also suggested that INHP should be better integrated into the surrounding fabric:

As a resident of Philadelphia, I wish to see Independence Park restored as part of a “necklace” of parks throughout Washington Square West, not see them separated.

A number of respondents also mentioned that the preferred alternative called for significant physical limitations in the name of a rather unsubstantiated or exaggerated terror threat. Eighteen respondents suggested that these proposals seemed overblown several years after September 11, 2001, a feeling echoed by some in New York (Németh and Hollander 2010b). According to some, these concerns were unfounded:

Almost 5 years ago, after the attacks in New York and Washington D.C., this country went into an excessive security frenzy. Unfortunately the National Park Service became infected with that rage and was right there at the head of the pack in implementing undue security measures. The Statue of Liberty was closed, Chestnut Street in Philadelphia was closed outside Independence Hall and worst of all a metal temporary fence was installed around it.

A more complete analysis of the physical layer would include a detailed modeling of user behavior and mobility as affected by the fence proposal. A mapping of surrounding land uses would also help determine whether adjacent and nearby businesses and residences are indeed affected by the fence imposition. Finally, in addition to perspective images of the fence showing its visual impact on park buildings, a study of possible aesthetic treatments of the fence itself would be useful (e.g., period-appropriate wrought iron vs. reinforced steel).

Code Layer

As shown in Table 1, the code layer includes all laws, regulations, policing/enforcement, and cultural and behavioral norms governing a space. Because the space is managed and maintained by the NPS, the rules governing use of the space are quite extensive. In addition to normal regulations governing city-managed public spaces in Philadelphia, a number of activities are

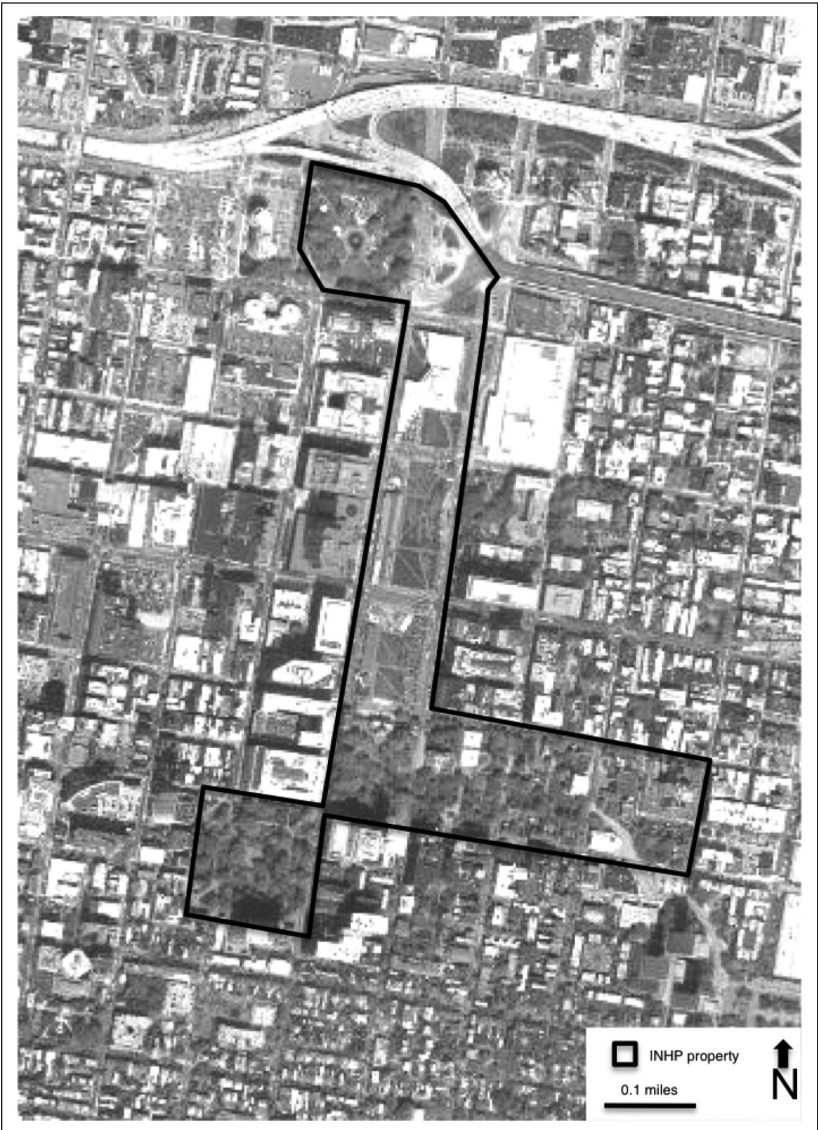


Figure 4. Independence National Historical Park in Center City Philadelphia
Source: Google; NPS (2010).

prohibited under park rules. Still photography is not allowed in most areas and distributing printed material (i.e., leafleting) is strictly prohibited within 20 feet of a building entrance. While certain areas of the park are open 24 hours, my count reveals no fewer than 44 buildings and 26 park sections with limited hours or closed completely to the public.

First Amendment rights of assembly are protected in only certain areas of the park (refer again to Figure 3), and permits are required for any event or gathering of more than 25 persons, solely at the Superintendent's discretion. Specifically, NPS only grants permits for "First Amendment events" if the activity

will not cause derogation of the park's resources or values, visitor experiences, or the purposes for which the park was established. Primary consideration will be given to potential resource damage and to anticipated disruption of normal public use (NPS 2010).

What this reveals is that the "code" layer—especially the park's rules and regulations—have clear implications on not just what behaviors are acceptable, but *when* and *where* these behaviors can take place. I return to this dialectic later in this paper.

In addition to the laws and rules governing the use of INHP, my analysis showed that the public comment process itself is an important component of the code layer. The NEPA process sets the rules and the official procedures through which public opinion is expressed. As part of this process, the EA only invites comment on a proposed action rather than gathering proposals from local communities or interested groups. A number of respondents to the preferred alternative stated that simply reacting to a proposal was unacceptable: The formal NEPA process did not allow enough "real" participation from the local community. Indeed, several community plans developed and sent to NPS for review were neglected by the agency:

I hope you will urge the future National Park Service director to consider the alternative security plans offered by the community. Although time consuming, a critical review of the community plans is the best method to ensure that the plan that is eventually adopted will be effective and widely accepted.

Also related to the code layer is disagreement about the ownership and governance of the site itself. My interviews with NPS officials and Pedro A.

Ramos, the City of Philadelphia's Managing Director (i.e., Chief Operating Officer), revealed that although INHP is managed by NPS, the City of Philadelphia controls the physical site on which the Liberty Bell and Independence Hall sit. Because the Liberty Bell itself was bequeathed to the City several centuries ago, some public comments suggested the City should just move the monument:

That square belongs to me, as a Philadelphian. I do not give the National Park Service permission to alter it.

Ramos reinforced this argument with a directive to NPS that “under a 1950 agreement the city retains ownership of the Independence Hall group of structures and the land whereon they are erected . . . [so] any work of restoration or any major alterations or repairs to any of the buildings shall not be undertaken until the plans for such work have been mutually agreed upon” by the City and Secretary of the Interior.

This set of comments came on the heels of a fervent and well-publicized battle between federal and local authorities, in which state- and local-level planners and elected representatives like Arlen Specter believed NPS was overstepping its bounds by proposing a fence through INHP. Public comments to this end suggested that a detached, bureaucratic federal authority was imposing its will on local neighborhood life:

The bureaucrats in Washington would never seal off the Washington and Lincoln Monuments, or the Reflecting Pool from the people because, living there, they can see for themselves how pointless and self-punishing such an act would be. But Philadelphia isn't where they live.

A more complete analysis of the code layer would include longer-term observations and user interviews to understand what cultural and behavioral norms are acceptable in the space. For example, while it might be legal, sunbathing in the Independence Hall forecourt would likely raise objections by park staff and visitors alike. In addition, although outside the scope of this paper, a more detailed examination of the interactions of federal, state, and local regulations, including details of the aforementioned controversy over who maintains rights of ownership and management, would help us understand the “property regime” governing use and behavior in INHP (see Staeheli and Mitchell 2008).

Content Layer

Content broadly includes actual use, behavior, symbolism, and meaning. Just as we saw above that rules governing behavior have real physical implications, much of this section has impacts on the previously discussed layers. Central to this layer is the myriad meanings represented by the physical artifacts themselves (i.e., the monuments and symbols), especially in INHP with its icons to democracy and liberty. Behavioral studies in response to the fence proposal were impossible because the fence was never built, and since I began this project two years after the EA was issued, I was unable to observe public meetings or conduct interviews at the time of the controversy. So instead, I concentrate this pilot test on those public comments associated with the content of the space, but acknowledge here and below that this is not an adequate surrogate for a more robust analysis.

Some comments suggest that fencing off the park would mean sacrificing or compromising values represented in the park's monuments, like freedom, liberty, and independence:

The irony of surrounding symbols of our national independence and liberty with visible security fencing is lost on no one, with the exception perhaps of the National Park Service. The Liberty Bell and Independence Hall are national and world icons because of their symbolic representation of these principles.

Others argue that this type of solution plays into the hands of terrorists by closing citizens off from their national monuments to freedom. A U.S. Marine Corps Sergeant commented that:

The fence at Independence Square is a bad idea. For one, it signals to the terrorists that we are afraid. Two, it lets them know that they are winning. . . . By banning the public from one of the most important open spaces in the country, we're doing exactly what terrorists want: sealing off our history from ourselves.

Six comments specifically note that the proposal seems more appropriate in a Communist country, and several argued that as monuments symbolize the very struggle for rights, their fencing only serves to devalue this struggle. Another line of argument suggested that if preventing terrorist acts was really the goal, the fence was not enough:

Creating a fence declares [*sic*] that a few hundred pounds of iron is sufficient to protect a sacred place from anyone wishing harm upon it.

These comments suggest that when powerful actors attempt to present and defend a singular, official representation of a culturally significant space, a diverse public is likely to have a strong reaction. When public spaces are home to significant historical events or associated with national iconography, struggles over the identity of space are likely to arise (Benton-Short 2007; Staeheli and Mitchell 2008). In this regard, stakeholders often interpret proposed changes to symbolic landscapes as challenges to their own conceptions of history, a notion voiced by several EA respondents and park officials themselves (D. Reidenbach, personal communication).

A more complete analysis of the content layer would include interviews with park staff, users, and neighborhood groups to understand the various meanings associated with park elements. Although marked by their own challenges, observational analyses such as the Rapid Ethnographic Assessment Procedure (REAP) or William Whyte's participant observations from his Street Life Project would be immensely beneficial for decoding this layer (see Low, Taplin, and Scheld 2005; Taplin, Scheld, Low 2002; Whyte 1988).

Discussion

Three questions emerge from the preceding analysis. First, what does the framework add to our understanding of public space that existing models have failed to address? The framework and its pilot test can help expose the perceived challenges to personal freedoms across the physical, code and content layers. Armed with this knowledge, planners and decision makers better predict public opinion on a proposed action and frame stakeholder discussions according to these layers. The framework provides scholars a more holistic and robust methodology for analyzing individual and group freedoms in public space, as it is inclusive of design, legal, political, and sociological perspectives. The framework is also more easily operationalized than some of the competing models presented, and since it is developed by a law scholar, is rooted more deeply in legal doctrine and is potentially more defensible than some of the exclusively subjective models that exist. This is not to say that objective observation should be prioritized over subjective opinion and perception, just that it provides citizen groups as well as public space owners and managers a justifiable set of parameters from which to operate. Related is the synthetic nature of the framework, which explicitly ties together issues relevant to both virtual and material space,

especially in the discourses and languages employed. I would add that public space advocates can learn a lot from the emergence of cyber-freedom initiatives, which have enjoyed much success in recent years.

Second, how does transferring Lessig's framework to the material world change its operation and what must we add to his model to make it relevant in that context? Transferring Lessig's framework to the material world requires a more robust set of components and corresponding analytical methods. I outline some of the potential components and methods in Table 1, but recognize that future studies using this framework might add or adapt methods as appropriate. Still, the power of the model is that it is broad enough to be adapted to local circumstances. I took steps to conclude each section above with some of the necessary elements of a more complete analysis, and it is important to reiterate that the three layers of the framework are intended to serve as meta-categories only: More thorough analyses within each layer will include more detailed examinations using accepted methods like REAP or even indexes that attempt to measure security levels through a variety of observable phenomena (Németh and Schmidt 2007, 2011b).

Third, how does the framework advance thinking about "the commons" more generally, and how does making these categorical distinctions help us understand the data we have on hand? The tool advances thinking about the concept of the commons in some important ways. Strangely enough, making categorical distinctions clearly demonstrates that a dialectic exists across layers: the attempt to split the analysis into three *separate* layers proves how changes to one layer impact the others. For example, visitors to INHP perceive (content layer) these material artifacts (physical layer) through a variety of different means (code layer). In the fence proposal example itself, the material imposition of the fence (physical) would cut off visual access to Independence Hall, which necessitated changes to the way in which the space would be regulated and policed (code), which would then impact the use, behavior, and perhaps even the popular imagination of the structures contained within the park (content). So while the tool also allows us to more easily *disaggregate* perceived impacts on freedoms across these layers, it also exposes the *interplay* between the layers. Indeed, Lessig argues that the point of the schema is to help one visualize the range of trade-offs across layers.

As such, even design alterations or a newly imposed regulation that *appear* minor can affect a space's overall publicness in a major way: "Control at any one level is enough to make a . . . system unsuited to many types of political communication" (Kohn 2004, 217). Nonetheless, the application of the framework in physical space shows that gradients of control exist—space

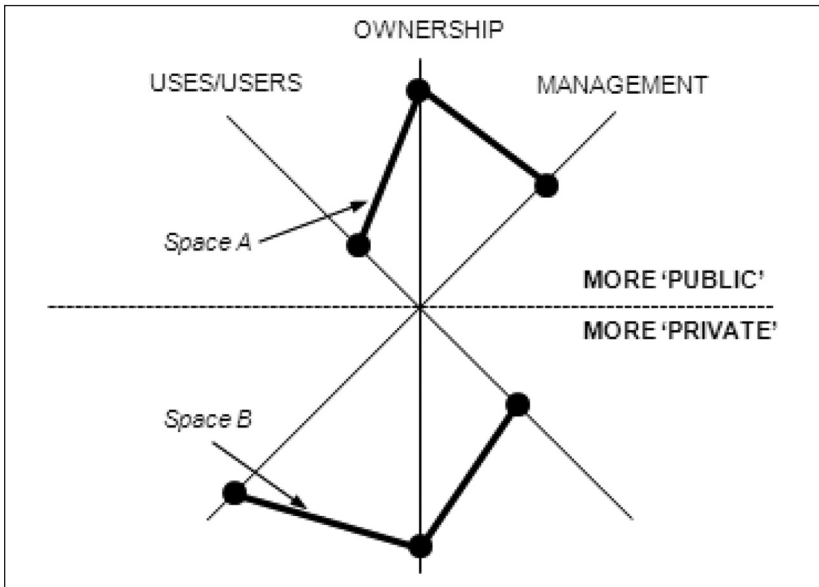


Figure 5. Hypothetical plot of a space’s publicness
 Source: Németh and Schmidt 2011a.

cannot be considered “completely public” just because it is government owned or contains very few, if any, explicit rules and regulations.

Along these lines, Varna and Tiesdell (2010) and Németh and Schmidt (2011a) have both produced models for assessing public space control that examines multiple axes of control. In both models, spaces are “scored” on each axis then “plotted” on a graph with a resultant score attributed to the overall space (see Figure 5 for a hypothetical plotting on the latter model). A similar structure that explicitly acknowledges gradients, or continua, of control might aid the enhanced Lessig framework.

It is important to note that spaces like London’s Hyde Park or New York City’s Tompkins Square Park—those traditionally held in the commons, at least in the popular imagination—require some control lest we devolve into a true tragedy of the commons. The question, then, is how much control is too much? When, exactly, is space “taken out” of the commons? The answer depends on rigorous and robust public consultation, above and beyond that which occurred in response to the EA for INHP. Only then can we begin to understand the acceptable level of control tolerated for a particular space, at a

particular time, by a particular public. In the most controversial cases, we can only hope that opinions are voiced, viewpoints debated, and balances eventually forged. Although Lessig was writing before 9/11, his prescient statement that “the level of control at one time might be insufficient at a different time” (2001, 97) conjures panicked attempts to secure all monuments after the 2001 attacks by any means necessary. Precisely because customs, norms, and values are socially, geographically, and historically contingent, planners must consistently consult with communities to determine appropriate levels of freedom for any resource, for any public space. This augmented framework provides one tool to aid in such consultations.

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Note

1. Lefebvre (1991) introduced a powerful *theoretical* model for understanding how space is produced through a complex interplay of three generative realms: representations of space, spatial practices, and representational space. But, perhaps by design, Lefebvre’s model cannot be operationalized because it is both “tantalizingly vague” (Merrifield 1993, 524) and provides no framework for examining how real on-the-ground plans and processes affect these generative realms or mediate their interplay.

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Bio

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