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RECLAIMING THE PUBLIC FORUM: COURTS MUST STAND FIRM AGAINST GOVERNMENT EFFORTS TO DISPLACE DISSIDENCE

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Dissent is what rescues democracy from a quiet death behind closed doors.[1]

I. Introduction

As the twenty-first century gets underway, governmental authorities appear to be undertaking increasingly unfriendly measures against citizens who take to the streets to influence policymaking. In some jurisdictions, for example, courts have given authorities the green light to stifle speech by limiting access to public spaces.[2] In one recent case involving the 2004 Republican National Convention in New York, a district court judge seemed more worried about the condition of the grass in Central Park than the right of the citizenry to gather in a public space and conduct a rally.[3] Particularly in this age

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[1] Lewis Lapham, *Foreword* to HEIDI BOGHOSIAN, THE ASSAULT ON FREE SPEECH, PUBLIC ASSEMBLY AND DISSENT: A NATIONAL LAWYERS GUILD REPORT ON GOVERNMENT VIOLATIONS OF FIRST AMENDMENT RIGHTS IN THE UNITED STATES 2 (The North River Press 2004).

[2] *See, e.g.*, United for Peace & Justice v. Bloomberg, 783 N.Y.S.2d 255 (N.Y. Gen. Term); Nat'l Council of Arab Ams. v. City of New York, 331 F. Supp. 2d 258 (S.D.N.Y. 2004).

[3] *Nat'l Council of Arab Ams.*, 331 F. Supp. 2d at 264.

of globalized media outlets and big-money political campaigns, which in concert tend to considerably constrain the range of debate,[4] an important component of the health of American democracy is the general public's ability to make their grievances known by taking to the streets without undue governmental hindrance. The general public represents that vast majority who lack the means to convey their message via the media or directly to lawmakers.[5]

This escalating government clampdown on free expression, along with current trends toward privatization of public functions,[6] governmental secrecy,[7] and gagging

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[4] Media consolidation recently has drawn criticism. A bid during 2003 by the Federal Communications Commission (FCC) to allow large media companies to own television and radio stations and newspapers in the same cities provoked protests in more than a dozen U.S. cities, with marchers in Los Angeles displaying signs that read "No Choice, No Voice: Reclaim our Airwaves." Furthermore, 750,000 Americans phoned, wrote, or e-mailed messages, arguing that the proposed rule changes would stifle diversity and were fundamentally anti-democratic. The FCC ignored these messages. Steve Barnett, *On Broadcast: Hurrah for Jowell as She Puts Brakes on Big Media*, THE OBSERVER, June 29, 2003, at 6 (internal quotation marks omitted). *See also* Madison Smart Bell, *Have You Heard the New Neil Young Novel?*, N.Y. TIMES, Nov. 9, 2003, at 33 (noting that musician Neil Young is "not the first or last to notice that if our world is significantly less free now than in the time of his youth, it's less because of government than the inert momentum of the increasingly monolithic media.").

[5] *See infra* notes 18, 60-73 and accompanying text.

[6] *See infra* Part V.C.

[7] This nation now holds some trials in secret. One newspaper columnist points out that "a tiny group of fringe right-wing lawyers" created secret and unaccountable military tribunals controlled by the White House that have proven "totally useless" in the war on terror, but have "indelibly stain[ed] America's reputation as a leader in democratic principles and endanger[ed] the lives of American prisoners of war in current and future conflicts." Robert Scheer, *The Man Behind the Oval Office Curtain*, L.A. TIMES, Oct. 26, 2004, at B11. Furthermore, the federal government has been operating under ever-greater secrecy in recent years, especially since the September 11, 2001 terrorist attacks in New York and Washington, D.C. For example, the number of classified government documents has jumped forty percent between 2001 and 2003. Moreover, in 2003 only one fifth as many documents were declassified as in 1997. Edward Epstein, *White House Takes Secrecy to New Levels, Coalition Reports*, S.F. CHRON., Aug. 27, 2004, at A7.

of citizens,[8] should give anyone who favors governance by open democracy serious pause. Though perhaps not fashionable to emphasize in this era of magnified terrorism fears, evidence is abundant that the polity's rights are steadily eroding. "The war on terrorism threatens to destroy the very values of a democratic society governed by the rule of law."[9] In light of recent mass arrests and secret detentions by the federal government, Judge Tashima, who was imprisoned in an internment camp in Arizona along with other Americans of Japanese ancestry during World War II, said, "It's happening all over again."[10] Professor Don Mitchell argues that the

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> [President George W.] Bush has . . . presided over one of the most closed administrations in modern history, increasing the classification of documents and defending against any challenges to its secrecy. Early in his tenure, [former Attorney General John] Ashcroft issued a memorandum to other agencies of government promising to stand by any plausible refusal of a Freedom of Information Act request.

Editorial, *Administration Unbound*, ST. PETERSBURG TIMES, Oct. 2, 2004, at 16A. In addition, hearings for immigrants caught up in the sweeps following the September 11, 2001 attacks were closed to not only the news media and the public, but even the detainees' relatives. Adam Clymer, *Government Openness At Issue as Bush Holds On to Records*, N.Y. TIMES, Jan. 3, 2003, at A1. The details of their arrests and even the number detained have been kept secret. *Id.* Bush also has kept under wraps presidential papers pertaining to his father, George H.W. Bush, and Ronald Reagan, robbing scholars and the public of valuable information. *Id.* In general, the Bush Administration's "penchant for secrecy . . . has been striking to historians, legal experts and lawmakers of both parties." *Id.*

[8] *See infra* Part III.

[9] Steve Hymon, *Rights a Victim of Terror War, U.S. Judge Says*, L.A. TIMES, Nov. 7, 2004, at B3 (quoting United States Court of Appeals Judge A. Wallace Tashima, speaking at a conference on the civil rights cases challenging the World War II-era internments) (internal quotation marks omitted).

[10] *Id.* (internal quotation marks omitted). Judge Tashima also criticized the government for interrogating people based only on race and for conducting searches of Internet, library, and university records without probable cause. *Id.* Another former detainee at an internment camp told the newspaper, "A lot of people now are governed by fear. There are friends of mine who say racial prejudice can be justified. . . . They really believe it. It's scary the way things are going. But I think people

intersection of the new repressive state apparatus spawned by the September 11, 2001 attacks on American soil, along with jurisprudence that defines where free speech may take place, "portends a frightening new era in the history of speech and assembly in America."[11]

Protecting core rights such as free expression is vital because "[s]ometimes a right, once extinguished, may be gone for good."[12] Recognizing that the right to free speech for dissidents is increasingly at risk in the United States, this article catalogs manifold methods the government has employed to constrain free speech. It urges that courts not only serve as a bulwark against further erosion of public expression of dissent but endeavor to restore access to the public forum that recently has been lost. Part II surveys the background of the right of free expression, examining the traditional limits on the public forum. Part III provides details and examples of the government's increasing tendency to suppress dissident expression by deploying heavily-armed police in demonstrations, committing violent acts against peaceful protesters, engaging in mass arrests, exaggerating the criminal charges against detained demonstrators, and holding demonstrators in ignominious conditions for unreasonably long periods of time. Part IV examines how such government actions violate constitutional protections of speech by deterring participation in public debate. In recent years, the government has gone beyond such street tactics and has placed public fora off-limits by forcing dissenters into protest pens, determining, based on viewpoint, where they may engage in political expression and limiting the landscape of free speech via privatization schemes. Part V analyzes the First Amendment

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are going to be outraged sooner or later." *Id.* (internal quotation marks omitted).

[11] Don Mitchell, *The Liberalization of Free Speech: Or, How Protest in Public Space is Silenced*, 4 STAN. AGORA 1, *45 (2004).

[12] Doe v. Ashcroft, 334 F. Supp. 2d 471, 477 (S.D.N.Y. 2004).

implications of such developments, and Part VI concludes that courts must defend the right to free expression by limiting or disallowing these governmental schemes that have the effect of restricting access to the public forum.

II. Background

The First Amendment to the United States Constitution[13] represents "nothing less than a celebration of the value of intellectual and moral autonomy."[14] Our nation's founders believed that democratic government would only be possible with the widest access to information.[15] This belief reflects the self-governance theory underlying the First Amendment tradition, whereby free speech is viewed as an indispensable tool for governing a democracy. Because it facilitates the spread of political truth, free speech receives heightened protection.[16]

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[13] The First Amendment provides in relevant part: "Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. CONST., amend. I.

[14] Sheila Suess Kennedy, *Introduction* to FREE EXPRESSION IN AMERICA: A DOCUMENTARY HISTORY xviii (Sheila Suess Kennedy ed., Greenwood Publishing Group 1999).

[15] *Id.*

[16] According to one author,

> The true meaning of freedom of speech seems to be this. One of the most important purposes of society and government is the discovery and spread of truth on subjects of general concern. This is possible only through absolutely unlimited discussion, for . . . once force is thrown into the argument, it becomes a matter of chance whether it is thrown on the false side or the true, and truth loses all its natural advantage in the contest.

ZECHARIAH CHAFEE, JR., FREE SPEECH IN THE UNITED STATES 31 (Harvard Univ. Press 1948); RODNEY A. SMOLLA, FREE SPEECH IN AN OPEN SOCIETY 12 (Random House 1992). Professor Smolla lists five ways in which free speech is related to self-governance: (1) through participation (debating issues, casting votes, joining decision-making processes); (2) the pursuit of political truth; (3) augmentation of

A variation on this theory posits that the right of free expression is needed for citizens to develop the intellectual tools necessary to assimilate and evaluate a wide range of viewpoints.[17] Additionally, commentators have cited the marketplace theory as an underlying purpose of free speech by which truth competes in the marketplace with falsity and ultimately triumphs.[18] Free speech also is often justified as an end unto itself, inextricably tied to human autonomy and dignity.[19] Thus, under this self-fulfillment theory, even where one's words may lack truth, value, or argumentative merit, free expression offers the speaker fulfillment through inner satisfaction and the realization of self-identity.[20] Whatever its true *raison d'etre*, free speech on issues of public concern has enjoyed protection for hundreds of years and has as its conceptual progenitor the right to petition

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majority rule; (4) restraint on "tyranny, corruption and ineptitude"; and (5) societal stability. *Id.* at 12-13. *See also* New York Times v. Sullivan, 376 U.S. 254, 270 (1964) (declaring that "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials").

[17] "By allowing for ambiguity and conflict in the public sphere, the First Amendment promotes the emergence of character traits that are essential to a well-functioning democracy, including tolerance, skepticism, personal responsibility, curiosity, distrust of authority, and independence of mind." GEOFFREY R. STONE, PERILOUS TIMES: FREE SPEECH IN WARTIME FROM THE SEDITION ACT OF 1798 TO THE WAR ON TERRORISM 7 (W.W. Norton & Co. 2004).

[18] "Truth has a stubborn persistence. Persecution may eliminate all visible traces of a truth, like the scorched earth after a napalm bombing. Yet truth comes back. . . . Cut down again and again, truth will still not be stamped out; it gets rediscovered and rejuvenated, until finally it flourishes." SMOLLA, *supra* note 16, at 7. However, Professor Smolla argues that like economic markets, the marketplace of ideas suffers a bias in favor of the wealthy who have greater access than the poor or disenfranchised. *Id.* at 6. *See also* Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) ("the best test of truth is the power of the thought to get itself accepted in the competition of the market").

[19] SMOLLA, *supra* note 16, at 9.

[20] "It is a right defiantly, robustly, and irreverently to speak one's mind, *just because it's one's mind*." *Id.*

government for redress of grievances, as originally developed in Medieval England.

A. The Right of Free Expression: Ancient Roots

The right of free expression as a means toward effecting change in governmental policy predates the founding of the United States. Although the Magna Carta contains no language directly protecting free speech, some authors suggest that it contains the seeds that later flourished into support for free-speech rights.[21] These seeds take the form of the right to petition the governing authority for redress, which finds some reference in the Magna Carta[22] but more direct support in later texts.[23] Yet,

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[21] The most salient feature in its seeds-of-free-expression context is that the Magna Carta enunciates a limit on the power of the Crown. Kennedy, *supra* note 14, at 1. "However unarticulated, there is in the Charter the principle that we today would call the 'rule of law.'" A.E. DICK HOWARD, MAGNA CARTA: TEXT AND COMMENTARY 23 (Univ. of Va. Press 1964). According to Howard:

> The very fact that the King was forced to agree to this declaration of rights and liberties set an example that could never be erased. In a later century when Stuart kings, to cloak their tyranny, invoked the doctrine of 'Divine Right,' men could look back to Magna Carta as a reminder that free men are not obliged to allow themselves to be ground into the dust.

Id.

[22] According to one author, who cites an unpublished Ph.D. dissertation, the right to petition predates even the Magna Carta. While the King regularly provided redress, he only provided redress when beneficial to himself and only under a very limited set of circumstances—namely in private disputes between property owners. Gregory A. Mark, *The Vestigal Constitution: The History and Significance of the Right to Petition*, 66 FORDHAM L. REV. 2153, 2163 n.26 (1998). Thus, this early petition for redress was not a means to bolster political rights or affect policy. *Id.* at 2163-64. On the other hand, the Magna Carta does provide, in Chapter 61, a means of petitioning by which barons could seek that the King abide by the Charter. *See id.* at 2164 n.29. The King and his counselors had discretion over how to treat petitions, but even those rejected or not

around the time of the Magna Carta, the right to petition the government for redress of grievances became a formal mechanism by which the disenfranchised could participate with the enfranchised in English political life.[24] Not surprisingly, the right to petition began early in North America when it was codified in the Body of Liberties adopted by the Massachusetts Bay Colony in 1641.[25]

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acted on had to be read. *Id.* at 2168. The Magna Carta provides:

> [I]f We, Our Justiciary, bailiffs, or any of Our ministers offend in any respect against any man, or shall transgress any of these articles of peace or security, and the offense be brought before four of the said twenty-five barons, those four barons shall come before Us, or Our Chief Justiciary if We are out of the kingdom, declaring the offense, and shall demand speedy amends for the same.

HOWARD, *supra* note 21, at 50 (quoting MAGNA CARTA ch. 61).

[23] *E.g.*, The Bill of Rights of 1689, *quoted in* Michael J. Wishnie, *Immigrants and the Right to Petition*, 78 N.Y.U. L. REV. 667, 685). This bill gave subjects the right to petition the King, and declared that "all commitments and prosecutions for such petitioning are illegal." *Id.* at 685 n.92 (internal quotation marks omitted).

[24] Mark, *supra* note 22, at 2169. Mark observes:

> In the thirteenth and fourteenth centuries, for example, an extremely wide band of English society participated in politics by petitioning for redress of grievances, without question a wider spectrum of society than that with the franchise. . . . A petition from a group of prisoners, for example, suggests a participatory consciousness that extended well beyond even that which underlies some quite modern concepts of enfranchisement.

Id. at 2169-70.

[25] *See* Wishnie, *supra* note 23, at 688. The Body of Liberties provides:

> Every man whether Inhabitant or fforreiner, free or not free shall have libertie to come to any publique Court, Councell, or Towne meeting, and either by speech or writing to move any lawfull, seasonable, and materiall question, or to present any necessary motion, complaint, petition, Bill or information, whereof that meeting hath proper cognizance, so it [can] be done in convenient time, due order, and respective manner.

Not unlike today's demonstrators who take to the streets to protest war, economic injustice, or environmental degradation, those who petitioned the government in Colonial America were among the disenfranchised.[26] Also, like street marching today, petitioning in colonial times made it possible for even the disenfranchised to participate in political life.[27] Furthermore, like some street demonstrations carried out by the disenfranchised and their sympathizers in the 1960s, as well as more recently,[28] petitioning during colonial times successfully effected changes in governmental policy.[29] The Declaration of Independence also refers to unsuccessful petitions for redress from the King of England made "in the most humble terms," but which "have been answered only by repeated injury."[30] Finally, the First Amendment itself provides for petitioning.[31] Although originally seen as central to the relationship between government and the governed, the courts and academics historically have paid

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A Coppie of the Liberties of the Massachusetts Collonie in New England (December 1641), *reprinted in* 1 DOCUMENTS ON FUNDAMENTAL HUMAN RIGHTS: THE ANGLO-AMERICAN TRADITION 122, 124 (Zechariah Chafee, Jr., ed., 1963). *See also* Mark, *supra* note 22, at 2177.

[26] Wishnie, *supra* note 23, at 686-87. "Disenfranchised white males, such as prisoners and those without property, as well as women, free blacks, Native Americans and even slaves, exercised their right to petition for redress of grievances." *Id.* at 688-89 (citations omitted).

[27] *Id.* at 687.

[28] *See, e.g.*, Leti Volpp, *The First Annual Peter Cicchino Awards for Outstanding Advocacy in the Public Interest Pannel Discussion: A Defender of Humanity: In Honor of Peter Cicchino*, 9 AM. U. J. GENDER SOC. POL'Y & L. 45, 47 (2001) (rallying against global economic inequality allows participants to feel a connection with "the subordinated and disenfranchised whose humanity is routinely denied").

[29] For example, more than half the statutes enacted in eighteenth-century Virginia began as petitions. Wishnie, *supra* note 23, at 687.

[30] THE DECLARATION OF INDEPENDENCE, para. 30 (U.S. 1776).

[31] "Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people to peaceably assemble, and *to petition the Government for a redress of grievances*." U.S. CONST. amend. I (emphasis added).

this aspect scant attention.[32] For practical purposes, the First Amendment's protection of petitioning has been subsumed into its defense of speech and the press.[33] "[W]here once political speech had petitioning at its very core, and what we understand as speech and press stood at the periphery, now the core and periphery are reversed."[34]

Giving historic context to and underlining the importance of free speech in America, colonists in the early 1720s, writing under the pseudonym "Cato," explained:

> Freedom of Speech is the great Bulwark of Liberty; they prosper and die together. And it is the Terror of Traytors and Oppressors,

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[32] Mark, *supra* note 22, at 2155.

[33] *Id.* at 2154-56. A narrow exception to this trend arose during the 1960s with the development of the *Noerr-Pennington* doctrine, named for two Supreme Court cases, *Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961) and *United Mine Workers v. Pennington*, 381 U.S. 657 (1965). Gary Minda, *Interest Groups, Political Freedom, and Antitrust: A Modern Reassessment of the* Noerr-Pennington *Doctrine,* 41 HASTINGS L.J. 905, 908-10, 913 (1990). Under this doctrine, the Supreme Court, citing the right to petition as "an essential component of our representative government" under the First Amendment, immunized from antitrust attack petitioning (i.e., lobbying) by business special-interest groups, even where the purpose of such petitioning was to restrain trade and even if the restraint caused an antitrust injury. *Id.* at 909-10, 913. Professor Minda questions the validity of the *Noerr-Pennington* doctrine, however, when he states:

> The true threat to the values of free expression and representative government lies not with antitrust regulation of petitioning, but rather with antitrust immunity, which has allowed the political process to be overwhelmed by the excessive influence of corporate greed and private access.
>
> By immunizing government-petitioning cases under the *Noerr-Pennington* antitrust doctrine, the courts have allowed business interests to use political expression as a predatory strategy for capturing the benefits of regulation, thus threatening the political legitimacy of government.

Id. at 1028.

[34] Mark, *supra* note 22, at 2154.

> and a Barrier against them. . . . But when [free speech] was enslaved . . . [t]yranny had usurped the Place of Equality, which is the Soul of Liberty, and destroyed publick Courage. The Minds of Men, terrified by unjust Power, degenerated into all the Vileness and Methods of Servitude: Abject Sycophancy and blind Submission grew the only means of Preferment, and indeed of Safety; Men durst not open their Mouths, but to flatter.[35]

Yet, intellectuals of the time frequently followed the teaching of eighteenth century English commentator, Blackstone, whose conception of free expression consisted of barring government from prior restraint of speech while allowing subsequent punishment.[36] Arguably, this type of thinking underlies the passage of the Alien and Sedition Acts of 1798,[37] which punished, *inter alia*, criticism of the government.[38] These Acts, passed amid a looming

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[35] Letter from Cato number 15, *Of Freedom of Speech: That the Same Is Inseparable from Publick Liberty, in* KENNEDY, *supra* note 14, at 15.

[36] *See* CHRISTOPHER WOLFE, THE RISE OF MODERN JUDICIAL REVIEW: FROM CONSTITUTIONAL INTERPRETATION TO JUDGE-MADE LAW 182-83 (Rowman & Littlefield rev. ed. 1994).

> The liberty of press is indeed essential to the nature of a free state; but this consists in laying no *previous* restraints on publications, and not in freedom for criminal matter when published. Every freeman has an undoubted right to lay what sentiments he pleases before the public; to forbid this, is to destroy the freedom of the press; but if he publishes what is improper, mischievous or illegal, he must take the consequences of his own temerity.

Id. at 182 (quoting WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND (1866)).

[37] Law of June 25, 1798, ch. 58, 1 Stat. 570; Law of July 14, 1798, ch. 74, 1 Stat. 596 [hereinafter Law of July 14, 1798].

[38] The Sedition Act punished any act wherein a person should "write, print, utter or publish . . . any false, scandalous or malicious writing or

prospect of war against France, provoked immediate public furor.[39] Thomas Jefferson assailed the constitutionality of the Acts—rightfully so according to author Chafee—so much so that when he became the nation's third President in 1801, he pardoned all prisoners arrested under these Acts.[40] Popular indignation with prosecutions under the Acts destroyed the Federalist Party, and Congress repaid all of the imposed fines.[41]

Despite this history, the United States Supreme Court has never passed on the constitutionality of the Alien and Sedition Acts,[42] and for nearly the first century and a half of its existence, the Court expended little effort on examining or upholding free speech or free press rights.[43] One reason the Court rarely reached First Amendment

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writings against the government . . . with intent to defame . . . or to excite against them . . . the hatred of the good people . . . or to stir up sedition" with up to two years in prison and a $2,000 fine. Law of July 14, 1798, §2. Truth was a defense. *Id.* at §3.

[39] WOLFE, *supra* note 36, at 183. The passage of the Acts represented the one instance from the founding of the nation until 1917 in which the government attempted to apply the doctrine of bad tendency, which punishes speech that tends to favor an enemy at war by creating disaffection in the country and discouraging men from enlisting in the armed forces. *See generally* CHAFEE, *supra* note 16, at 25-28.

[40] CHAFEE, *supra* note 16, at 27-28.

[41] *Id.* at 27. *See also Sullivan*, 376 U.S. at 276.

[42] *Sullivan*, 376 U.S. at 276. "Although the Sedition Act was never tested in this Court, the attack upon its validity has carried the day in the court of history. Fines levied in its prosecution were repaid by Act of Congress on the ground that it was unconstitutional." *Id.* (citations omitted).

[43] *E.g.*, WOLFE, *supra* note 36, at 183 ("The period between 1800 and 1919 was generally dormant for free-speech cases on the federal court level."). However, it is not as though the Supreme Court never referred to free-expression rights in the 19th century. *See, e.g.*, United States v. Cruikshank, 92 U.S. 542, 552 (1876) ("The right of the people peaceably to assemble for the purpose of petitioning Congress for a redress of grievances, or for any thing else connected with the powers or the duties of the national government, is an attribute of national citizenship, and, as such, under the protection of, and guaranteed by, the United States."); Slaughter-House Cases, 83 U.S. 36, 80 (1873) ("The right to peaceably assemble and petition for redress of grievances . . . are rights of the citizen guaranteed by the Federal Constitution.").

questions during the nineteenth century is that the prospect of mob violence or economic punishment discouraged parties from asserting their rights to free speech in any court. Thus, few cases or controversies regarding speech made their way to the Supreme Court.[44]

Indeed, it was not until well into the twentieth century that Justice Holmes, in his famous dissent in *Abrams v. United States*,[45] presaged the Court's modern tendency to give teeth to First Amendment protection of expression. Justice Holmes wrote, "I think that we should be eternally vigilant against attempts to check the expression of opinions that we loathe."[46] This dissent appeared in one case among a series in which both agitators against the World War I draft and Socialists, who advocated the violent overthrow of the government, were hauled into court for violating the Espionage Act of 1917[47] and a similar state statute. Once there, their convictions were upheld.[48] Even in the 1925 case of *Gitlow v. New York*,[49] which serves as a free-speech milestone by holding

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[44] *See generally* Michael T. Gibson, *The Supreme Court and Freedom of Expression from 1791 to 1917*, 55 FORDHAM L. REV. 263, 268-70 (1986) (noting that economic and social pressures kept plaintiffs from taking free speech cases to court in the 19th century). For example, in 1869 the *New York Times* sent riflemen and machine guns to protect the *Herald Tribune* from a mob, and employers purportedly threatened to eliminate employees' jobs if William Jennings Bryan was elected president in 1896. *Id.* at 268 n.21, 269 n.22. Nevertheless, evidence exists that newspapers did not exactly feel "shackled" by the Supreme Court's nineteenth century free speech jurisprudence. *Id.* at 270-71. Moreover, nineteenth century procedural and substantive rules prevented many cases from reaching the Supreme Court, and the Court did not "incorporate" the First Amendment into the Due Process Clause of the Fourteenth Amendment until 1925. *Id.* at 267-68.

[45] 250 U.S. 616.

[46] *Id.* at 630 (Holmes, J., dissenting).

[47] Act of June 15, 1917, ch. 30, tit. 1, § 3, 40 Stat. 219, amended by the Act of May 16, 1918, ch. 75 § 1, 40 Stat. 553.

[48] *See, e.g.*, *Abrams*, 250 U.S. 616; Debs v. United States, 249 U.S. 211 (1919); Frohwerk v. United States, 249 U.S. 204 (1919); Schenck v. United States, 249 U.S. 47 (1919).

[49] 268 U.S. 652 (1925).

for the first time that the First Amendment was "incorporated" into the Fourteenth Amendment Due Process Clause[50] and was therefore applicable to the states, the majority held that legislatures could prohibit classes of speech that they consider to be dangerous.[51] Justices Holmes and Brandeis dissented, pointing out that "[e]very idea is an incitement."[52] This paved the way for the latter's seminal concurrence in *Whitney v. California*.[53] There, Justice Brandeis enunciated the clear and present danger

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[50] *Gitlow*, 268 U.S. at 666.

> For present purposes we may and do assume that freedom of speech and of the press—which are protected by the First Amendment from abridgment by Congress—are among the fundamental personal rights and 'liberties' protected by the due process clause of the Fourteenth Amendment from impairment by the States.

Id. While debating the Bill of Rights, the House of Representatives approved a provision stating that "[n]o State shall violate the equal rights of conscience, or the freedom of the press, or the trial by jury in criminal cases." Gibson, *supra* note 44, at 268 n.18 (quoting 1 ANNALS OF CONGRESS 755 (J. Gales ed. 1834)). However, the Senate rejected the provision. *Id.* (citing 2 B. SCHWARTZ, THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 1146 (McGraw-Hill Professional Publishing 1971)).

[51] According to the Court:

> [W]hen the legislative body has determined generally, in the constitutional exercise of its discretion, that utterances of a certain kind involve such danger of substantive evil that they may be punished, the question whether any specific utterance coming within the prohibited class is likely, in and of itself, to bring about the substantive evil, is not open to consideration. It is sufficient that the statute itself be constitutional and that the use of the language comes within its prohibition.

Gitlow, 268 U.S. at 670.

[52] *Id.* at 673 (Holmes, J., dissenting) ("Every idea is an incitement. It offers itself for belief and if believed it is acted on unless some other belief outweighs it or some failure of energy stifles the movement at its birth. The only difference between the expression of an opinion and an incitement in the narrower sense is the speaker's enthusiasm for the result.").

[53] 274 U.S. 357, 372 (1927) (Brandeis, J., concurring).

test as a limit on government prosecution of speech, such that "[o]nly an emergency can justify repression."[54]

Justice Brandeis further emphasized that those who won the nation's independence believed that "without free speech and assembly discussion would be futile; that with them, discussion affords ordinarily adequate protection against the dissemination of noxious doctrine."[55] This call to limit government sanction of speech would not really strengthen until the 1960s.[56] During the Great War Era, Learned Hand, sitting as a district court judge, most eloquently defended the right of free speech in an Espionage Act case in which he issued an injunction requiring the postmaster to distribute a magazine containing anti-war poetry, cartoons, and other writings.[57]

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[54] *Id.* at 377 (Brandeis, J., concurring).

[55] *Id.* at 375.

[56] *See, e.g.*, Brandenberg v. Ohio, 395 U.S. 444 (1969) (overturning Ohio law punishing advocacy of violence as a means to achieve industrial or political reform); *Sullivan*, 376 U.S. at 276 (enunciating the actual malice standard in defamation of public figures); Noto v. United States, 367 U.S. 290 (1961) (reiterating that the teaching of the moral propriety or necessity for a resort to force are not sufficient for conviction). In *Brandenberg*, Justice Douglas criticized the courts for too readily punishing advocacy by characterizing it as a threat. *Brandenberg*, 395 U.S. at 454-55 (Douglas, J., concurring). According to Justice Douglas,

> When one reads the opinions closely and sees when and how the 'clear and present danger' test has been applied, great misgivings are aroused. First, the threats were often loud but always puny and made serious only by judges so wedded to the *status quo* that critical analysis made them nervous. Second, the test was so twisted and perverted in [Dennis v. United States, 341 U.S. 494 (1951)] as to make the trial of those teachers of Marxism an all-out political trial which was part and parcel of the cold war that has eroded substantial parts of the First Amendment.

Id. at 454.

[57] Masses Pub. Co. v. Patten, 244 F. 535 (S.D.N.Y. 1917), *rev'd*, 246 F. 24 (2d. Cir. 1917). Chafee considers that during the World War I era, there was "no finer judicial statement" advocating the right of free speech than this from Judge Hand. CHAFEE, *supra* note 16, at 46.

Judge Hand wrote:

> Political agitation, by the passions it arouses or the convictions it engenders, may in fact stimulate men to the violation of law. Detestation of existing policies is easily transformed into forcible resistance of the authority which puts them in execution, and it would be folly to disregard the causal relation between the two. Yet to assimilate agitation, legitimate as such, with direct incitement to violent resistance, is to disregard the tolerance of all methods of political agitation which in normal times is a safeguard of free government. The distinction is not a scholastic subterfuge, but a hard-bought acquisition in the fight for freedom.[58]

B. The Need for Free Expression: The Lack of Alternatives

Certainly such an eloquent defense of free speech during wartime applies with no less force today, particularly where the current administration portends a permanent war against terrorism. Engaging in political speech in the streets is worthy of the most heightened

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[58] *Masses Pub. Co.*, 244 F. at 540. Judge Hand further argues:

> If one stops short of urging upon others that it is their duty or their interest to resist the law, it seems to me one should not be held to have attempted to cause its violation. If that be not the test, I can see no escape from the conclusion that under this section every political agitation which can be shown to be apt to create a seditious temper is illegal. I am confident that by such language Congress had no such revolutionary purpose in view [when it passed the Espionage Act].

Id.

protection, especially because the mass media may not accurately reflect the voices of the public, and because much of the public lacks access to the media.[59] Indeed, for much of the twentieth century, the main avenues of protest—such as leafleting, picketing, rallying on public property, and engaging in door-to-door advocacy—were geared toward low-cost message-making. Courts' First Amendment rulings sought to protect such methods[60] because the rich enjoyed a built-in advantage of media access in getting their message across to a broad audience, and potentially were able to exclude those without such means from public debate.[61] Underscoring the importance

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[59] "[F]reedom of the press is guaranteed only to those who own one." Seth F. Kreimer, *Social Movements and Law Reform: Technologies of Protest: Insurgent Social Movements and the First Amendment in the Era of the Internet*, 150 U. PA. L. REV. 119, 121-22 (2001) (quoting A.J. LIEBLING, THE PRESS 32 (2d rev. ed. 1975)). While media consolidation has put the lack of access in sharp focus, *see supra* note 4, it can hardly be said that this concern is new. Justice Douglas, dissenting in a 1966 trespass case, stated:

> The right to petition for the redress of grievances has an ancient history and is not limited to writing a letter or sending a telegram to a congressman; it is not confined to appearing before the local city council, or writing letters to the President or Governor or Mayor. . . . Conventional methods of petitioning may be, and often have been, shut off to large groups of our citizens. Legislators may turn deaf ears; formal complaints may be routed endlessly through a bureaucratic maze; courts may let the wheels of justice grind very slowly.

Adderley v. Florida, 385 U.S. 39, 49-51 (1966) (citations omitted). In *Adderley*, Florida students were convicted of "trespass with a malicious and mischievous intent" for demonstrating against racism and other governmental policies on the grounds of a local jail. *Id.* at 40.

[60] *E.g.*, Martin v. Struthers, 319 U.S. 141, 146 (1943) (protecting familiar methods is "essential to the poorly financed causes of little people").

[61] Kreimer, *supra* note 59, at 122. One book reviewer refers to "a world bought and paid for by big business, which, not coincidentally, can count on the corporate media to push anti-people agendas." Marlene Webber, *Kicking Against Them*, THE TORONTO STAR, Jan. 13, 2002, at D14 (book review). A letter writer contends that members of the public will take to the streets when they are "deliberately bypassed

of low-cost street protesting, Supreme Court Justice Douglas noted:

> Those who do not control television and radio, those who cannot afford to advertise in newspapers or circulate elaborate pamphlets may have only a more limited type of access to public officials. Their methods should not be condemned as tactics of obstruction and harassment as long as the assembly and petition are peaceable.[62]

While it is true that the Internet has the potential to provide a low-cost medium for those with dissenting political messages to reach a broad audience, it serves more as a highly efficient organizational, research, and interpersonal communication tool than a replacement for the town square.[63] Still, the Internet enables both large and small groups, which represent the entire political spectrum, to make their views available to readers all over the world.[64] And thus far, they have been able to elude governmental and media censorship in doing so.[65] For

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by those in power." Postbag, *Don't be a Stooge of Globalization*, BANGKOK POST, Oct. 3, 2000 (letter to the editor).

[62] *Adderley*, 385 U.S. at 50-51.

[63] *See generally* Kreimer, *supra* note 59, at 142-43 (arguing that the existence of more than five billion websites creates a "digital attention deficient" as Internet users only have so many hours in a given day to view websites and a group's message may get lost in the clamor). *See also* Frederick W. Mayer, *Labor, Environment and the State of U.S. Trade Politics*, 6 NAFTA L. & BUS. REV. AM. 335, 339 (2000) (explaining that the Internet merely allows groups to promote leaders' efforts, solicit support, provide information to members, distribute key documents, or serve as an informational clearinghouse, rather than engage in the debate characteristic of visible public protests).

[64] Kreimer, *supra* note 59, at 125. A good example of such a website may be found at http://www.indymedia.org.

[65] "Not only does the Internet allow insurgents to bypass the 'soft' censorship of the mainstream media, but it allows evasion of the more direct efforts at suppression of information by local, state, or national authorities." Kreimer, *supra* note 59, at 127. Professor Kreimer cites

protest groups, maintaining a website means giving readers a view of marches and police reactions that the broadcast media may ignore.[66] Moreover, the use of Internet chat rooms, e-mail, and websites enables dissident groups to provide volumes of information including, for example, complaints and court decisions that would have been inconceivable without the computer-based medium. Moreover, groups employ online resources to facilitate recruitment and mobilization.[67]

Professor Seth Kreimer, however, contends that for all its ability to move information and reach globally, the Internet has not developed into a cyber-town square.[68] Primary among the reasons for this lack of development include what he calls the "digital attention deficit"; dissident group websites, no matter how comprehensive, exist in a worldwide cacophony of websites, each trying to compete for readers who only have twenty-four hours a day.[69] Moreover, protest site publishers may be able to post links on portals that attract heavy traffic or host more easily found "sucks" sites.[70] But these may not offer the impact of ground protests at prominent venues, such as the National Mall in Washington, which by their nature capture

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the Mexican Zapatista rebels' ability to convey their accounts to the world, Vietnamese dissenters' efforts to post banned novels, and Serbian radio stations' web-based broadcasts to bypass airwave jamming by the government. *Id.* at 127-28. Similarly, Matt Drudge's efforts arguably dragged the mainstream media into full-scale coverage of the Monica Lewinsky sex scandal during the Clinton era, while "the seamy quality of the Starr Report became impossible to disguise when the text of the report became available online." *Id.* at 130.

[66] *Id.* at 125-26.

[67] *Id.* at 131-37.

[68] *Id.* at 140.

[69] *Id.* at 142-43.

[70] Kreimer, *supra* note 59, at 152-53. *See, e.g.*, http://homedepotsucks.com (criticizing Home Depot for trying "to stifle [sic] freedom of speech, [and] attempting to steal this domain"); http://paypalsucks.com (critiquing the service used to pay for product purchased on the eBay auction website). Note that businesses, aware of the effects of "sucks" websites, have tried to thwart them through legal means.

the public's attention.[71] "On the Internet, there are neither malls nor sidewalks."[72]

While the argument is strong that the Internet has yet to serve as a substitute for the town square, it is also unlikely that the Internet would replicate the emotive impact of street protest. Although his expertise lay in copyright, Professor Melville Nimmer wrote an appellate brief on and advocated at oral argument the value of emotive speech in an important First Amendment case, *Cohen v. California*.[73] In *Cohen*, Justice Harlan adopted Nimmer's own phrasing[74] when he wrote:

> [W]ords are often chosen as much for their emotive as their cognitive force. We cannot sanction the view that the Constitution, while solicitous of the cognitive content of individual speech, has little or no regard for that emotive function which, practically speaking, may often be the more important element of the overall message sought to be communicated. Indeed, as Mr. Justice Frankfurter has said, "one of the prerogatives of American citizenship is the right to criticize public men and measures—and that means not only informed and responsible criticism but the freedom to speak foolishly and without moderation."[75]

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[71] Kreimer, *supra* note 59, at 147-48.

[72] *Id.* at 148.

[73] 403 U.S. 15 (1971) (overturning defendant's conviction for disturbing the peace by wearing a jacket with the slogan "Fuck the Draft"); William Van Alstyne, *Remembering Melville Nimmer: Some Cautionary Notes on Commercial Speech*, 43 UCLA L. REV. 1635, 1649, 1655-57 (1996).

[74] Van Alstyne, *supra* note 73, at 1656-57.

[75] *Cohen*, 403 U.S. at 26 (quoting Baumgartner v. United States, 322 U.S. 665, 673-74 (1944)).

Because the Internet does not duplicate a true public meeting place and the majority of the citizenry lacks meaningful access to shape the content of the mass media, most political dissenters still lack viable alternatives to a public forum in which to voice their opinions.

C. The Public Forum and its Traditional Limits

Whether bypassed by those in power, lacking alternate vehicles for message-making, or simply outraged at ill-conceived government policy, citizens who take to the streets and other public spaces utilize a forum traditionally dedicated to political expression. Though frequently recited in First Amendment literature, the words of Justice Roberts, in *Hague v. Committee for Industrial Organization*,[76] are worth repeating here. In that opinion, he wrote:

> Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions. Such use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens.[77]

While this proclamation of privilege should resonate like a favorite tune to the ear of any street demonstrator, one should note that Justice Roberts also stressed that "the privilege of a citizen . . . to use the streets and parks for

[76] 307 U.S. 496 (1939).
[77] *Id.* at 515.

[free expression] may be regulated in the interest of all; it is not absolute, but relative."[78]

Yet, while recognizing a governmental prerogative to regulate in the interest of peace and order, Justice Roberts nonetheless admonished that government must not use "the guise of regulation" to abridge or deny free speech.[79] After deciding *Committee for Industrial Organization*, the Court developed a regulation scheme that categorizes the use of public spaces for political expression based on their relative availability to the public. Thus, the Court referred to what is now known as the traditional public forum—the streets, sidewalks, and parks found to be "natural and proper" places for political expression.[80] These are places that "by long tradition or by government fiat have been devoted to assembly and debate."[81] The Court also has defined limited or designated public fora and nonpublic fora,[82] but the focus of this article rests on political expression in the traditional public forum,

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[78] *Id.* at 515-16. The privilege "must be exercised in subordination to the general comfort and convenience, and in consonance with peace and good order." *Id.*

[79] *Id.* at 516.

[80] In such places, "expressive activity will rarely be incompatible with the intended use of the property, as is evident from the facts that they are 'natural and proper places for dissemination of information and opinion.'" Cornelius v. NAACP Legal Def. & Educ. Fund, 473 U.S. 788, 817 (1985) (quoting Schneider v. State, 308 U.S. 147, 163 (1939)).

[81] Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983).

[82] Limited or designated public fora include university meeting facilities and municipal theaters, places that the government has deliberately opened to expressive activity for limited time periods, for a limited class of speakers (e.g., student groups), or for a limited range of topics (e.g., school board business). The nonpublic forum category refers to government property not traditionally used or deliberately designated for speech activity. For example, courts have found post office sidewalks, airports, state fairgrounds, jails, military bases, and a municipally-owned pier to be nonpublic fora. For a thorough treatment of the public forum doctrine, including abundant case citations, *see* Kevin Francis O'Neill, *Disentangling the Law of Public Protest*, 45 LOY. L. REV. 411, 418-62 (1999).

especially to elucidate how recent government actions have sharply limited its availability.

The extent to which the government is permitted to regulate speech in a public forum depends on whether or not the content is a motivation for the constraint. Content-based restrictions in public fora are sharply circumscribed and strictly examined.[83] "It is axiomatic that the government may not regulate speech based on its substantive content or the message it conveys."[84] To be valid, a content-based regulation "must be shown to protect some vital state interest, or to prevent some clearly identifiable harm."[85] An egregious form of content-related regulation is that based on viewpoint.[86] "When the government targets not subject matter, but particular views taken by speakers on a subject, the violation of the First Amendment is all the more blatant."[87]

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[83] Capitol Square Review & Advisory Bd. v. Pinette, 515 U.S. 753, 761 (1995) (citing *Perry Educ. Ass'n*, 460 U.S. at 45) (holding that a state may regulate expressive content "only if such a restriction is necessary, and narrowly drawn, to serve a compelling state interest").

[84] Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 828 (1995). Moreover, "[d]iscrimination against speech because of its message is presumed to be unconstitutional." *Id.* at 828. Professor O'Neill lists five categories in which courts have found impermissible governmental acts that restrict speech based on content: (1) categorically suppressing or favoring a particular message; (2) blocking access to a forum because of a speaker's intended message; (3) charging higher fees for certain speakers to use a forum because the speech is likely to generate controversy and require more police protection; (4) withholding a subsidy to which a speaker, but for her message, would be entitled; and (5) altering a speaker's message as the price of access to the public forum, such as when private parade organizers were required to include gay and lesbian participants who would convey a message that the organizers cared not to communicate). O'Neill, *supra* note 82, 429-433. *See also Rosenberger*, 515 U.S. at 828 (observing that the government offends the First Amendment when it imposes financial burdens on certain speakers based on the content of their expression).

[85] Mitchell, *supra* note 11, at *15 (emphasis omitted).

[86] *Rosenberger*, 515 U.S. at 829.

[87] *Id.* "The government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction." *Id.* (citing *Perry Educ.*

In contrast, where a regulation is justified without reference to the content of the expression, courts give government entities some leeway to constrain speech by imposing reasonable restrictions on the time, place, or manner.[88] The government's purpose is the controlling factor in determining such content neutrality.[89] When the purpose served is unrelated to the content of the expression, a restriction will be deemed content-neutral, even if it has an incidental effect on some speakers or messages, but not others.[90] The content-neutral regulation must be narrowly tailored to serve a significant governmental interest—in this context, meaning that the restriction need not represent the least-intrusive means, but only that the governmental interest "would be achieved less effectively absent the regulation"[91]—and leave open ample alternate avenues through which to convey the information.[92] "An

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Ass'n, 460 U.S. at 46).

[88] Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989). Boiled down to its essence, the time, place, or manner doctrine permits government to restrict speech to serve a substantial government interest, but does not allow it to restrict more speech than necessary to accomplish that end. Kelly Conlan, Note, *The Orange Order Looks to the First Amendment: Would it Protect Their Parades?*, 17 J.L. & POL. 553, 565 (2001).

[89] *Ward*, 491 U.S. at 792.

[90] *Id.* at 791. (citing Renton v. Playtime Theatres, Inc., 475 U.S. 41, 47-48 (1986)) (upholding zoning ordinance as content-neutral, even though it affected adult theaters differently than others, because the governmental purpose of its enactment was to quell undesirable secondary effects attending adult theaters).

[91] *Id.* at 797-99. "'The validity of [time, place, or manner] regulations does not turn on a judge's agreement with the responsible decisionmaker concerning the most appropriate method for promoting significant government interests' or the degree to which those interests should be promoted." *Id.* at 800 (citing United States v. Albertini, 472 U.S. 675, 689 (1985)). Additionally, the validity of a regulation "depends on the relation it bears to the overall problem the government seeks to correct, not on the extent to which it furthers the government's interests in an individual case." *Id.* at 801.

[92] *Ward*, 491 U.S. at 801. *See also* Bay Area Peace Navy v. United States, 914 F.2d 1224 (9th Cir. 1990). "[A]n alternative mode of communication may be constitutionally inadequate if the speaker's ability to communicate effectively is threatened. . . . Restrictions have

alternative is not ample if the speaker is not permitted to reach the 'intended audience.'"[93] The requirement that an alternative be ample is important because the First Amendment "protects the right of every citizen to reach the minds of willing listeners, and to do so there must be opportunity to win their attention."[94]

III. Bullying with Billy Clubs: Government Discourages Participation

Recently, governmental agencies across the nation have undertaken extensive and expensive efforts that have the ostensible purpose of enhancing public safety. In reality, however, these efforts have had the effect of curtailing the ability of political dissidents to win the attention of their intended audience. Much like government officials in the late eighteenth and early twentieth centuries, who were facing war when they passed laws clamping down on speech,[95] federal and local leaders today refer to concerns about terrorism as reasons for seeking constraints on free expression. In addition to oft-times harsh treatment of street demonstrators,[96] the

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been upheld, for example, when [the challenged ordinance] does not affect any individual's freedom to exercise the right to speak and to distribute literature in the same place where the posting of signs on public property is prohibited, and the [challenged rule] has not been shown to deny access within the forum in question." *Id.* at 1229 (citations, emphases, internal quotation marks omitted) (alteration in original); Weinberg v. City of Chicago, 310 F.3d 1029 (7th Cir. 2002) (noting ample alternatives ineffective where author of book criticizing professional sports team owner prevented from reaching his audience by ordinance barring him from selling the book within 1,000 feet of the entrance to the sports venue during home games). "The alternatives require Herculean efforts by Weinberg or his customers to complete the sale." *Id.* at 1042.

[93] *Bay Area Peace Navy*, 914 F.2d at 1229 (internal quotation marks omitted).

[94] *Id.*

[95] *See* discussion of Alien and Sedition Acts and Espionage Act, *supra* Part II.A.

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

government has, under the auspices of the war on terror, sought to permanently gag certain entities subject to FBI searches.[97] A New York district court judge recently found the law prohibiting disclosure in such cases facially unconstitutional, noting that "as our sunshine laws and judicial doctrine attest, democracy abhors undue secrecy, in recognition that public knowledge secures freedom."[98]

Beyond the federal government's current obsession with secrecy is its concentrated and multi-faceted assault on protesters and their use of public spaces to engage in political speech. Government agencies at the federal and local level intimidate protesters from participating, unjustifiably denounce them as violent, impede their entry or exit from demonstrations, assault them with chemical agents such as pepper spray, shoot them with so-called "less-than-lethal" projectiles (ignoring manufacturers' suggested limitations on their use), round them up in mass arrests, seek exaggerated charges, and abuse them while they are in custody.[99]

A. Denouncing the Participants

Before demonstrators even show up for their rally, authorities frequently have already begun to denigrate or intimidate them.[100] This denunciation often takes the form

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[97] *See* 18 U.S.C. § 2709 (2000 & Supp. 2003); *Doe*, 334 F. Supp. 2d at 479-80, 483-84. For example, 18 U.S.C. § 2709(c) prohibits Internet service providers from disclosing "to any person that the Federal Bureau of Investigation has sought or obtained access to information or records under this section." 18 U.S.C. § 2709(c).

[98] *Doe*, 334 F. Supp. 2d at 519.

[99] *See infra* Sections III. A & III. B.

[100] For example, prior to the Republican National Convention in 2004, New York City officials demonized and criminalized those who planned to engage in political protest and portrayed them "in the most negative light." Class Action Complaint, MacNamara v. New York (S.D.N.Y. filed 2004), para. 62 [hereinafter "MacNamara Complaint"] (internal quotation marks omitted), *available at* http://nlgnyc.org/pdf/rncclassactioncomplaint.pdf (last visited Aug. 19, 2005). New York Police Commissioner Kelly made public statements

of taunts, thinly veiled threats, or apocalyptic predictions of demonstrator-derived violence. Sometimes officials seem to base these predictions on little more than isolated incidences of vandalism or infrequent cases of violence that marked previous marches in other cities.

1. Protesters' Propensity for Violence Exaggerated

The Los Angeles Police Department (LAPD) "painted a dire picture" of civil disobedience and mass protests prior to the Democratic National Convention in August 2000,[101] based on disruptions caused by dressed-in-black anarchists, who constituted a small percentage of the tens of thousands of marchers protesting globalization at the World Trade Organization (WTO) in Seattle in December 1999.[102] During a presentation to the Los

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about the threats "hard-core" and "dangerous" protesters posed to New York City. *Id.* (internal quotation marks omitted).

[101] Jeffrey L. Rabin & Tina Daunt, *LAPD Seeks Reversal of Protest Site Designation*, L.A. TIMES, June 29, 2000, at B1.

[102] The Washington Post described the scene in Seattle as follows:

> Delegates who stepped out of their hotels Tuesday morning, the first day of the [WTO] conference, with freshly issued ID badges around their necks [exited their hotels to find that] throngs of chanting demonstrators had taken control of the streets of downtown Seattle. With arms linked, they formed tight human chains to block all entrances to the convention center where the meeting would take place.
>
> Downtown's usual din of traffic was banished, replaced by the beating of protesters' drums and a lone trombone's wail, by chants and '60s rock tunes at peak volumes. Riot police marched in tight phalanxes, slapping their nightsticks against the sides of their boots. The sound was like massed jackboots on pavement.

Robert G. Kaiser & John Burgess, *A Seattle Primer: How Not to Hold WTO Talks*, THE WASH. POST, Dec. 12, 1999, at 40. Most protesters left property alone, but a small group of youths dressed in black, whose faces were covered with ski masks or bandanas, committed acts of

Angeles City Council in June 2000, the LAPD stirred fear of pandemonium by showing a dramatic video of the demonstrations in Seattle;[103] the tenor of this video could be compared to that of the famous 1936 anti-marijuana propaganda film, "Reefer Madness."[104] One police official told the city council, "We fully expect to be fully involved with mass arrests and civil disobedience . . . on a level of what we saw in Seattle if not more intense."[105]

Poking fun at the City Council's concerns over protesters, a newspaper columnist wrote that city leaders, looking over their shoulders at Seattle, were "shaking with fear" over the prospect of the public relations fiasco that street-level political expression could bring.[106] "With trembling hands, they're ripping up the Constitution and throwing it to the winds, a craven sacrifice to the gods of chaos."[107]

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vandalism, breaking storefront windows of businesses such as McDonalds and Starbucks and spray-painting slogans on buildings. *Id.* "Though more than 20,000 union members marched peacefully in Seattle that day, the world would see and remember the sporadic violence and the clouds of tear gas." *Id.* The mayor of Seattle responded to these impromptu protests (other, sanctioned events took place at the same time in other parts of the city) by calling out the National Guard, covering every street corner of downtown Seattle with baton-wielding police officers "in head-to-toe black" who marched shoulder-to-shoulder and shoved demonstrators out of a 25-block zone of the city in which free speech effectively had been banned. Mitchell, *supra* note 11, at *33, *35; Lynda Gorov, *A Crackdown Calms Seattle Action Taken to Prevent Confrontation*, BOSTON GLOBE, Dec. 2, 1999, at A1.

[103] *Id.*

[104] The author of this article, who was a newspaper reporter at the time, attended the City Council meeting at which the LAPD showed its fear-of-another-Seattle video, and saw the video. For further information on Reefer Madness, *see* http://www.reefer-madness-movie.com (last visited August 22, 2005).

[105] Chris Ford, *Police Outline Plan To Handle Protests*, L.A. DAILY J., June 29, 2000, at 2.

[106] Garry Abrams, *Spines in Short Supply, Wimp City Faces Dreadful Electoral Pestilence*, L.A. DAILY J., July 11, 2000, at 1.

[107] *Id.* The LAPD even went so far as to chop down trees for fear that protesters might set them afire and to remove newspaper racks from downtown Los Angeles in case they might be used as battering rams.

2. Protesters Depicted as "Terrorists"

Preparing to host the 2004 Republican National Convention, New York City officials, no doubt still haunted by images of the September 11, 2001 terrorist attacks on their city, were concerned about a repeat during the GOP political event. However, their concerns about terrorist threats morphed into a practice of lumping demonstrators and terrorists together.[108] The media gave a voice to this effort. A top police official, for example, cited "terrorist threats and the escalating plans of anarchist groups to disrupt the city of New York" as cause for concern.[109] A civil rights attorney told Newsday, "The context we're now operating here in New York City is that protesters are terrorist threats, protesters are anarchists, protesters are the enemy."[110] Furthermore, New York Mayor Michael Bloomberg presumed demonstrators had criminal motives by making statements to the press that they "came here to get arrested."[111] Likewise, John Street,

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Todd S. Purdum, *The 2000 Campaign: The Scene; Police and Protesters Ready; Politicians Hope for the Best*, N.Y. TIMES, Aug. 13, 2000, at 22.

[108] *E.g.*, Bryan Virasami, *GOP Convention Threats; Arrests led to fingerprints; Top police official says terror fears convinced cops to verify IDs of hundreds held that week*, NEWSDAY, Oct. 27, 2004, at A05.

[109] *Id.* (internal quotation marks omitted). Newsday also reported that police fingerprinted hundreds of protesters during the Republican National Convention "due to looming threats by terrorist and anarchist groups." *Id.*

[110] *Id.*

[111] "The mayor . . . urged demonstrators not to fight their cases in court, despite the fact that many say they haven't done anything wrong – and out-of-towners who have pleaded guilty said they did so to avoid returning to New York." Glenn Thrush, *Convention Arrests; Mayor to ex- detainees: Plead Guilty*, NEWSDAY, Sept. 20, 2004, at A15. "The mayor's comment reflects a disdain for the principle that people are innocent until proven guilty." *Id.* (quoting Donna Lieberman, Executive Director for the New York Civil Liberties Union). Mayor Bloomberg further made public statements that those engaging in free speech were "terrorists and guilty criminals." MacNamara Complaint

the mayor of Philadelphia anticipated the arrival of demonstrators to the 2000 Republican National Convention by belittling them, calling them "idiots."[112] He then issued a warning, stating "[s]ome will come here to disrupt, to make a spectacle of what's going on. They are going to get a very ugly response."[113] While mayors of Philadelphia and New York made no effort to hide their hostility toward free expression, recently a spokesman for the anti-terrorism section of the California Department of Justice was even more blatant, designating anti-war protesting as a form of terrorism outright.[114]

Similarly, police training in preparation for anti-globalization demonstrations that coincided with a 2003 Miami meeting of Western leaders attempting to create a Free Trade Area of the Americas (FTAA) emphasized violent protests, yet gave little regard to protection of free speech.[115] The media build-up of the Miami FTAA protests emphasized the "anarchists, anarchists, anarchists."[116] The emphasis on anarchists "contributed to a police mindset to err, when in doubt, on the side of

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para. 62.

[112] "[W]e have got some idiots coming here. Some will come and say whatever obnoxious things they want to say and go home." BOGHOSIAN, *supra* note 1, at 21.

[113] *Id.*

[114] Mike van Winkle, the spokesman for the California Anti-Terrorism Information Center told the Oakland Tribune, "You can make an easy kind of a link that, if you have a protest group protesting a war where the cause that's being fought against is international terrorism, you might have terrorism at that protest. You can almost argue that a protest against that is a terrorist act." James Bovard, *Quarantining Dissent: How the Secret Service protects Bush from free speech*, S.F. CHRON., Jan. 4, 2003, at D1.

[115] "[Miami-Dade Police Department] spent 40,000 'work hours' preparing for this event, yet the training materials in the After-Action Report document little pertaining to the protection of citizen rights of free expression." Independent Review Panel of the Miami-Dade Police Department, The Free Trade Area of the Americas (FTAA) Inquiry Report 5, Sept. 20, 2004, *available at* http://www.miamidade.gov/irp/ (last visited Dec. 5, 2004).

[116] *Id.* at 6.

dramatic show of force."[117] Disconcertingly, this mindset inhibited police from performing such basic tasks as assisting members of the public.[118] In Seattle after the 1999 WTO Conference, the city council ultimately concluded that the images of rampant violence and chaos, which the media repetitiously broadcast to the world, amounted to an inaccurate portrayal, "as peaceful political demonstrators 'were drowned out by press coverage of disturbances.'"[119]

Politicians, police, and the media are not the only ones who are quick to characterize citizens who go to public places and engage in political speech as hoodlums prone to violence. Sadly, this mindset crept into a federal court considering a motion by protest groups to enjoin the city of Boston, host of the 2004 Democratic National Convention, from forcing demonstrators to protest in a zone so harsh that the court said created the "overall impression . . . of an internment camp."[120] Despite finding the protest zone to be "a grim, mean, and oppressive place," the court justified the city of Boston's security measures in light of the surmised potential for protesters to engage police in "hand-to-hand combat."[121]

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[117] The idea was "to preempt violence rather than being subject to criticism for avoidable injury and destruction based on a reserved presence of police force." *Id.*

[118] The report cites "failure by the police to respond appropriately to civilian inquiries for directions, street closings, and other assistance." *Id.* Suspicion of protesters is not new in Florida; St. Petersburg police practices of photographing demonstrators and recording their license plate numbers while they marched were criticized in 1988 for their chilling effect on free speech and assembly. Such tactics are similar to those the FBI allegedly used starting in 1981 in surveillance of groups opposed to U.S. foreign policy in Central America. *See* Stephen Koff, *City Police Accused of Spying at Rallies*, ST. PETERSBURG TIMES, Feb. 14, 1988, at 1.

[119] Menotti v. City of Seattle, 409 F.3d 1113, 1160 n.3 (9th Cir. 2005) (Paez, J., dissenting).

[120] Coalition to Protest DNC v. City of Boston, 327 F. Supp. 2d 61, 74 (D. Mass. 2004).

[121] *Id.* at 67, 75.

B. Penalizing the Participants

The government further chills expression and limits access to the public forum through intimidating and violent treatment of protesters, denial of access to public spaces, limiting ingress to and egress from marches, mass arrests that sometimes include uninvolved bystanders, and abusive treatment during detention.[122]

1. Show of Force Intimidation

Police agencies prepare for demonstrations almost as though they are headed to war with a violent enemy rather than ensuring safety in a public forum for First Amendment expression.[123] For example, Los Angeles police projected their rough-and-ready image prior to the 2000 Democratic National Convention by staging a training for television cameras to film a mock containment of protesters.[124] Protest planners became so frustrated by pre-convention harassment by police that they sued the city of Los Angeles to get it to stop taking actions "aimed at chilling [their] speech."[125] The police officers questioned the protestors about their identification, told them walking the streets without identification was illegal, buzzed their planning center with low-flying helicopters, and taunted

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[122] National Lawyers Guild v. City of Los Angeles, No. CV-01-6877 FMV (C.D. Cal. Dec. 2, 2003), *available at* http://www.nlg-la.org/NLG_v._City.pdf (last visited Dec. 3, 2004).

[123] Chris Ford, *Commission Praises LAPD for Handling of Protest Marches*, L.A. DAILY J., Aug. 23, 2000, at 1.

[124] Nicholas Riccardi & Jeffrey L. Rabin, *Protesters Say L.A. Will Be Used as a Model of Injustice*, L.A. TIMES, July 13, 2000, at B1.

[125] D2K Convention Planning Coalition v. Parks, CV-00-08556 (C.D. Cal., filed Aug. 8). *See also* Chris Ford, *Lawyers Will Be Keeping a Close Eye on the LAPD*, L.A. DAILY J., Aug. 11, 2000, at 1. ("The complaint accuses the LAPD of carrying out an 'intense, well-orchestrated campaign of intimidation and harassment' and seeks a temporary injunction against the police actions.").

them with threats of planning center raids.[126] During the convention, police, with their uniforms bristling with pepper-spray canisters, tear-gas guns, and other weaponry, menaced would-be protesters.[127] The city sent overwhelming numbers of heavily armed officers even to small gatherings.[128] One Los Angeles City Council member noted, "There were demonstrations I was at where there were more police than demonstrators."[129]

Police frequently project a menacing presence at demonstrations by showing up in heavy riot gear, which critics deride as "Darth Vader" uniforms.[130] After examining how police handled the demonstrations during the FTAA meeting, a Miami police review board conceded that "[t]he overwhelming riot-clad police presence, when there was no civil disturbance, chilled some citizen participation in permitted and lawful demonstrations and

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[126] *Id.*

[127] Ford, *supra* note 123.

[128] *Id.*

[129] Chris Ford, *Council Rails at Heavy DNC Police Presence*, L.A. DAILY J., Dec. 4, 2000, at 2 (internal quotation marks omitted). Another City Council member emphasized the heavy cost the city of Los Angeles bore to police the convention, calling it a "fraud on the taxpayers from the moment it started." *Id.* (internal quotation marks omitted). City officials had estimated that the policing tab would be $8.3 million, but it reached nearly $36 million, with almost $10 million going just toward overtime pay for police officers. *Id.* The difference between the estimated and ultimate policing cost was "more than [Los Angeles] spends to fix sidewalks in the city, trim trees in the city and clean up every neighborhood in the city." *Id.* (internal quotation marks omitted). The police presence during convention week was compared to that of an occupying army and criticized as "staggering, inappropriate and over the edge." *Id.* (internal quotation marks omitted).

[130] "Having witnessed the . . . outrageous overreaction to the minor protests of the Trans-Atlantic Business Dialogue, I now know what it feels like to live in a police state. The horde of officers in their Darth Vader costumes dominated the streets, dwarfing and menacing the few hundred peaceful protesters." John Schauer, Letter to the Editor, *Failure of Pot Initiatives a Victory Anarchy vs. Liberty Protesting Overkill Silencing Free Speech Not-so-Sweet Deal Who's Typical? Curing What Ails Docs Throw the Bums Out Tax the Aldermen*, CHI. SUN-TIMES, Nov. 18, 2002, at 34.

events."[131] At one point, Miami police in riot gear blocked access to a church service, even though there was no demonstration at the time.[132]

The intimidation of protesters is not always pressed at the tip of a billy club. In 2002, the Justice Department lifted FBI restrictions imposed in 1976 and began allowing this federal agency to spy on Americans' everyday lives.[133] The FBI encouraged its agents to enhance "paranoia" by increasing the number of interviews it conducted with anti-war activists.[134] The FBI claimed that doing so would "get the point across that there is an FBI agent behind every mailbox."[135]

2. Use of Force Causes Injuries

While the so-called Miami Model came under some criticism from the police review panel, the panel's report does not tell the full story. According to those present, Miami police employed extraction teams, described as squads of plain-clothes officers in full body armor, "wearing ski masks . . . jumping out of vans and dragging protesters off."[136] Other snatch squads would drag protesters behind three-row police lines, preventing legal observers and medics from identifying the detainees and gaining access to them.[137] Moreover, legal observers in Miami obtained arrest reports listing "brutality, beatings and such—tasers, wooden and rubber bullets, many cops

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[131] *Id.*
[132] *Id.*
[133] Bovard, *supra* note 114.
[134] *Id.* (quoting from an internal FBI newsletter) (internal quotation marks omitted).
[135] *Id.* (internal quotation marks omitted).
[136] Christopher Getzan, *Infamous 'Miami Model' of Protest Clampdown, Coming to a Town Near You*, THE NEW STANDARD, June 8, 2004, *available at* http://newstandardnews.net/content/?action=show_item&itemid=488 (last visited Nov. 9, 2004) (internal quotation marks omitted).
[137] BOGHOSIAN, *supra* note 1, at 53.

beating one person, concussion grenades, electrical shields, etc."[138]

In Los Angeles, the police department's policy-making board questioned officers' use of "less-lethal" weapons at a demonstration protesting police brutality in October 2000.[139] There, police shot demonstrators with weapons designed, according to their manufacturer, for use against "subjects heavily dressed and in a violent mindset."[140] Among the weapons used that day was one intended for use against armed or violent individuals, which was described as "an excellent tool" for cell extractions or cellblock-clearing operations in prisons.[141]

Police in Portland, Oregon used not only less-than-lethal weapons during a protest coinciding with a 2002 political fundraiser for President Bush but also used pepper spray.[142] Police claimed that protesters were interfering with the ability of attendees to reach the event site and ordered the crowd to move back 120 feet.[143] After demonstrators allegedly ignored the order, officers assaulted the crowd with pepper spray and shot crowd members with rubber bullets.[144] In the resulting civil rights lawsuit, the plaintiffs alleged that officers sprayed peaceful

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[138] *Id.* at 54.

[139] Chris Ford, *Panel Checks 'Less-Lethal' Weapons*, L.A. DAILY J., Dec. 20, 2000, at 1. (on file with author).

[140] *Id.* at 9. (internal quotation marks omitted). It should be noted that while the weapons are designed for use against "heavily dressed" subjects, in October the sun in Los Angeles typically generates summer-like temperatures. In fact, the average high temperature in Los Angeles in October is 78 degrees and rarely is it necessary to be heavily dressed. *See* National Weather Service, Downtown Los Angeles Climate Page, 1921-2004 Data, Observed and Average Monthly/Annual, Max Temp, http://www.wrh.noaa.gov/lox/climate/cvc.php (last visited Feb. 13, 2005).

[141] Ford, *supra* note 139, at 9 (internal quotation marks omitted).

[142] Marbet v. City of Portland, No. CV-02-1448-HA, 2003 U.S. Dist. LEXIS 25685 at *2 (D. Ore. Sept. 8, 2003).

[143] *Id.* at *2-*3.

[144] *Id.*

protesters in the face with pepper spray and other chemical agents.[145] Police forcefully blocked the exit of one family with small children, including an 11-month-old who had been pepper sprayed, even though they were screaming in pain and seeking medical attention.[146] Police sprayed the parents and their three children without warning.[147]

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[145] Second Amended Complaint, Marbet v. City of Portland, No. CV-02-1448-HA, at paras. 5.6, 5.8-5.11 (D. Ore. Sept. 8, 2003).

[146] *Id.* In one incident, officers, without audible warning, "doused and soaked" protesters with pepper spray, aiming the weapons directly into the faces of the protesters, and caused one protestor to sustain extreme pain and chemical burns. *Id.* paras. 4.5-4.6. In another incident, the family with children ages 6, 3, and 11 months, who were concerned that they had been surrounded by officers as the demonstration wound down, sought to exit the protest area but were twice denied by police. *Id.* paras. 6.4-6.6. Later, an officer "took aim" at the mother and sprayed chemical agents into her face, also hitting her 11-month-old child. *Id.* para. 6.8. The father was sprayed in the eyes, so both parents were debilitated and kneeling or prone on the ground in pain. *Id.* paras. 6.7, 6.9. Meanwhile, their three children were crying in pain and fear and left "unattended by their parents for a period due to the effects of the chemical agents and their parents' incapacitation from the chemical agents." *Id.* para. 6.9. The complaint further alleges that the Portland police officers' assault on the demonstrators violated the First Amendment because "[t]he mass spraying of chemical agents caused a large number of peaceful protesters to leave the area and abandon their lawful free speech and assembly activities." *Id.* at para. 5.11.

[147] Ryan Frank, et al., *Cleanup, Questions Begin*, THE OREGONIAN, Aug. 23, 2002, at A01. "There was no warning, no ultimatum, nothing," the father told a newspaper reporter as he tried to comfort his wailing 11-month-old son, whose eyes were red and swollen. "They picked the guy with three kids to spray first." *Id.* (internal quotation marks omitted). In a more recent and similar episode in Pittsburgh, police used Tasers, pepper spray, batons, and dogs against people demonstrating in front of a military recruitment station. Pittsburg Organizing Group, Press Release, Save Our Civil Liberties, Pittsburgh Police Attack Non-Violent Protestors With Tasers, Pepper Spray and K-9 Units, *available at* http:///www.saveourcivilliberties.org/en/2005/08/1180.shtml (last visited Jan. 30, 2006). Two of the demonstrators required hospitalization. *Id.* One of those hospitalized was a grandmother who was bitten from behind by a police dog, arrested, and kept in an unventilated police van in the hot sun for 45 minutes. The other person hospitalized was a young woman who police officers pepper sprayed directly in the face and then "Taser[ed] her mercilessly as she lay on the street screaming." *Id.* Police also pepper-sprayed a four-year-old girl and toppled a man with multiple sclerosis in his motorized

3. Checkpoints and Denial of Access to Public Fora

During some events which drew strong opposition from protesters, police erected barriers or thwarted public passage to spaces that clearly are public fora. For example, armed officers staffed checkpoints outside the FTAA meeting site in Miami, and several streets were off limits to anyone without meeting credentials.[148] One reporter observed, "Security fences cut up downtown like a jigsaw puzzle, with numerous checkpoints."[149]

Police in Los Angeles during the 2000 Democratic National Convention protests, as well as at another demonstration later that year, used a slightly different tactic, blocking ingress to and egress from ongoing demonstrations in public places.[150] A district court found credible evidence that Los Angeles police "prevented people from joining [a] demonstration, standing on the sidewalk, or leaving the march for any reason, including to use the restroom or disperse [sic] leaflets."[151] The court found that those actions permitted a reasonable inference that police unconstitutionally chilled the demonstrators'

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wheelchair. *Id.*

[148] BOGHOSIAN, *supra* note 1, at 44.

[149] *Id.* (quoting John Pacenti, *Miami Trade Summit Security Hailed, Reviled*, PALM BEACH POST, Nov. 22, 2003, at A1).

[150] *Nat'l Lawyers Guild*, No. CV-01-6877 FMV (order granting in part and denying in part defendants' motion for summary judgment). New York police also have limited ingress to and egress from ongoing demonstrations. *See* Stauber v. City of New York, No. 03 Civ. 9162, 2004 U.S. Dist. LEXIS 13350, at *14-*15 (S.D.N.Y. July 19, 2004).

[151] *Nat'l Lawyers Guild*, No. CV-01-6877 FMV, at 10 (granting in part and denying in part defendants' motion for summary judgment). Plaintiffs, a coalition of protest groups and a human rights bar association, alleged that along with blocking ingress to and egress from demonstrations in August and October 2000, police improperly terminated legal political protests "without cause," used excessive force against those engaged in free expression, and drowned out participants' speech by flying helicopters at low altitudes "without a legitimate law enforcement justification to do so." *Id.* at 5.

First Amendment right to free expression.[152]

4. Mass Arrests, Exaggerated Charges

During events that attract large numbers of protesters, police have engaged in mass arrests or round-ups and file exaggerated charges—or even charges for crimes that do not exist—against those arrested. For example, during the 2004 Republican National Convention, New York police arrested more than 1,800, suddenly sweeping protesters, legal observers, members of the media, and even bystanders from the street in orange plastic nets.[153]

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[152] *Id.* at 9. A New York court related the account of a family whose participation at a 2003 anti-war demonstration was effectively thwarted, and thus their expression chilled, by the New York City police department's use of barricades and protest pens. Trapped blocks from the event, the family decided to go home because the mother did not believe that "there was going to be any way ever of getting anywhere close to the demonstration." *Stauber*, 2004 U.S. Dist. LEXIS 13350, at *13 (internal quotation marks omitted).

[153] Dan Janison, et al., *There was order, but at what price?*, NEWSDAY, Sept. 4, 2004, at A04; Diane Cardwell, *Lawyers' Group Sues City Over Arrests of Protestors*, N.Y. TIMES, Oct. 8, 2004, at B3. *See also* MacNamara Complaint, paras. 87A., 87B (noting police used "orange nets[] to arrest groups of people lawfully standing on sidewalks in Times Square, including legal observers and members of the media"). *Id.* paras. 87B (stating police used the orange nets to round up and arrest "individuals who were either participating in, observing, or were merely in the vicinity of a march which began in Union Square"). *Id.* paras. 87D, 142 (pointing out that one march had not even proceeded a full block when police officers surrounded more than 200 people, used the orange nets, and arrested them all, even though they had remained on the sidewalk without blocking it and had complied with police instructions). *Id.* para. 161 (explaining that a group was assembling for a permitted march when a police officer screamed and officers rounded up the participants with plastic orange netting and handcuffed them). *Id.* para. 185 (noting that officers surrounded a group of demonstrators after an officer shouted, "Arrest them all!" The group included protesters "as well as non-protesting bystanders") (internal quotation marks omitted). *See also* First Amended Complaint Schiller v. New York, No. 04 Civ. 07922, para. 24 (S.D.N.Y. filed 2004), *available at* http://nyclu.org/pdfs/rnc_lawsuit_schiller.pdf ("At Convention-related

In addition, while posting smaller numbers of arrestees, during the 2000 Democratic National Convention, the Los Angeles police carried out mass arrests, forcing detainees to wait hours to be processed, strip searching some of the detainees, and filing charges that either were thrown out for lack of probable cause or were based on nonexistent law.[154] An attorney representing a group of animal rights activists, who were arrested *en masse* during the Los Angeles Convention, characterized the round-up as "an unlawful effort to suppress expressions of dissent."[155] The forty-two animal rights activists were arrested after they marched into a

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demonstrations there were nearly 1,800 arrests, many of them mass arrests of people lawfully on public sidewalks or streets, with law-abiding demonstrators and innocent bystanders alike being swept up."). Another New York case arising from the 2004 Republican National Convention contains this account of a violent mass arrest:

> [A] group of demonstrators carrying signs and playing drums and other instruments left its gathering place at the southern end of Union Square Park and proceeded north on Union Square East. They were followed by curious observers. After the police prevented the demonstrators and observers from proceeding north on Union Square East, the group moved east on 16th Street. Using mesh nets and large numbers of officers, the police then sealed off both ends of the block . . . and refused to allow anyone inside to leave. Many of those trapped between the police lines had been walking lawfully on the sidewalk, and some had not even been following the demonstrators but were simply caught in the crowd when the police sealed the entire block. Without giving any opportunity for people to disperse, the police began systematically arresting people on the block, throwing some people to the ground.

First Amended Complaint, Dinler v. New York, No. 04 Civ. 07921 para. 3 (S.D.N.Y. filed 2004), *available at* http://nyclu.org/pdfs/rnc_lawsuit_dinler.pdf (last visited Jan. 30, 2006).

[154] *See infra* notes 155-61, 165-70 and accompanying text.

[155] "It's very obvious what was going on here," the attorney added. "They arrested these kids on Tuesday [the second of the four days the convention lasted] and they planned to hold them until Friday after the convention." David Houston, *Animal Rights Activists Plan to Sue City*, L.A. DAILY J., Sept. 22, 2000, at 2.

commercial area of downtown Los Angeles and approached a jewelry store they mistook for a furrier while chanting that it is harmful to wear animal fur.[156] The store owner became frantic and closed the metal security grate, prompting some to kick or bang on the grate.[157] Police rounded up these protesters, sixteen of whom were juveniles, forced them against a wall with their hands up, forced them to sit in the hot sun and in a police bus for hours, and charged them with conspiracy to commit vandalism.[158] A judge threw out the charges for all but two of the protestors for lack of probable cause.[159] In another incident shortly before the beginning of the 2000 DNC Convention, Los Angeles police arrested two young women who had been participating in the protest planning, handcuffed them, interrogated them, and threw them into holding cells.[160] Their alleged crime: jaywalking.[161]

While police lacked probable cause to arrest the animal rights demonstrators, they charged a group of

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[156] Ted Rohrlich & Henry Weinstein, *Convention-Related Arrests Cause Little Stir in Legal System*, L.A. TIMES, Aug. 19, 2000, at A22.

[157] *Id.* Anne La Jeunesse, *DNC Anti-Fur Activist Pleads No Contest*, L.A. DAILY J., Nov. 16, 2000, at 2.

[158] Houston, *supra* note 155; Anne La Jeunesse, *Observers See Protest Photos Taken by Police*, L.A. DAILY J., Aug. 18, 2000, at 11 (stating that an ACLU attorney pointed out that police arrested legal observers and journalists along with the protesters, contending that the police were engaged in "a pattern to try to eliminate observers of their . . . misconduct"); Susan McRae, *Volunteer Cameraman Sees the Rougher Side*, L.A. DAILY J., Aug. 18, 2000, at 1. A student filming the animal rights protest and subsequent arrest was clubbed by a police officer in full riot gear and not informed of the charges against him. *Id.* at 11; Rohrlich & Weinstein, *supra* note 156.

[159] Anne La Jeunesse, *Court Drops Charges in Ant-Fur Protest Case*, L.A. DAILY J., Sept. 26, 2000, at 2. Two others, who allegedly kicked the store-front grate, were charged with felony vandalism, and one of these later pleaded guilty to the charge. *Id.*

[160] Ford, *supra* note 123.

[161] *Id.* An ACLU lawyer commented, "Obviously, it's unheard of for somebody to be hauled off to [the police station] and handcuffed . . . for jaywalking. This sort of repression of people for their political views is to be expected in a police state, but it has no place in a democratic country." Ford, *supra* note 125, at 1.

bicyclists with reckless driving, a violation that does not apply to bike riders under California law.[162] Advocating the increased use of bicycles instead of cars, seventy one bicyclists were riding through downtown Los Angeles as part of a sanctioned demonstration, when they suddenly were swarmed by motorcycle officers, who shouted, "Put your bikes down!"[163] The bicyclists were subjected to mass arrest;[164] yet unsurprisingly, all charges were later dropped.[165] Additionally, bicyclists in a similar event in New York in 2004 endured the same treatment.[166]

5. Abuses in Detention

The twenty three women among the bicyclists in Los Angeles were strip-searched twice—once after a judge had already ordered their release.[167] Los Angeles County

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[162] Flynn McRoberts, *Dear Mother Tribune, Send Bail Money*, CHI. TRIB., Aug. 17, 2000, at 17. Realizing that police had wrongly charged the bicyclists, the Los Angeles City Attorney's Office revised the charges to misdemeanor obstructing a public way and two traffic infractions. *Id.*

[163] *Id.*

[164] *Id.* (internal quotation marks omitted). McRoberts, a Chicago Tribune reporter who bicycled with the group known as Critical Mass to report on the event, further described the process: "With their hands on their holstered batons, officers in riot gear told us to get 'up against the fence!'" *Id.* Most officers acted professionally, but they "cuffed us behind our backs with hard plastic 'flex cuffs' and kept us at the fence under [an] overpass for an hour or so," and made the group wait in a bus for another hour. *Id.* "Out of the blue, they cornered the riders and ordered them off their bikes. . . . There was no warning, no message to disperse. It was very scary. I mean, we just went on a bike ride. How did we end up in jail?" Sue Fox, *$2.75 Million Proposed for Cyclists Arrested in Protest*, L.A. TIMES, March 25, 2003, at B1 (internal quotation marks omitted).

[165] Fox, *supra* note 164, at B1.

[166] During the 2004 Republican National Convention in New York, once-cooperative police officers turned on participants in the bicycling event. Police "used orange nets to trap and arrest scores of people participating in [the] bicycle event that [police] had allowed to take place for nearly one and one-half hours before the mass arrests were made without warning." MacNamara Complaint, para. 87A.

[167] Fox, *supra* note 164. Also, after the judge ordered their release, the

sheriff's deputies walked the women, many in biking shorts and tank tops, past holding cells filled with jeering male prisoners.[168] They were taken to a chilly cinder-block hallway and ordered to face the wall and undress, whereupon "belligerent uniformed officers" conducted visual body cavity searches of the women.[169] Los Angeles-area taxpayers shelled out $3.625 million to settle lawsuits that arose from this treatment.[170] In 2003, FTAA protesters were also strip-searched.[171] They accused Miami jailers of violating their Fourth Amendment rights by requiring them to undergo strip and visual body cavity searches without reasonable suspicion that such searches would disclose contraband or weapons.[172]

Aside from strip searches, denial of access to medicine and phone calls,[173] and being held beyond their release date, members of the public who have participated in political speech have experienced other abuses in detention. They have been denied access to restroom facilities and forced to endure lengthy detention in cold,

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women participants were denied telephone calls and access to medication. *Id.* Even the judge himself could not resist over-restricting protesters by requiring as a condition of their bail that they refrain from riding bicycles, prompting criticism from a criminal lawyer. Rohrlich & Weinstein, *supra* note 156. "Ordering someone not to ride a bicycle has nothing to do with guaranteeing the person will appear in court," the lawyer said. *Id.* The lawyer further questioned the constitutionality of the judge's order that a bicycle messenger not ride his bike, because he is being deprived of his livelihood. *Id.*

[168] Rohrlich & Weinstein, *supra* note 156.

[169] *Id.* (internal quotation marks omitted); Elizabeth Fernandez, *Strip-search claims spur immediate outcry; Women's lawsuits inspire calls for reform*, S.F. CHRON., Sept. 6, 2003, at A13.

[170] The women received $70,000 apiece and the men $5,000 each in the $2.75 million settlement with Los Angeles County. Fernandez, *supra* note 169, at A13; Fox, *supra* note 161, at B1. In addition, the City of Los Angeles paid $875,000 to settle a lawsuit from the same group of bicyclists based on lack of probable cause for their arrest. *Council OKs Settlement Over Convention Protest*, L.A. TIMES, Feb. 27, 2004, at B3.

[171] Haney v. Miami-Dade County, No. 04-20516-CIV, 2004 U.S. Dist. Lexis 19552, *4-*6 (S.D. Fla. Aug. 24, 2004).

[172] *Id.*

[173] *E.g.*, MacNamara Complaint.

toxin-suffused quarters.[174] Protesters and others who were corralled in orange nets and arrested in New York during the 2004 Republican National Convention were hauled to Pier 57, a filthy bus storage and repair facility, where they allegedly were exposed to a variety of toxic and carcinogenic chemicals and substances for up to 50 hours.[175] Environmental inspections of this facility in 2001 and early 2004 revealed a lack of fire protection systems, asbestos particles, and "floors covered with black oily soot."[176]

The New York arrestees, furthermore, were caged in chain-link fence enclosures topped with razor wire that did not have enough benches for sitting or sleeping, requiring detainees to rest on the grime- and chemical-covered floor, which caused skin rashes and blisters.[177] The facilities not only lacked adequate restroom facilities, but also lacked toilet paper and a place to wash up.[178] During the arrest process, demonstrators and bystanders were handcuffed for hours, causing pain, numbness, and swelling, as well as denied access to restroom facilities and medical attention.[179] Some plaintiffs contended that the

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[174] *See supra*, Part III.B.4.; Gorov, *supra* note 102 (Seattle police arrested hundreds, holding them "face-down on the wet streets, their hands bound with plastic handcuffs"). All arrestees were fingerprinted, even if accused of only "minor offenses for which fingerprinting is unnecessary." *Id.* at para 64.

[175] MacNamara Complaint, paras. 66, 78, 90, 95, 110, 126, 176, 193.

[176] *Id.* at para. 67.

[177] Moreover, although detainees were dressed for hot summer weather, the facilities were kept cold with fans blowing at top speed, and they were not given blankets or other means to keep warm. *Id.* at paras. 67, 77, 78, 93.

[178] *Id.* at para. 93.

[179] *Id.* at paras. 92, 93 (plaintiff complained of handcuff tightness, but officer said nothing could be done; she suffered three weeks of numbness, pain and swelling of her left hand); *Id.* at paras. 95, 96, 97, 98 (plaintiff a Ph.D. and vice-president at J.P. Morgan, was arrested while merely walking home from a bookstore and despite lack of probable cause for her arrest; officer told her, "Sorry but you were at the wrong place at the wrong time"; she suffered extreme pain in her shoulder and swelling in her hand due to the handcuffing); MacNamara

City of New York deliberately and needlessly detained protesters and others for lengthy periods even when they could have processed them more quickly using existing booking facilities around the city.[180]

IV. Intent to Silence Implied: How Governmental Actions Chill Free Expression

The plaintiffs further asserted that the mass round-ups, arrests allegedly without probable cause, and unnecessarily long detentions in cruel and inhumane conditions were intended "to punish and retaliate against individuals who were engaging in political protest."[181] Consequently, the city deterred the expression of core political speech.[182]

It is true that city officials at least need to be prepared to maintain order in case crowds—or even a small

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Complaint paras. 102, 107-08, 112-14, 118-19, 123-24, 133-34, 137-38, 143-44, 146, 151-52, 173-74, 177-78, 182, 186, 191, 195 (noting that extremely tight handcuffing for many hours caused plaintiffs extreme pain, discomfort, and numbness); Cardwell, *supra* note 152, at B3. ("marchers suddenly swept into orange nets, languishing on buses in tight handcuffs without medical attention, and one woman, panicked, in convulsions after being corralled into a mass arrest as she walked to work"). *See also* First Amended Complaint, Dinler v. New York, No. 04 Civ. 07921, para. 3 (S.D.N.Y. filed 2004), *available at* http://nyclu.org/pdfs/rnc_lawsuit_dinler.pdf (last visited Jan. 30, 2006); First Amended Complaint, Schiller v. NewYork, No. 04 Civ 07922, para. 24 (S.D.N.Y. filed 2004), *available at* http://nyclu.org/pdfs/rnc_lawsuit_schiller.pdf (last visited Jan. 30, 2006).

[180] Some of the plaintiffs further pointed out that in 1982 the city processed 1,600 demonstrators and usually released them the same day, often within several hours. MacNamara Complaint, at paras. 63, 65. Protesters argued that the city held arrestees too long to avoid embarrassing city leaders during the convention. Sabrina Tavernise, *City to Pay $150 a Person in G.O.P. Arrest Settlement*, N.Y. TIMES, April 16, 2005, at B3. The city settled one dispute over arrest and detainment methods for $231,200, and the city's comptroller office stated that 570 notices of claim totaling $859 million had been filed. *Id.*

[181] *Id.* at para 61.

[182] *Id.*

percentage of a crowd—should decide to abandon the peaceful methods that most tend to follow. The vast majority of protesters at the Seattle WTO demonstration in 1999 were peaceful, but a small contingent appeared willing to engage in property destruction.[183] In New York in 2004, city leaders were attempting to ensure that the streets remained safe for city residents and visiting politicians alike, a concern overlain by the specter of a reprisal of the September 11, 2001 terrorist attack on the city.[184] But while a government justifiably concerns itself with public safety, it may not limit speech based on mere conjecture that vandalism (which courts, elected officials and the media frequently characterize as "violence") or disruption might occur.[185] It follows that "First Amendment jurisprudence teaches that banning speech is an unacceptable means of planning for potential misconduct."[186] Moreover, "[t]he courts have held that the

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[183] Kaiser & Burgess, *supra* note 102.

[184] *Nat'l Council of Arab Ams.*, 331 F. Supp. 2d at 265.

[185] According to the Ninth Circuit,

> Although the government legitimately asserts that it need not show an actual terrorist attack or serious accident to meet its burden, it is not free to foreclose expressive activity in public areas on mere speculation about danger. Otherwise, the government's restriction of first amendment expression in public areas would become essentially unreviewable.

Bay Area Peace Navy, 914 F.2d at 1228 (citations and internal quotation marks omitted).

[186] Serv. Employee Int'l Union v. City of Los Angeles, 114 F. Supp. 2d 966, 972 (C.D. Cal. 2000) (citing Collins v. Jordan, 110 F.3d. 1363, 1373 (9th Cir. 1997)).

> The law is clear that First Amendment activity may not be banned simply because prior similar activity led to or involved instances of violence. There are sound reasons for this rule. Demonstrations can be expected when the government acts in highly controversial ways, or other events occur that excite or arouse the passions of the citizenry. The more controversial the occurrence, the more likely people are to demonstrate. Some of these demonstrations may become violent. The

proper response to potential and actual violence is for the government to ensure an adequate police presence and to arrest those who actually engage in such conduct, rather than to suppress legitimate First Amendment conduct as a prophylactic measure."[187]

Therefore, the aggressive tactics undertaken by police, as well as governmental acts blocking access to the public forum, arguably violate this principle, because they curtail free expression based on the possibility that mischief may erupt rather than based on actual wrongdoing by those engaged in political speech. Furthermore, the government's ignoble and rough treatment of dissidents violates the First Amendment by discouraging participation.

A. "Ordinary Firmness" Standard

To successfully allege a First Amendment violation under such circumstances, a plaintiff must show that the defendant's actions deterred or chilled the plaintiff's speech and that the deterrence was a substantial or motivating factor in the defendant's conduct.[188] While this statement "might be read to suggest that a plaintiff must demonstrate that his speech was actually inhibited or suppressed [the court] requires only a demonstration that defendants *intended* to interfere with [plaintiffs'] First Amendment rights."[189] A court, thus, will examine "whether an

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> courts have held that the proper response to potential and actual violence is for the government to ensure an adequate police presence and to arrest those who actually engage in such conduct, rather than to suppress legitimate First Amendment conduct as a prophylactic measure.

Collins, 110 F.3d at 1372 (citations omitted).

[187] *Collins*, 110 F.3d at 1372.

[188] Mendocino Environmental Center v. Mendocino County, 192 F.3d 1283, 1300 (9th Cir. 1999).

[189] *Id.* (internal quotation marks omitted). The court looks to intent "[b]ecause it would be unjust to allow a defendant to escape liability

official's acts would chill or silence a person of ordinary firmness from future First Amendment activities."[190]

The intent component of this principle was at issue in *Mendocino Environmental Center v. Mendocino County*.[191] There, a bomb went off under the car of an environmental activist while she was driving it, severely injuring her.[192] Police and FBI agents ascribed responsibility for the explosion to the activist, then her passenger and released incriminating information about them that later proved to be false; charges against the activists were never filed.[193] The activist and her passenger sued, alleging *inter alia* that the police and FBI agents conspired to falsely accuse them in connection with the bombing, chilling their First Amendment activities.[194] The court found intent on the part of the police and FBI because their actions included describing the environmental activists as "members of a violent terrorist group,"[195]

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for a First Amendment violation merely because an unusually determined plaintiff persists in his protected activity." *Id.*

[190] *Id.* (citing Crawford-El v. Britton, 93 F.3d 813, 826 (D.C. Cir. 1996), *vacated on other grounds*, 523 U.S. 1273 (1997)) (internal quotation marks omitted); *accord*, Keenan v. Tejeda, 290 F.3d 252 (5th Cir. 2002). It is settled law among federal appellate courts that

> to establish a First Amendment retaliation claim against an ordinary citizen, [plaintiffs] must show that (1) they were engaged in constitutionally protected activity, (2) the defendants' actions caused them to suffer an injury that would chill a person of ordinary firmness from continuing to engage in that activity, and (3) the defendants' adverse actions were substantially motivated against the plaintiffs' exercise of constitutionally protected conduct.

Id. at 258.

[191] 192 F.3d 1283.

[192] *Id.* at 1287.

[193] *Id.* at 1287-88.

[194] *Id.* at 1288.

[195] *Id.* at 1302 (internal quotation marks omitted). Note how law enforcement officials characterize the activists' group Earth First!, an avid environmental group known for acts of vandalism and civil disobedience, as a "violent terrorist" organization. *Id.*

spreading misinformation, evincing a desire to cast their group in a negative light, and thus harming its activities.[196]

B. Applicability in Protester Cases

Following *Mendocino Environmental Center*, a federal court in Oregon concluded that a high school football coach's abuses toward a student whose parents had complained of earlier mistreatment would lead ordinary people in the parents' position to refrain from further condemnation of the coach's practices to protect their son from further harm.[197] Denying the football coach's motion to dismiss, the court found that the coach had engaged in "verbal tirades and emotionally abusive conduct" toward the plaintiffs' son and other players during a summer training camp.[198] After the plaintiffs complained, the coach turned the student's teammates against him, encouraged other parents to verbally attack the plaintiffs, and called the student into an equipment room, locked the door, and verbally abused the boy.[199]

Many of the cases applying the "ordinary firmness" standard involve retaliation. However, this standard was recently followed in a protester case as well.[200] A district court in Los Angeles found that the LAPD's preventing ingress to and egress from demonstrations during the 2000 Democratic National Convention, blocking protesters from

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[196] *Id.*

[197] Cain v. Tigard-Tualatin Sch. Dist. 23J, 262 F. Supp. 2d 1120, 1130 (D. Ore. 2003).

[198] *Id.* at 1123.

[199] The coach turned the teammates against the plaintiffs' son by falsely telling them that his parents had accused him of racism. This is significant because the plaintiffs' son was one of five African-American players on a team of 120 students. Team members threatened the plaintiffs' son with physical harm, chastised and isolated him, and the coached harassed him during school hours in front of his friends. *Id.* at 1124.

[200] *E.g.*, *Crawford-El*, 93 F.3d 813. *See Mendocino Envtl. Ctr.*, 192 F.3d at 1300 (collecting decisions).

using sidewalks, and using low-flying helicopters that interfered with speakers' ability to communicate "permits a reasonable inference that [the LAPD's] acts would deter a person of ordinary firmness from participating in future First Amendment activities."[201]

If government intent to chill speech can be found when law enforcement officials call environmental activists "terrorists" and otherwise spread misinformation about their group,[202] it is equally likely that the intent to chill could be found when mayors and police officials liken protesters to terrorists and say that they take to the streets to get arrested.[203] If a person of ordinary firmness would be chilled from engaging in free speech because a coach is harassing her son,[204] then a partygoer would be deterred from protected expression because he was arrested after saying "I can't believe what is happening" while police were breaking up a party.[205] If a mayor's campaign against topless bars and their owners, silences the expression of a policeman's paramour,[206] then surely assaulting

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[201] *Nat'l Lawyers Guild*, No. CV-01-6877 FMV (granting in part and denying in part defendants' motion for summary judgment).

[202] *Mendocino Envtl. Ctr.*, 192 F.3d at 1287-88.

[203] See *supra* Part III.A.

[204] *Cain*, 262 F. Supp. 2d at 1130.

[205] Tatro v. Kervin, 41 F.3d 9, 12 (1st Cir. 1994).

[206] Connell v. Signoracci, 153 F.3d 74 (2d. Cir. 1998). To be accurate, the court here did not find a First Amendment violation, in part because the plaintiff's 89-page complaint was "an omnium gatherum, obsessively repetitious, overwrought in tone, and organized like a front hall closet." *Id.* at 82. But the court affirmed in part the lower court's judgment denying the public official defendants' motion to dismiss on grounds of qualified immunity, giving the plaintiff another chance to replead "in a way that would organize the issues." *Id.* In another case decided on the same doctrine, neighbors opposed to a Berkeley, California, multi-family housing proposal expressed their concerns publicly that the project would house substance-abusing or mentally disabled persons. White v. Lee, 227 F.3d 1214, 1220 (9th Cir. 2000). The neighbors wrote the Berkeley City Council, spoke out at public meetings, and published a newsletter critical of the project, prompting an eight-month investigation by local officials of the U.S. Department of Housing and Urban Development (HUD), who believed that the neighbors had violated the Fair Housing Act by distributing

demonstrators with pepper spray, shooting them with rubber bullets, rounding them up in plastic orange nets, and detaining them in substandard conditions would deter a person of ordinary firmness from returning to the streets to engage in protected expression.[207] As previously mentioned, a court found it plausible that some LAPD actions did just that during the 2000 Democratic National Convention.[208] Therefore, even taking into account the need to maintain street order and security, the vast array of recent government actions taken against protesters, as described in Part III, *supra*, so chill expression that they readily could be found to deter a person of ordinary firmness from engaging in future protected speech. Thus, these actions arguably violate the First Amendment.

V. Fencing the Public Forum: Protest Pens, Viewpoint Exclusion, Privatization

Harsh street tactics are not the only governmental acts that have taken a toll on First Amendment expression. The government has further muted voices of dissent in

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"discriminatory" newsletters and flyers. *Id.* at 1220, 1221 (internal quotation marks omitted). During the investigation, HUD officials interrogated the neighbors

> under threat of subpoena about their views and public statements regarding the challenged project; directed them to produce an array of documents and information, including all involved parties' names, addresses, and telephone numbers and all correspondence or other documents relating to their efforts in opposition to the project; informed them and a major metropolitan newspaper that they had violated the Fair Housing Act; and advised them to accept a "conciliation proposal" that required them to cease all litigation and the distribution of "discriminatory" newsletters and flyers.

Id. at 1220. The court concluded that the HUD's actions "would have chilled or silenced" a person of ordinary firmness from engaging in future activities protected by the First Amendment. *Id.* at 1229.

[207] See *supra* Part III.B.

[208] *See supra* notes 200-01 and accompanying text.

public places by eliminating key portions of the public forum, relegating dissenters to portions of the public forum that are less visible to the targets of their speech than portions accorded supporters of the government's policies or non-allied members of the public, and yanking the forum for expression out from under the public's feet through privatization.

A. Protest Pens: The Ghettoization of Demonstration[209]

Protest pens, otherwise known as protest zones or demonstration zones, essentially are a legacy of the WTO protests in Seattle.[210] Courts have split on the constitutionality of their use. To the extent to which they keep protesters at a distance from their intended audience and hinder the protestors' ability to communicate their message, they have been struck down. For example, in *Bay Area Peace Navy v. United States*,[211] a case that preceded the WTO protests by nearly a decade, the plaintiffs, a group of boaters, displayed their disagreement with U.S. military policy by displaying signs, having children sing anti-war songs, and conducting a theatrical production on their vessels in front of a San Francisco pier from which high government officials were watching a parade of Naval ships.[212] The government claimed that a 75- to 100-yard buffer around the pier imposed by the Coast Guard was needed to protect against terrorist acts.[213] However, the court found that the buffer zone was not narrowly tailored because it "burden[ed] substantially more speech than

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[209] Mitchell, *supra* note 11 at *38.
[210] *Coalition*, 327 F. Supp. 2d at 74.
[211] 914 F.2d 1224.
[212] The demonstrators paraded in formation in pleasure craft ranging from kayaks to 30-foot boats while the Naval display took place farther out in the San Francisco Bay. *Id.* at 1225-26.
[213] *Id.* at 1227.

[was] necessary to further the government's legitimate interests."[214] The court found the government's argument unpersuasive because its references to terrorist or other violent incidents were unrelated to events in the San Francisco area (or even in the United States). It upheld a lower court injunction limiting the buffer zone to no more than 25 yards.[215] Some subsequent decisions have followed this court's reasoning.

1. Protest Zones Found Unconstitutional

Haunted by images of Seattle in 1999, Los Angeles officials the following year developed a 185-acre security zone around the venue for the Democratic National Convention, relegating demonstrators to a protest pen 260 yards away.[216] In *Service Employee International Union v. City of Los Angeles*, the court granted an injunction against the security zone because its vastness did not render it narrowly tailored enough to serve the government's significant interest in delegate safety. The court also reasoned that the distant protest pen did not provide an adequate alternate means of communication.[217] According to the court, "although it may be more convenient for delegates to have exclusive access to the immediate area, *convenience can never predominate over the First Amendment*."[218] The court further noted that the time restriction against speech would have been "absolute" had the 185-acre security zone been built because it would have

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[214] *Id.* at 1227 (quoting *Ward*, 491 U.S. at 799). The Peace Navy's message could not effectively be conveyed at a distance of 75 yards "because the audience on the pier could neither read the banners nor hear the boatload of children singing." *Id.* at 1226.
[215] *Id.* at 1226, 1227-28, 1231.
[216] *Service Employee Int'l Union*, 114 F. Supp. 2d at 968, 971.
[217] *Id.* at 971-72.
[218] *Id.* at 971 (emphasis added).

blocked expressive activities 24 hours a day.[219] Acknowledging that the content neutrality of the security area was not argued, the court nonetheless noted that it "ha[d] its doubts regarding the zone's neutrality" because free speech would have been permitted in the zone only to those with access.[220] The court in *Stauber v. City of New York* [221] also shared this view.[222]

The *Stauber* court agreed that the use of protest pens is not narrowly tailored to serve the government's interest in public order because it places an unreasonable limit on the movement of demonstrators.[223] The New York Police Department (NYPD) has created large pens using interlocking metal barricades that run the length of the

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[219] *Id.*

[220] *Id.* at 970 n.1.

[221] 2004 U.S. Dist. LEXIS 13350.

[222] "Had the plaintiffs objected that particular police officers were making decisions relating to the provision of access information or to ingress and egress [to the protest pens used in a 2003 anti-war demonstration in New York] for reasons relating to the content of the demonstrator's speech, the objection would be appropriate. The plaintiffs, however, have made no such objection." *Id* at *60. Professor Mitchell expresses a similar view, offering the following provocative queries:

> If the streets 'from time immemorial' have been the place where people debate and discuss, protest and rally, then how is it that now it is only on *some* streets (or even *some parts* of the streets) where this is possible, while on other streets – the streets where the decisions are made that direct our lives – the right to dissident speech is outlawed outright? Indeed, in the end, isn't protest zoning really just a way of controlling the *content* of debate without really acknowledging that that is what is being done, by, for example, privileging the right of WTO ministers to meet [in Seattle] and to speak over the right of protest groups to contest that speech?

Mitchell, *supra* note 11, at *39.

[223] *Stauber*, 2004 U.S. Dist. LEXIS 13350, at *80. Because the court found that the city's restriction was not narrowly tailored, it declined to reach whether the city provided adequate alternative means of expression. *Id.*

block and have an exit at one end.[224] When a pen fills up with protesters, the police physically close off the entrance and require participants to enter a pen farther from the center of the demonstration.[225] As a result, protesters cannot leave the pens, even to use the restroom or to get food or water, without risking separation from those with whom they attended; at times, police block access altogether, driving people to give up and leave.[226] Thus, some groups have tried to keep their events small and omit the use of a sound system to avoid NYPD involvement.[227] The *Stauber* court enjoined the NYPD's use of the pens because the practice unreasonably restricted access to and participation in protests.[228]

While the constitutionality of the use of protest pens frequently turns, in significant part, on whether those engaged in political speech are able to effectively reach their audience,[229] the Court of Appeals for the Ninth Circuit also considered the importance of the location of speech as a component of its content in determining the constitutionality of time, place, and manner restrictions.[230] The court in *Galvin* ruled that the government's relegation of a San Francisco prayer group that was protesting the demolition of housing on federal land to a protest pen 150 to 175 yards away from the originally selected location was not narrowly tailored to serve the government's interest.[231] The court found that where location is "an essential part of the message sought to be conveyed," a court must consider

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[224] *Id.* at *6, *25-*26. Protesters are expected to assemble in the pens, which may hold about 4,000 people "shoulder-to-shoulder" per block. *Id.* at *25.
[225] *Id.* at *25-*27.
[226] Furthermore, "once pens are full, people experience considerable problems getting out of the pens." *Id.* at *26.
[227] *Id.* at *28.
[228] *Id.* at *95.
[229] *See infra* Part V.B.1.
[230] Galvin v. Hay, 374 F.3d 739, 749-56 (9th Cir. 2004).
[231] *Id.* at 743.

the degree to which the regulation in question distorts the message.[232] The court concluded that "there [was] a strong First Amendment interest in protecting the right of citizens to gather in traditional public forum locations that [were] critical to the content of their message, just as there [was] a strong interest in protecting speakers seeking to reach a particular audience."[233]

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[232] *Id.* at 754 (internal quotation marks omitted). The U.S. Supreme Court has recognized that choice of communicative aspects, message, and manner are best left to the individual. *Id.* at 750 (citing Riley v. Nat'l Fed'n of the Blind, 487 U.S. 781 (1988)) (presuming that speakers, not the government, best know what they want to say and how to say it). Unfortunately, a New York district court failed to follow this policy, allowing the government to determine how a protest was to be held, rather than allowing the planners to decide. United for Peace & Justice v. City of New York, 243 F. Supp. 2d. 19 (S.D.N.Y. 2003). Specifically, the court upheld New York City's restriction of an antiwar demonstration in a plaza rather than a march along city streets. *Id.* at 20-21, 30-31. The plaintiffs argued that a march is a "time honored tradition in New York City and perhaps the single most important method of demonstrating large public support for a particular cause." *Id.* at 30 (internal quotation marks omitted). It is true that a district court in New York, located in the Second Circuit, need not follow the Ninth Circuit in which the *Galvin* case was decided. However, the view expressed in *Galvin* that a court must consider the extent to which a regulation distorts a group's message, where location is an essential part of the message, is persuasive authority in a case with facts such as those in *United for Peace & Justice.* The demonstrators chose the street as a venue for their march, and they did so to communicate that as many as 100,000 or more New Yorkers are so opposed to the war in Iraq that they are willing to brave the frigid February weather to communicate this sentiment. *Id.* at 20, 30. Under the rule in *Galvin*, the government has no business taking that choice away. Perhaps this New York court is too caught up in the fear of terrorism that has pervaded government since the September 11, 2001 attacks on New York and Washington, D.C. The court cited "heightened security concerns due to September 11th" as a reason for upholding the city's prohibition on the antiwar march. *Id.* at 28-29. Because they live at the site of the major portion of the September 11th attacks, it is understandable that some New Yorkers continue to live in fear that their city may be targeted for another attack producing a mass loss of life. However, that does not rightly provide an excuse for the government to place excessive limits on core political expression, as allowed by the court in *United for Peace & Justice.*

[233] *Id.* at 752.

2. Hollow Victory: Dissenters Reduced to Negotiating for the Public Forum

Both the *Stauber* and the *Service Employees International Union* courts reached the correct result by finding that the cities' practices unconstitutionally restricted free expression. Professor Mitchell argues that the latter case, which was decided in 2000 just months after the WTO protests in Seattle, turned out to be a hollow victory for free-speech advocates.[234] While the Los Angeles protesters won the ability to demonstrate near the targets of their speech, the case leaves future groups in the position of having to negotiate with government officials over which part of the public forum the government will allow them to engage in protected speech.[235]

One protest group that sought to demonstrate on the Great Lawn in New York's Central Park declined to negotiate over geography. The court refused to grant an injunction overturning the city's denial of a permit to use the Great Lawn for a protest against the 2004 Republican National Convention.[236] The court seemed almost huffy at the groups' refusal to negotiate stating, "Simply because

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[234] Mitchell, *supra* note 11, at 37.

[235] As a result of the case,

> [A]dvocates of speech rights [are reduced] to arguing the fine points of geography, pouring [sic] over maps to determine just *where* protest may occur. Protesters are put entirely on the defensive, always seeking to justify why their voices should be heard and their actions seen, always having to make a claim that it is not unreasonable to assert that protest should be allowed in a place where those being protested against can actually hear it, and always having to "bend" their tactics—and their rights—to fit a legal regime that in every case sees protest subordinate to "the general order" (which, of course, really means the "established order").

Mitchell, *supra* note 11, at *37.

[236] *Nat'l Council of Arab Ams.*, 331 F. Supp. 2d at 260.

Plaintiffs feel that no other location in New York City is worthy of their cause . . . does not make it so."[237] In another case, an organization of dissenters in Philadelphia found themselves having to negotiate with police and Secret Service agents for "the right to demonstrate on [a] public sidewalk" across the street from a facility that the President was expected to visit.[238] And another group that attempted to negotiate a protest route for the 2004 Democratic National Convention in Boston got stuck with a deal so raw that the court itself wrote, "A written description cannot begin to convey the ambience of the [demonstration zone] a space redolent of the sensibility conveyed in Piranesi's etchings published as Fanciful Images of Prisons."[239]

3. Protest Zones Upheld

Perhaps the most significant protest zone case is that in which the Court of Appeals for the Ninth Circuit upheld a 50-block "No Protest Zone" in Seattle during the 1999 WTO meeting in a split decision.[240] The court held that the Local Proclamation of Civil Emergency Order No. 3, which imposed a limited curfew on downtown Seattle streets, was a valid time, place, and manner restriction.[241]

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[237] *Id.* at 271.

[238] Amended Complaint, Acorn v. City of Philadelphia, No. 03-4312, para. 40 (E.D. Pa. May 6, 2004), *available at* http://homepage.ntlworld.com/jksonc/docs/acorn-edpa-d10.html (last visited Jan. 30, 2006) [hereinafter Acorn Complaint].

[239] *Coalition*, 327 F. Supp. 2d at 67.

[240] *Menotti*, 409 F.3d at 1156. The term "No Protest Zone" was used by city officials, police, and demonstrators to refer to the area in which anti-WTO demonstrations expressions were banned, but the dissent in Menotti noted that city officials changed its name to "restricted zone" once "word came out" that "No Protest Zone" was an "inappropriate term." *Id.* at 1158 n.1 (Paez, C.J., dissenting).

[241] *Id.* at 1124-25, 1142-43 (internal quotation marks omitted). Upon determining that the "No Protest Zone" was a valid time, place, and manner restriction, the court declined to consider whether banning protest in downtown Seattle constituted a prior restraint.

The majority in *Menotti* argued that demonstrators had ample alternate means of communicating their message both via the media, and because hotels where some WTO delegates were staying were located outside the "No Protest Zone."[242] But Judge Paez, writing in dissent, had the better argument, calling Order No. 3 an "affront to First Amendment protections."[243] Specifically, Judge Paez found that Order No. 3 was not narrowly tailored to serve the government's interest in security because the "No Protest Zone" "purposely encompassed every place [where protesters] could hope to communicate to delegates."[244] Moreover, Judge Paez pointed out that the court had struck down much smaller buffer zones in the past.[245] The dissent also found that Order No. 3 did not leave open ample alternate venues for speech, concluding that "an entire medium of speech was foreclosed and the WTO protestors were silenced and relegated to the sidelines."[246] Furthermore, the order was sufficiently vague as to allow the official charged with enforcing the regulation unduly broad discretion.[247] As to this latter point, the examples

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[242] *Id.* at 1139 n.49, 1142 n.54.

[243] *Id.* at 1170. It appears that the majority in *Menotti* may have felt either that the dissent was persuasive or was not so secure in its own reasoning. The majority opinion is peppered with an unusual number of lengthy footnotes disputing points made by the dissent.

[244] *Id.* at 1168. Judge Paez points out that Order No. 3 lasted longer than necessary, and that Mayor Schell signed the order in the early morning hours of December 1, 1999, "long after both violence and protest activity had subsided." *Id.* at 1168 n. 9.

[245] *Id.* at 1168, 1168 n.11 (citing *Bay Area Peace Navy*, 914 F.2d at 1127 (75-yard buffer zone surrounding naval ships in a parade too large, and 25-yard zone would suffice to serve security interests); United States v. Baugh, 187 F.3d 1037, 1044 (9th Cir. 1999) (rejecting 150- to 175-yard distance from entrance to visitor center); Kuba v. 1-A Agric. Ass'n, 387 F.3d 850, 862 (9th Cir. 2004) (restricting protesters to small locations more than 200 feet from venue entrance which was not narrowly tailored)).

[246] *Menotti*, 409 F.3d at 1173.

[247] *Id.* at 1174. Seattle's then-Police Chief Stamper admitted that Order No. 3 was sufficiently vague that "it made it difficult from a working cop's point of view to distinguish between who should and who should

Judge Paez proffered in his dissent show that the police used this discretion to practice *de facto* viewpoint discrimination, keeping anyone who evinced any sort of anti-WTO message out of the "No Protest Zone."[248]

Five years later, city leaders of Boston, with ghosts of Seattle no doubt dancing in their heads, put forth a cavalcade of restrictions that could serve as a checklist of schemes designed to abridge free expression. First, the city shut down a federal building adjacent to the convention venue, as well as the subway, the principal railway station serving routes to other parts of New England, the Charles River, and even an Interstate highway for several hours before and after the convention's daily activities.[249] On the

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not be left out." *Id.* at 1175.

[248] *See id.* at 1162-67. The story of Martha Ehman is illustrative; she was an attorney who worked within the "No Protest Zone." Dressed causually, she was walking to work behind three people in business suits who passed into the zone without incident. *Id.* at 1163. Officers asked where she was going, then allowed her to pass when she told them where she worked. *Id.* Once they noticed the words "No WTO" written in masking tape on her backpack, officers required her to remove the message or face arrest. *Id.* In another example, police refused entry into the zone for a partner at a downtown law office while he carryied an anti-WTO sign, even after he explained that he owned a business within the zone; yet, after getting rid of the sign, he walked through another checkpoint without incident. *Id.* A schoolteacher carrying signs that read "Free Trade is Slave Trade" and "Global Cops for Global Corps" was stopped even though she was outside the "No Protest Zone." She was surrounded by four or five officers, who ripped anti-WTO signs off her clothing and backpack, took the signs she was carrying and broke them, then threatened her with arrest if she did not "be quiet and leave." *Id.* at 1164-65 (internal quotation marks omitted). Ironically, the city could have used mobile police teams known as "flying squads" whose duty was to identify and arrest vandals and violent protesters while leaving the tens of thousands of non-violent demonstrators to engage in free expression. *Id.* at 1172. Instead, these squads were pulled off that duty and ordered to join fixed police lines within an hour of arriving on the street. *Id.* "As a result, the relatively small number of vandals could destroy property without threat of arrest." *Id.* (quoting internal police report) (internal quotation marks omitted).

[249] *Coalition*, 327 F. Supp. 2d at 65. Surely, if all public transportation is shut down and auto traffic is compromised by actions as severe as freeway closures, fewer individuals inclined to express dissenting

few public streets surrounding the convention site that were not cut off from public access, the city placed a severe limit on the number of people allowed to demonstrate.[250] Only a twenty-foot strip of a main street leading to the convention site was made available to the public but was cut off from delegates and officials by an eight-foot-high fence covered with a material designed to prevent visibility, therefore even those small demonstration groups located in streets open to the public were not seen by their intended audience, the delegates and officials on the other side.[251]

If that was not enough to deter those intent on expressing dissent, the worst horrors were reserved for participants with the fortitude to enter the demonstration zone. The zone "conveys the symbolic sense of a holding pen where potentially dangerous persons are separated from others."[252] It is "a place . . . not just on the wrong side of the tracks but literally under them."[253] Its capacity was a paltry 1,000 people.[254] The "roof" of the zone was, at best, as high as an average adult and was supported by a "forest of girders."[255] The tracks above were bedecked with razor wire and patrolled by armed police and National Guard officers.[256] The portion of the zone not located under the tracks was covered overhead by mesh netting.[257] More significant than the demonstration zone's profoundly

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views will be willing or even able to transport themselves to the convention venue to protest.

[250] "Anywhere in the soft zone, leafleting and small stationary demonstrations of 20 persons or less may be conducted without a permit. Demonstrations of between 21 and 50 people require a permit." *Id.* Police would not let any more than 12,000 protestors in all of the side streets combined. *Id.* at 66.

[251] *Id.* at 65-66.

[252] *Id.* at 74-75.

[253] *Id.* at 74.

[254] The city calculated that 4,000 protestors would fit, but under questioning by the court, conceded that it "must limit the capacity . . . to no more than 1,000 persons." *Coalition*, 327 F. Supp. 2d at 67.

[255] *Id.*

[256] *Id.*

[257] *Id.*

oppressive nature, however, the remote chance the delegates would see or hear demonstrators, because the demonstration zone was set off by a double set of cement barriers, each topped by eight-foot chain-link fences.[258] The outer fence was covered with mesh supposedly to prevent liquids from being squirted into the protected area, but which actually had the effect of impairing visibility, and altogether preventing leafleting.[259] This last effect of the city's multitude of restrictions, that no one was able to pass leaflets to delegates and their guests, should fail constitutional scrutiny because the "[f]reedom to distribute information to every citizen wherever he desires to receive it is so clearly vital to the preservation of a free society that, putting aside reasonable police and health regulations of time and manner of distribution, it must be fully preserved."[260] Banishing participants behind a double fence that resembles a prison holding area goes well beyond the reasonable police and health regulations suggested by the *Struthers* court.[261]

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[258] *Id.*

[259] According to the court,

> Delegates and invited guests arriving or departing via buses on the opposite or eastern bus row of the terminal will have essentially no visibility from or to the [demonstration zone] because of the distance and the mesh screen. By contrast, those arriving or departing via buses in the western row may be able to hear and, to some extent, see demonstrators in the [demonstration zone], depending on precisely which bus they take and whether they walk in relative proximity to the [demonstration zone] fence. It will be, however, completely impossible to pass a leaflet . . . to a delegate or other [convention] guest, even one who wants to approach the edge of the [demonstration zone] to receive the literature.

Id. at 68.

[260] *Struthers*, 319 U.S. at 146-47.

[261] *See id.* *Struthers* concerned an ordinance prohibiting door-to-door distribution of leaflets. If the state is constitutionally disallowed from prohibiting distribution of circulars door-to-door, then arguably it cannot, with constitutional blessing, completely prevent dissidents from passing handbills to important government officials and their guests.

Nonetheless, in *Bl(a)ck Tea Society*, the court upheld Boston's security scheme,[262] even though it admitted that it could not find that the restrictions on prospective protesters were narrowly tailored.[263] The court reached this conclusion despite its acknowledgement that the *Stauber* court "considered detailed evidence" before enjoining the use of protest pens in New York,[264] *and* despite the design of the Boston demonstration zone being labeled "an offense to the spirit of the First Amendment" and "a brutish and potentially unsafe place for citizens who wish to exercise their First Amendment rights."[265] To justify its decision, the court cited a 1986 case upholding barricades to protect those exercising their First Amendment rights "from those who would prevent its exercise."[266] The court also based its decision on "past experience at comparable events" such as the 2000 Democratic National Convention in Los Angeles.[267] These latter reasons do not provide strong support for issuing a ruling that the court admits falls shy of constitutional scrutiny, especially since newspaper accounts from Los

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Id. at 149.

[262] *Coalition*, 327 F. Supp. 2d. at 77. A more recent case distinguished *Coalition*, fnding that a regulation which kept demonstrators between 260 and 265 feet away from the targets of their speech was unconstitutional. *Kuba*, 387 F.3d at 854, 863. The *Kuba* court found that the government's interest in preventing traffic congestion and ensuring public safety were significant, but "less weighty" than the "substantial" interest found in the *Bl(a)ck Tea Society* case. *Id.* at 858 n.9 (citing Bl(a)ck Tea Soc'y v. City of Boston, 378 F.3d 8, 12 (1st Cir. 2004)).

[263] *Coalition*, 327 F. Supp. 2d at 75.

[264] *Id.* at 74.

[265] *Id.* at 76.

[266] *Id.* at 74 (quoting Oliveri v. Ward, 801 F.2d 602, 607 (2d Cir. 1986)) (internal quotation marks omitted).

[267] *Id.* at 75. The court also based its decision on affidavits from law enforcement personnel and information the United States government gave the court regarding specific intelligence concerning security threats kept under seal. Because the plaintiff was unable to confront the information, the court did not rely on it in making its decision. *Id.* at 75 n.2.

Angeles in 2000 reveal that there were no major injuries and minimal property damage during the Convention protests.[268]

The First Circuit expressed its disagreement with this viewpoint by upholding the *Bl(a)ck Tea Society* decision, but the court should be criticized for doing so. First, while it correctly characterized time, place, or manner analysis as "intermediate scrutiny,"[269] the court applied a standard closer to a rational basis test.[270] Second, the appellate panel raised the same concerns as the lower court regarding harm done during past large gatherings such as those in 2000 in Los Angeles, which amounted to little more than injuries sustained by protesters and journalists.[271] Yet, the court failed to list specific violent incidents to justify its concerns.[272] Therefore, unlike the

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[268] The only injuries reported in Los Angeles were to demonstrators at the hands of police. *See, e.g.*, William Booth & Rene Sanchez, *2,000 Rally in Streets Against Sweatshops*, THE WASH. POST, Aug. 18, 2000, at A25 ("Dozens of protesters . . . have been struck by rubber bullets that police have fired into crowds twice this week."); Paul Pringle, *Week of Demonstrations Closes with Minor Injuries, 190 Arrests*, THE DALLAS MORNING NEWS, Aug. 18, 2000, at A23 ("Some demonstrators threw rocks and bottles at the police. Officers dispersed the crowd with batons, pepper spray and rubber bullets, injuring numerous protesters and journalists."). *See also* Jim Newton, *Police, Critics Clash Over Use of Force*, L.A. TIMES, Oct. 24, 2000, at A1 ("no serious injuries, a smattering of property damage"); V. Dion Haynes & Vincent J. Schodolski, *Immigrants, The Rights of Workers Top Final Rally*, CHI. TRIB., Aug. 18, 2000, at 15 (indicating no reports of serious injury).

[269] *Bl(a)ck Tea Society*, 378 F.3d at 12.

[270] *Id.* at 13 ("We turn next to the City's goal, mindful that the government's judgment as to the best means for achieving its legitimate objectives deserves considerable respect.").

[271] *See supra* note 268.

[272] *See, e.g.*, *Bl(a)ck Tea Soc'y*, 378 F.3d at 14. According to the court,

> While a government agency charged with public safety responsibilities ought not turn a blind eye to past experience, it likewise ought not impose harsh burdens on the basis of isolated past events. And in striking this balance, trial courts should remember that heavier burdens on speech must, in general, be justified by more cogent evidentiary predicates. On this hastily assembled record, the quantum of "threat"

decisions in *Stauber* and *Service Employees International Union*,[273] the First Circuit found that Boston's security measures, "though extreme," were narrowly tailored and left open viable alternative means of communication.[274] This conclusion is open to question.[275]

B. Viewpoint Discrimination in "Pro-Con" Cases

Besides employing the constitutionally dubious tactic of corralling protesters into fenced-off *cordons*

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evidence was sufficient to allow the trier to weigh it in the balance.

Id. The court continued:

> The City claims that the risk of harm was substantial. It designed the elaborate security measures here at issue in light of recent past experience with large demonstrations, including those at the 2000 Democratic National Convention in Los Angeles. The double ranks of fencing were meant to deter attempts to break through the fence; the liquid dispersal mesh was intended to protect the delegates from being sprayed with liquids; and the overhead netting was added to prevent demonstrators from hurling projectiles. Conduct of this type admittedly has occurred at a number of recent protests.

Id. at 13. Note that there was no report of attempts to break through the security fence in Los Angeles in 2000. On the other hand, the author of this article, then a reporter covering the demonstrations at the 2000 convention, interviewed one man who had been shot six times with plastic bullets for attempting to climb the fence to post a sign. The bullets caused quarter-sized welts on his shirtless torso.

[273] *See supra* Part V.A.1.

[274] *Bl(a)ck Tea Soc'y*, 378 F.3d at 14.

[275] The alternate means of communication mentioned by the court are dubious. Principally, the court said the delegates could get the dissidents' message through the television, radio, the press, the Internet, and other outlets. *Id.* But for reasons discussed in Part II.B., *supra*, these methods do not constitute a viable alternative for citizens of modest means and are no substitute for street advocacy. Professor Mitchell concludes, "[N]o matter what the courts say and no matter how carefully police and the courts together draw the lines of protest, creating a geography of rights . . . can be frankly oppressive." Mitchell, *supra* note 11, at *42.

sanitaires,[276] the government has also engaged in obvious viewpoint discrimination[277] by creating special protest pens into which dissidents are shunted. The special protest pens are distant and often hidden from the protesters' target of speech, while demonstrators who favor government policy are allowed within view of elected officials. A variant from this "pro-con" approach would be to simply banish all demonstrators of whatever stripe from the public official's view and allow only those who do not express an opinion to be located closer to the official.[278] While this trend has accelerated where opponents of President George W. Bush's policies have attempted to make their views known to the President, the practice is rooted in the early years of the Clinton administration.

In *Johnson v. Bax*,[279] a critic of Clinton stood at a New York street corner near where the President was speaking, bearing a sign that read "Mr. Clinton: STOP

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[276] Mitchell, *supra* note 11, at *39.

[277] Justice Kennedy reminds us that viewpoint discrimination is "an egregious form of content discrimination." *Rosenberger*, 515 U.S. at 829. *See also* Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384, 394 (1993) ("The principle that has emerged from our cases 'is that the First Amendment forbids the government to regulate speech in ways that favor some viewpoints or ideas at the expense of others.'") (quoting City Council of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789, 804 (1984)).

[278] This happened, for example, in Seattle following the 1999 WTO protests that were marred by a small minority's vandalism spree. *See supra* note 102. Seattle's mayor called in the National Guard to clear the streets, declared a state of emergency, and closed public spaces in a 25-block area of the city to all including those who objected to WTO globalization policies except residents, owners and employees of businesses, emergency personnel, and, more interestingly from a viewpoint-discrimination standpoint, WTO delegates (presumably advocates of WTO policies) and shoppers (presumably voicing no opinion regarding WTO policies). Mitchell, *supra* note 11, at *33-*34. Thus, the mayor's street-closure order amounted to a pro-con scheme whereby pro-WTO delegates and those with no opinion were allowed in the very public places from which WTO opponents were excluded.

[279] No. 93 Civ. 3530, 1996 U.S. Dist. LEXIS 8850, at *2 (S.D.N.Y. June 25, 1996) (granting an order for a preliminary injunction).

CAMPAIGNING AND LEAD!"[280] Police told the critic he had to go to a designated protest zone. When he resisted, the police took away his sign, thereby committing a "clear violation" of his free-speech rights.[281] The critic made another sign, returned to the street corner, was again told to leave and refused, and was subsequently arrested.[282] Police set up "pro" and "anti" demonstration areas, with which the court had no quarrel, but because police, rather than the demonstrators themselves, were the ones directing demonstrators into the pens based on the content of their speech, the court found the practice impermissible.[283]

The *Bax* court noted that while "spectators" who cheered in support were allowed to stand across the street from the President, dissenters were kept at least 75 yards away at all times.[284] This practice, the court indicated, appeared to be an unconstitutional discrimination, but the court was not prepared to rule on this issue.[285] While the police in *Bax* kept dissidents 75 yards from President Clinton, which would appear to be unconstitutional under *Bay Area Peace Navy*,[286] the George W. Bush Administration has required dissenters to be as far as one half mile away from where the President is speaking, while allowing supporters and those expressing no opinion to remain closer.[287] Faithful to Orwellian tradition, these

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[280] *Id.* at *2.

[281] *Id.* at *1-*2. "The fact that the destruction of Mr. Johnson's sign was a violation of his First Amendment rights has not been disputed and the fact that the police officers knowingly violated his right is evidenced by the professed inability of any of the officers to remember who took the sign." *Id.* at *3-*4.

[282] The court also found the arrest a "clear violation" of the plaintiff's First Amendment rights. Police claimed they arrested him for blocking the sidewalk, but the court found that the record "clearly refutes" the claim, in part because one of the officers gave testimony that "is not true." *Id.* at *3, *4-*6.

[283] *Id.* at *8.

[284] *Id.* at *9-*10 (granting an order for a preliminary injunction).

[285] *Id.* at *10.

[286] *See supra* notes 212-15 and accompanying text.

[287] "These zones routinely succeed in keeping protesters out of

remote protest pens have been dubbed "designated free speech" or "First Amendment" zones.[288]

1. Dissenters Hidden from Presidential Motorcade

In 2002, for example, police cleared the motorcade path of all protest signs when President Bush went to Pittsburgh. While the police allowed supporters to line the route, they required dissidents to move to a distant baseball field designated especially for them.[289] Furthermore, police confiscated the sign of one participant, who was arrested for disorderly conduct and detained until the President had left town.[290] A court threw out the disorderly conduct charge.[291] During a hearing, the arresting officer admitted that he had been instructed by the Secret Service to direct some protesters, but not others, into the fenced-in zone.[292] Regarding the zone, the arrestee later told a reporter for *Salon*, "I could see these people behind the fence, with their faces up against it, and their hands on the wire. . . . It looked more like a concentration camp than a free speech area to me, so I said, 'I'm not going in there. I thought the whole country was a free speech area.'"[293]

The Pittsburgh case is not an isolated incident. One

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presidential sight and outside the view of the media covering the event." Bovard, *supra* note 114.

[288] *Id.*; Complaint, Elend v. Sun Dome Inc., No. 8:03-CV-1657-T-23TGW, para. 14 (M.D. Fla. 2005), *available at* http://www.voiceoffreedom.com/archives/protestzonefinalcomplaint/fnlprotestzone.html (last visited Aug. 22, 2005).

[289] Bovard, *supra* note 114.

[290] *Id.*; Transcript of Proceeding, Commonwealth v. Neel, (Oct. 31, 2002) *available at* http://homepage.ntlworld.com/jksonc/docs/neel-2002-10-31.html#fn (last visited Aug. 19, 2005) [hereinafter "Neel Transcript"].

[291] Neel Transcript.

[292] *Id.*

[293] David Lindoff, *Keeping Dissent Invisible*, http://archive.salon.com/news/feature/2003/10/16/secret_service/index_np.html (last visited Aug. 19, 2005).

protest group provided a court with fifteen examples from all over the country.[294] For example, two grandmothers were arrested for displaying handwritten signs critical of President Bush after declining to go to a designated zone hundreds of yards from the entrance to the venue the president visited.[295] In South Carolina, police arrested a man on "trespassing" charges for holding a "No War For Oil" sign among hundreds of Bush supporters.[296] He had refused to remove himself to the designated zone a half mile from where President Bush was to speak.[297] Although the state dropped the trespassing charges because they did not apply to public property, the federal government remained undaunted and charged the defendant with entering a restricted area around the President of the United States, a rarely-enforced law carrying a penalty of six months incarceration or a $5000 fine.[298] There could not be a clearer case of content discrimination, considering a police officer told the defendant, "[I]t's the content of your sign that's the problem."[299]

In addition, an Indiana man who stood near the entrance to a venue at which Vice President Dick Cheney was to speak displayed a sign that read "Cheney, 19th Century Energy Man." He was arrested on disorderly conduct charges after refusing to move to a protest zone 500 feet from the entrance.[300] In this case, the court found that the protest zone was not narrowly tailored to serve the government's interest in safety at the event.[301] Moreover, the court concluded that the protest zone did not constitute an adequate alternate channel of communication because its

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[294] *Acorn v. City of Philadelphia*, No. 03-4312, 2004 U.S. District LEXIS 8446, at *5 (E.D. Pa. May 5, 2004).
[295] Bovard, *supra* note 114.
[296] *Id.*
[297] *Id.*
[298] *Id.*
[299] *Id.* (internal quotation marks omitted).
[300] Blair v. City of Evansville, 361 F. Supp. 2d 846 (S.D. Ind. 2005).
[301] *Id.* at 859.

500-foot distance from the venue's parking facilities and entrance "significantly curtailed" the plaintiff's ability to convey his message to event patrons, a key component of his intended audience.[302] The government has engaged in blatant viewpoint discrimination, as the foregoing examples illustrate, by relegating dissenters to distant designated zones while allowing supporters and others to be within view of the President. Furthermore, in at least one instance, police even forbade the media from entering a protest area to speak to dissidents and banned protestors from exiting the zone to express themselves to the media.[303]

2. Court Declines to Enjoin Practices

In Philadelphia, a dissident organization sought to enjoin the government from keeping its members further away from the President than where supporters were allowed.[304] In one instance, a police line forced dissenting protesters to stay a third of a block from where a presidential motorcade was to pass, but allowed supporters to stand closer.[305] In another, police parked several large vans directly in front of dissenting protesters, ensuring that the President was unlikely to see them.[306] Government officials in Philadelphia were subject to a consent decree, issued in 1988, permanently enjoining them from barring leafleting and sign-carrying based on the messages communicated.[307] The plaintiffs in *Acorn* sought declaratory, as well as injunctive relief and an order requiring government officials to comply with the 1988

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[302] *Id.*
[303] Bovard, *supra* note 114.
[304] *Acorn*, 2004 U.S. Dist. LEXIS 8446, at *2-*3.
[305] Acorn Complaint at paras. 25, 34, 35, 37, 44-46.
[306] *Id.*
[307] *Acorn*, 2004 U.S. District LEXIS 8446, at *1-*2.

consent decree.[308] The court rejected the plaintiffs' claim based on a lack of standing,[309] despite conceding that the government "may indeed have violated" the protesters' rights.[310] The plaintiffs were unable to show a concrete likelihood that the government would violate their constitutional rights, or to specify future dates and times of official events at which violations were likely to occur. [311]

While the *Acorn* court denied a dissident group standing for purposes of an injunction, the court in *Stauber v. City of New York*[312] found that the New York Civil Liberties Union (NYCLU) had standing because it sponsored protest events in the past and planned to do so in the future.[313] The *Stauber* court further found that the plaintiffs in that case sufficiently alleged impairment for the purposes of standing by demonstrating that the challenged government practices "may prevent the NYCLU from expressing its message as forcefully as it would in the absence of the practices."[314] Clearly, the standard followed in *Stauber* requiring that plaintiffs show they are in the business of sponsoring political-speech events and that the government may impair their expressions, is less stringent than the specification of future events by time and date required in *Acorn*. Thus, *Stauber* enunciated the more correct and just standard. The *Acorn* court effectively conceded that its standard is unlikely to be met when it noted that plaintiffs "usually cannot learn of the scheduling of such events in sufficient time to enable them to obtain judicial relief."[315]

Moreover, the *Acorn* court appears to improperly

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[308] *Id.* at *3-*4
[309] *Id.* at *7.
[310] *Id.* at *7.
[311] *Id.* at *6-*7. "In my view, plaintiffs' claims are too amorphous to be justiciable at this point in time." *Id.* at *7.
[312] *See Stauber*, 2004 U.S. Dist. LEXIS 13350.
[313] *Id.* at *40.
[314] *Id.*
[315] *Acorn*, 2004 U.S. District LEXIS 8446, at *5.

rely on the fact that Secret Service regulations forbid its agents from regulating speech based on viewpoint.[316] Essentially, the court instructs the plaintiffs to sue individual Secret Service agents over First Amendment violations, finding that "no useful purpose would be served" by entering a declaratory judgment to the effect that the Secret Service must not engage in viewpoint discrimination [317] This finding is questionable, as "the internal guidelines of a federal agency, that are not mandated by statute or the constitution, do not confer substantive rights on any party."[318] Because the internal regulations of the Secret Service were unlikely to confer rights on the plaintiffs, the declaratory judgment that the *Acorn* plaintiffs sought would have served a useful purpose.

Courts in the future should not follow *Acorn*, but should look to *Stauber* for guidance. If courts follow *Acorn*, most protest groups will be unable to specify a future likelihood of viewpoint discrimination required by that court, despite ample evidence that the Secret Service is engaging in a practice of banishing dissenters to remote fields or pens while allowing supporters to congregate much closer to the President. Furthermore, this issue should be heard by the Supreme Court; otherwise, the President could elude dissenters by avoiding or rarely visiting those jurisdictions which, through their equitable powers, might forbid the Secret Service from violating the Constitution. Better yet, Congress could accomplish the goal of requiring equal treatment of all who engage in political speech by passing a statute that punishes government officials who discriminate by viewpoint with

[316] *Id.* at *6. "[T]he Secret Service has elaborate written guidelines which specifically provide for non-discrimination on the basis of the views sought to be expressed by the protesters." *Id.*

[317] *Id.* at *6. Agents who violate Secret Service policy cannot successfully assert a qualified-immunity defense. *Id.*

[318] *See, e.g.*, United States v. Craveiro, 907 F.2d 260, 264 (1st Cir. 1990).

sanctions like incarceration or stiff fines.

C. Privatization: Theft of the Public Forum

While determining whether an outdoor space is a street, sidewalk, or park, and thus a traditional public forum, should not raise many questions, the advent of public-private partnerships as a substitute for public investment has begun to blur the line between public and private spaces. While the Supreme Court is not likely to countenance an outright ban on expression in traditionally public places, it has allowed speech restrictions on private property, even if heavily trafficked by the public. For example, after Congress stripped certain free-speech activities from the Supreme Court building and grounds, the Court responded by declaring the law unconstitutional when applied to the sidewalks surrounding the building.[319] The Court pointed out that there was no fence or other form of delineation that marked the sidewalks surrounding the Court's grounds as "some special type of enclave."[320] Congress "may not by its own *ipse dixit* destroy the 'public forum' status of streets and parks which have historically been public forums."[321]

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[319] "The public sidewalks forming the perimeter of the Supreme Court grounds, in our view, are public forums and should be treated as such for First Amendment purposes." United States v. Grace, 461 U.S. 171, 180 (1983). The statute at issue provided, "It shall be unlawful to parade, stand, or move in processions or assemblages in the Supreme Court Building or grounds, or to display therein any flag, banner, or device designed or adapted to bring into public notice any party, organization, or movement." *Id.* at 173 (quoting 63 Stat. 617 § 6) (codified at 40 U.S.C. § 13k).

[320] *Id.* at 180.

[321] *Id.* (quoting United States Postal Service v. Greenburgh Civic Assns., 453 U.S. 114, 133 (1981)) (internal quotation marks omitted). According to the court,

> The inclusion of the public sidewalks within the scope of [section] 13k's prohibition, however, results in the destruction of public forum status that is at least presumptively

On the other hand, the Supreme Court treats private spaces differently. For example, despite the increased function of shopping malls during the late 20th century as a central gathering place for Americans, the Court has ruled that these private properties lie outside the scope of First Amendment protection. In *Lloyd Corp. v. Tanner*,[322] the Court reversed an Oregon district court's injunction prohibiting a shopping mall owner from interfering with peaceful, noncommercial handbilling by draft and anti-war demonstrators. The Court held that private property, such as a mall, does not "lose its private character merely because the public is generally invited to use it for designated purposes."[323] In doing so, it distinguished *Marsh v. Alabama*.[324] Writing in 1972 for the four

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> impermissible. Traditional public forum property occupies a special position in terms of First Amendment protection and will not lose its historically recognized character for the reason that it abuts government property that has been dedicated to a use other than as a forum for public expression. *Nor may the government transform the character of the property by the expedient of including it within the statutory definition of what might be considered a nonpublic forum parcel of property.*

Id. (emphasis added). Interestingly, in dissent Justice Stevens counseled judicial restraint, contending that the Court should not have ruled on section 13k's constitutionality, because the statute did not reach the activities in which either defendant allegedly engaged. *Id.* at 188-89 (Stevens, J., concurring in part and dissenting in part). One of the defendants was threatened with arrest for distributing leaflets and handbills, which has nothing to do with the display of "any flag, banner or other device" proscribed in the statute, because "only after the material left [defendant's] possession would his message have become intelligible." *Id.* at 188 (Stevens, J., concurring in part and dissenting in part) (internal quotation marks omitted). The other defendant did display a device, Justice Stevens reasoned, but because her sign merely recited verbatim the text of the First Amendment, it could not be said to have been "designed or adapted to bring into public notice any party, organization, or movement." *Id.*

[322] 407 U.S. 551 (1972).

[323] *Id.* at 569. The Court reasoned, "The essentially private character of a store and its privately owned abutting property does not change by virtue of being large or clustered with other stores in a modern shopping center." *Id.*

[324] 326 U.S. 501, 507-08 (1946) (upholding the right to distribute

dissenting votes in *Lloyd*, Justice Marshall sounded a prophetic note when he concluded:

> It would not be surprising in the future to see cities rely more and more on private businesses to perform functions once performed by governmental agencies. The advantage of reduced expenses and an increased tax base cannot be overstated. As governments rely on private enterprise, public property decreases in favor of privately owned property. It becomes harder and harder for citizens to find means to communicate with other citizens. . . . When there are no effective means of communication, free speech is a mere shibboleth. I believe that the First Amendment requires it to be a reality.[325]

Four years later, the Court extended *Lloyd* and held that strikers were not allowed into a shopping mall to picket their employer, a shoe retailer.[326] Nonetheless, some jurists have urged that because shopping malls do function as public gathering places, mall owners have a reduced expectation of privacy and therefore must allow political expression.[327] Answering the Supreme Court's invitation

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leaflets in company-owned towns).

[325] *Lloyd Corp.*, 407 U.S. at 586 (Marshall, J., dissenting). Justice Marshall further advocated that the court continue to follow *Marsh* and hold that "the more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it." *Id.* (quoting *Marsh*, 326 U.S. at 506) (internal quotation marks omitted).

[326] Hudgens v. NLRB, 424 U.S. 507, 520-21 (1976).

[327] *E.g.*, Eastwood Mall v. Slanco, 626 N. E. 2d. 59, 62 (Ohio 1994) (Wright, J., dissenting) (advocating the application of a time, place, or manner analysis to achieve an appropriate balance between the mall owner's property rights and the public's free-speech rights). Justice

to employ alternate analyses or read their own constitutions more broadly than the Supreme Court interprets the federal Constitution,[328] a few states, namely California, Colorado, Massachusetts, New Jersey, New York, Pennsylvania, and Washington, have recognized a limited right to free expression at privately owned shopping malls.[329] The California Supreme Court held that that state's Constitution "protects speech and petitioning, reasonably exercised" in privately owned shopping centers.[330] Professor O'Neill predicted that because the First Amendment does not reach private spaces, the battle over the contours of speech-related access to the increasingly privatized public space will be fought on a state-by-state basis.[331]

1. Hoarding Horton Plaza

One such battle over privatized public space took place over Horton Plaza Park in San Diego, California.[332]

Wright noted:

> When one thinks about how a shopping mall actually functions, the enclosed common areas within the mall are comparable to the town square of yesteryear surrounded by downtown stores. . . . [C]itizens, because of the public nature of a mall, have a heightened expectation that they are permitted to engage in some forms of speech activities.

Id. at 67.

[328] City of Mesquite v. Aladdin's Castle, 455 U.S. 283, 294 (1982).

[329] O'Neill, *supra* note 82, at 455. *See also* Horton Plaza Assoc. v. Playing for Real Theatre, 228 Cal. Rptr. 817, 823 (Cal. App. 1986) (collecting decisions). Ten other states have not recognized this limited right. O'Neill, *supra* note 82, at 455-56.

[330] Robbins v. Pruneyard Shopping Ctr., 592 P.2d 341, 347 (Cal. 1979). This is based on CAL. CONST. art. I, § 2(a) (granting every person the right to "freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of this right") and CAL. CONST. art. I, § 3(a) (granting right to "petition government for redress of grievances"). *See also id.* at 345-46.

[331] O'Neill, *supra* note 82, at 456.

[332] *Horton Plaza Assoc.*, 228 Cal. Rptr. 817. *See also* Mitchell, *supra* note 11, at *17-*26 (reviewing *Horton Plaza*).

In an attempt to revitalize commercial activity in the downtown area, San Diego leaders permitted the development of a shopping mall adjacent to Horton Plaza Park, designed to serve as the mall's pedestrian entrance.[333] To increase the odds of the mall's financial success, the city altered the park's landscaping and furniture by removing benches and replacing lawn areas with prickly plants, attempting to make the park a less inviting place to gather, thereby encouraging people to pass through Horton Plaza Park and into the eponymous shopping mall.[334] Thus, the effect of the mall's opening in 1985, as well as the owner's goal in opening it, "was to move public life inside, to capture it really, for its own commercial interests."[335]

In a nod to *Pruneyard*, the shopping mall owners set up highly restrictive permit limitations to govern political expression.[336] The Playing for Real Theatre applied for a

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[333] Mitchell, *supra* note 11, at *22.

[334] The redesign "simply made it impossible to hang out in the park." *Id.*

[335] *Id.* at *21-*22, *26.

[336] *Horton Plaza Assoc.*, 228 Cal. Rptr. at 820-21. Restrictions recited by the court include:

> (1) Only one permit to any one person or group or organization will be issued per day. (2) A permit shall allow the holder to use only the portion of center property expressly designated and specified in the permit. (3) The office of the Center manager shall have the power to deny a request for a permit if the manager in good faith believes the proposed Political Expression to be profane, indecent, disturbing, offensive, in poor taste, or otherwise not conducive to the controlled business environment of the shopping center. (4) The number of persons who may engage in Political Expression in the Center at the same time shall be determined by the owner. Such number shall be determined with reference to the space provided in the designated area and the number of separate groups engaged in such activity at the same time. In no event shall more than two persons from any one group occupy space in the designated area at the same time. (5) *No permits will be issued between Thanksgiving and December 31st of any calendar year.*

permit to perform a ten-minute skit in the mall re-enacting the U.S. bombings of El Salvador. The skit involved eight actors and included leafleting as part of the skit.[337] The mall manager denied the request for the play, but approved the leafleting.[338] The theater group neither dispersed handbills nor put on the play, yet based on a tip from an unnamed police informant that the group planned to create a disturbance and engage in violence in the shopping mall, its owner sued the group. The mall owner won a preliminary injunction against any dramatic performances by the group and required 72 hours advance notice for any leafleting.[339] In *Horton Plaza*, the court distinguished *Pruneyard* and similar cases, limiting their holdings to protect only leafleting and signature-gathering, and not "expressive conduct" such as putting on plays.[340] The dissent in *Horton Plaza* chided the majority for upholding a prior restraint of political speech and for buying the story, "based on double and triple hearsay statements," that the theater group planned to create a disturbance.[341] Therefore, *Horton Plaza* serves as a warning that creeping privatization of public spaces heralds a concomitant muting

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Id. at 821 (emphasis added).

[337] *Id.* at 828 (Butler, J., dissenting).

[338] *Id.*

[339] *Id.* at 820-22, 828.

[340] *Id.* at 824.

[341] *Horton Plaza Assoc.*, 228 Cal. Rptr. at 828 (Butler, J., dissenting). Justice Butler added, "Chicken Little and Henny Penny are alive and well." *Id.* Justice Butler further noted:

> Finally, this case comes to us in a plain wrapper. The content is sterile. [Defendant] Phipps and his Theatre cohorts did not protest the denial of the permit to put on the play and they did not leaflet as allowed by issuance of the second permit. Hearing bumps in the night, Horton Plaza seeks to exorcise phantoms of its imagination. Our review should await an actual controversy.

Id. at 832-833 (Butler, J., dissenting).

of dissenting voices.[342]

2. New York: The Great Grass Debate

As the twentieth century progressed, courts came to the conclusion that property rights, though vital, were not as important as personal rights when considering whether to rule in equity. Relatively early in the century, a Texas court announced that "personal rights of citizens are infinitely more sacred and by every test are of more value than things that are measured by dollars and cents."[343] Toward the middle of the twentieth century, the California Supreme Court commented that treating property rights more favorably than personal rights bespeaks a doctrine "wholly at odds with the fundamental principles of democracy,"[344] especially in cases involving First Amendment rights.[345] This doctrinal development

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[342] *See* Mitchell, *supra* note 11, at *26.

[343] Hawkes v. Yancey, 265 S.W. 233, 237 (Tex. Civ. App. 1924). *See also Whitney*, 274 U.S. at 374 (Brandeis, J., concurring) ("The powers of the courts to strike down an offending law is no less when the interests involved are not property rights, but the fundamental personal rights of free speech and assembly.").

[344] Orloff v. Los Angeles Turf Club, Inc., 180 P.2d 321, 325 (1947). Whether to grant equitable relief "should not in logic or justice turn upon the sole proposition that a personal rather than a property right is involved. . . . These concepts of the sanctity of personal rights are specifically protected by the Constitutions, both state and federal, and the courts have properly given them a place of high dignity, and worthy of especial protection." *Id.*

[345] In one of those cases, the Supreme Court observed:

> When we balance the Constitutional rights of owners of property against those of the people to enjoy freedom of press and religion . . . we remain mindful of the fact that the latter occupy a preferred position. As we have stated before, the right to exercise the liberties safeguarded by the First Amendment "lies at the foundation of free government by free men."

Marsh, 326 U.S. at 509 (citation omitted). *See also Robbins*, 592 P.2d

represented a move away from the common law requirement that a plaintiff assert a property interest before a court would grant an injunction.[346] Yet, in this nascent century, especially where the rights of dissidents are concerned, what is old apparently is new again.

For example, in *National Council of Arab Americans v. City of New York*, the court denied protest groups the use of the Great Lawn in New York's Central Park, made extensive reference to the threat posed by a mass rally on the Great Lawn, and appeared far more concerned about the condition of the grass than about the groups' free-speech rights.[347] The court expressly pointed out that the Great Lawn was restored in 1997 at a cost of more than $18 million.[348] Whether the city got its money's worth is questionable because it was only after the restoration that the city imposed restrictions on the size of crowds allowed in the park and required that events be canceled if they take place during or shortly following rainy weather.[349] What the court did not mention was that

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at 347 ("the public interest in peaceful speech outweighs the desire of property owners for control over their property").

[346] *See Hawkes*, 265 S.W. at 237. Here, the court noted:

> The rule that equity will not afford relief by injunction except where property rights are involved is known chiefly by its breach rather than by its observance; in fact, it may be regarded as a fiction, because courts with greatest uniformity have based their jurisdiction to protect purely personal rights nominally on an alleged property right, when, in fact, no property rights were invaded. This is, in our opinion, as it should be . . ..

Id.

[347] *Nat'l Council of Arab Ams.*, 331 F. Supp. 2d at 261-64, 270.

[348] *Id.* at 263.

[349] *Id.* at 261, 263-64. The court, shown "dramatic photographs" by city officials of a pre-restoration Great Lawn in a beleaguered state, appeared concerned that the park not return to those "dust bowl" days. *Id.* at 264 (internal quotation marks omitted). However, other park areas such as East Meadow offer all-weather capability. *Id.* at 262. The cancellation requirement in rainy weather for events scheduled on the Great Lawn is especially puzzling given that Central Park

some of the $18 million needed to complete the restoration came largely from private corporate donors, who were allowed to use the Great Lawn for their large events, unless the grass was wet.[350] In communicating with the plaintiffs, the city emphasized that underlying its use-restriction plan was the idea that "restoration accomplished through significant public and private investment can be preserved."[351] Thus, while *National Council of Arab Americans* is a decision ostensibly based on a time, place, or manner analysis under which the court found the city's restriction reasonable, the subtext of the decision appears to be that where private donors help or principally fund an improvement to a public park, private functions will receive precedence over free-speech activities.[352] Most

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experiences frequent wet weather, averaging approximately an inch of rain a week during summer months. *See* National Weather Service, Normals and Extremes, Central Park, New York, 1869 to present, *available at* http://www.erh.noaa.gov/okx/climate/records/nycnormals.htm.

[350] *Nat'l Council of Arab Ams.*, 331 F. Supp. 2d at 263; Complaint, Nat'l Council of Arab Ams. v. City of New York, No. 04 Civ. 6602, paras. 8, 16, 47, 59, 331 F. Supp. 2d 258 (S.D.N.Y. 2004), *available at* http://www.arab-american.net/pdffiles/First_Amended_Complaint.pdf (last visited Jan. 30, 2006) [hereinafter "Nat'l Council of Arab Ams. Complaint"].

[351] Nat'l Council of Arab Ams. Complaint, at para. 51 (internal quotation marks omitted).

[352] City officials contended that the predicted 250,000 rally participants that the plaintiffs sought to permit would "decimate" the Great Lawn and require a lengthy closure. *Nat'l Council of Arab Ams.*, 331 F. Supp. 2d at 264. On the other hand, the city boasted in a press release, cited in the opinion, that the restored lawn "consist[ed] of approximately twelve acres of 'hearty' Kentucky blue grass," soil engineered to resist compaction, and more than four linear miles of subsurface drainage infrastructure. *Id.* at 263. The plaintiffs challenged the propriety of the apparent partial privatization of Central Park:

> Although the corporate donors may feel a sense of private ownership over the Park and do not want to be 'paying' to host a demonstration that may strongly advocate against their perceived interests the [Central Park Conservatory] may not act to deny protest permits on the Great Lawn in order to protect its relationships with such donors. The Park remains a

disconcerting, however, is that the court seemed to bolster its decision not to grant an injunction by noting that if the city permitted protestors to use the Great Lawn, dissedent groups might encourage more people to attend their event.[353] This approach appears to be little more than a pretext to quell dissent. After all, a primary function of a public forum such as Central Park is to accommodate political expression, and the city's decision to close the park to expressive activity, in part, because opening the park might encourage more expression, offends the very interest in free speech that a public forum is supposed to accommodate.

3. Leaving Las Vegas to the Privateers

Much like New York City did in obtaining private money to refurbish the Great Lawn, Las Vegas, attempting to reverse the declining economic fortunes of its "frumpy" and dated downtown, redeveloped the area using a private-public financing scheme.[354] The result was a five-block pedestrian zone closed to traffic, dubbed the "Fremont

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> public forum for all and is not privatized or subject to the discriminatory urges of [the conservatory's] corporate sponsors.

Nat'l Council of Arab Ams. Complaint, at para. 59.

[353] The court quoted the following statement that plaintiffs made at trial in their opinion:

> If this Court was to rule that the Great Lawn is not off limits for political legal mass assembly protest, there would be a surge of excitement and enthusiasm, and we don't know what the palpable impact of that would be . . . a lot of people who might not at this moment think about coming to Central Park a week before would find a way to get there.

Nat'l Council of Arab Ams., 331 F. Supp. 2d at 272.

[354] ACLU of Nev. v. City of Las Vegas, 333 F.3d 1092, 1094-95 (9th Cir. 2003), *cert. denied*, 124 S. Ct. 1077 (2004).

Street Experience." Wishing to minimize interference with commercial activity such as shopping in the new pedestrian zone, however, the city outlawed various free-speech activities, including leafleting, solicitation, and setting up a table in a public space to distribute literature or collect signatures (a practice called "tabling").[355] After police dispersed a small rally called to protest the restrictions, the American Civil Liberties Union of Nevada sued.[356]

The district court that declared a pedestrian mall is a nonpublic forum, upheld the solicitation, and tabled the bans while denying summary judgment to the city on the leafleting prohibition. The court reasoned that the leafleting prohibition probably violated the First Amendment even under the more relaxed standard of scrutiny for nonpublic fora.[357] The lower court determined that the pedestrian mall was a nonpublic forum because: (1) the city had created it for the purpose of stimulating economic growth and "not for the purpose of promoting expression"; (2) the $70 million spent on the redevelopment project represented a "great expense"; and (3) the textured pavement and overhead canopy distinguished the redeveloped area from surrounding streets and sidewalks.[358]

The Court of Appeals for the Ninth Circuit rejected this reasoning, holding that the Fremont Street Experience was a public forum as were other commercialized pedestrian malls, such as the Venice Beach Boardwalk and Olivera Street in Los Angeles, and Fisherman's Wharf and Union Square in San Francisco.[359] Although United States appellate courts apply "a jumble of overlapping factors" when determining public forum status, they typically

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[355] *Id.* at 1095, 1096.
[356] *Id.*
[357] *Id.* at 1096.
[358] *Id.*
[359] In such determinations, courts consider historical use. *Id.* at 1103-04, 1106.

consider compatibility of the uses of the forum with expressive activity.[360] Public thoroughfares, such as the Fremont Street pedestrian mall in Las Vegas, are "inherently compatible" with free speech.[361] Courts also seek to protect the reasonable expectation that speech will be protected where a location in question is indistinguishable from other public fora.[362] Even the use of distinctive pavement and landscaping is not sufficient to change the character of a public forum.[363] The appellate court concluded, "The Fremont Street Experience is still a street."[364]

Perhaps more noteworthy than the court's holding was that it echoed the concern voiced thirty-one years earlier by Justice Marshall, which states that as cities are drawn unresistingly down the path of financing public projects with private funds, citizens may encounter greater difficulty in effectively communicating their views.[365] "Although governmental attempts to control speech are far from novel, they have new potency in light of societal

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[360] *Id.* at 1099-1100.

[361] *Id.* at 1101.

[362] "The recognition that certain government-owned property is a public forum provides open notice to citizens that their freedoms may be exercised there without fear of a censorial government, adding tangible reinforcement to the idea that we are a free people." *Id.* at 1100 (quoting Int'l Soc'y for Krishna Consciousness v. Lee, 505 U.S. 672, 696 (1992) (Kennedy, J., concurring)).

[363] *Id.* at 1102.

[364] *Id.* at 1103. This reasoning echos that of an earlier U.S. Court of Appeals for the Ninth Circuit case, in which the city of Los Angeles sought to limit a man's leafleting in El Pueblo de Los Angeles State Historic Park, which encompasses Olivera Street, a tourist-oriented commercial area. Gerritsen v. City of Los Angeles, 994 F.2d 570, 572-74 (9th Cir. 1993). The city argued that Olivera Street "is a distinctive section of the park, with a unique historic and cultural atmosphere which is designed to foster commercial exchange." *Id.* at 576. The court found this argument "unconvincing," noting that the Olivera Street area "is still part of the park and it is indistinguishable from other sections of the park in terms of visitors' expectations of its public forum status." *Id.*

[365] *See supra* note 325 and accompanying text.

changes and trends toward privatization."[366] Unfortunately, this new potency has had a negative impact on the ability of dissidents to express themselves, as seen with respect to the Great Lawn in New York[367] and the Horton Plaza in San Diego.[368]

D. Sistrunk and Schwitzgebel: Viewpoint Discrimination Meets Privatization

While the Supreme Court in *United States v. Grace* cut governmental attempts to destroy the public forum status of places traditionally used as public fora, more recent attempts by private actors, typically political campaigns, to temporarily privatize a traditional public forum by obtaining a permit to use a park for an event have drawn mixed judicial responses.[369] During such events, the campaign committee typically treats the park as private property and excludes dissidents or limits admittance to the venue to those who do not support the campaign's opponent.[370] Two cases, both arising from a Republican campaign rally using the public commons in an Ohio town, demonstrate the split in authority concerning these viewpoint discrimination-meets-privatization schemes.

In *Schwitzgebel v. City of Strongsville*,[371] the campaign committee for then-President George H. W. Bush obtained a permit to use a park for a campaign rally and restrict entrance to those holding tickets to the event.[372] A police officer and a Secret Service agent guarded each entrance to the fenced-off park, requiring entrants to set aside any signs whether favorable or unfavorable to the

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[366] *ACLU of Nev.*, 333 F.3d at 1097.
[367] *See supra* Part V.C.2.
[368] *See supra* Part V.C.1.
[369] *See generally* O'Neill, *supra* note 82, at 459-62.
[370] *Id.* at 459.
[371] 898 F. Supp. 1208 (N.D. Ohio 1995).
[372] Tickets generally were made available to whomever wanted them. *Id.* at 1211-12.

campaign.[373] The plaintiffs entered with concealed signs criticizing Bush's AIDS policy. When they displayed the signs, a brouhaha ensued, resulting in their ejection from the park and arrest on various misdemeanor charges.[374] The *Schwitzgebel* court found that, despite the issuance of the permit, the park was a traditional public forum and the government could not convert it into something less protective of free speech.[375] The court noted:

> In essence, public fora serve as bulwarks protecting the right of all persons, especially those who have no access to any other outlet, to speak their minds freely. Courts must not allow the government to overcome the bastions protecting such an important right through so simple an exercise as the granting of a permit.[376]

The court found that when a permitted event, the admittance to which is restricted to ticket-holders, is held at a public park, the park retains its public forum status. Nonetheless, the court upheld the exclusion of the plaintiffs from the event by applying what Professor O'Neill characterizes as a "tortured time, place, and manner analysis."[377] Following *Saunders v. United States*,[378] the *Schwitzgebel* court found a significant government interest in preventing, by use of the permitting scheme, an individual from physically intruding on and interfering with another's event to inject his or her own beliefs.[379] Through

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[373] *Id.* at 1212. The campaign provided its own signs for participants to use during the rally.
[374] The charges were later dropped. *Id.* at 1212-13.
[375] *Id.* at 1216.
[376] *Id.*
[377] O'Neill, *supra* note 82, at 461 n.262.
[378] 518 F. Supp. 728, 729-30 (D.D.C. 1981), *aff'd without op.*, 679 F.2d 262 (D.C. Cir. 1982).
[379] *Schwitzgebel*, 898 F. Supp. at 1218.

its ruling, the court also sought to avoid "cacophony" by barring opponents from holding events in the public fora.[380] The court's reasoning, however, flies in the face of the Supreme Court's recognition of the "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open,"[381] and that free debate may carry with it "verbal tumult, discord, and even offensive utterance."[382] Thus, the *Schwitzgebel* court's justification for using a permit system to stifle dissent lacks validity. Essentially, the government is using a privatization scheme to do an end-run around the First Amendment's ban on viewpoint discrimination[383] by handing a traditional public forum to a private entity that discriminates. Courts should not countenance this practice.

If the *Schwitzgebel* court came to an improper result even while reaching the proper finding that permitting the use of a park does not strip the park of public forum status, then the court in *Sistrunk v. City of Strongsville*[384] failed even to reach an appropriate finding. In *Sistrunk*, a high school student was required to surrender her button showing support for Bill Clinton before entering a Bush

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[380] *Id.* at 1219. In deciding that the permitting scheme was a valid time, place, or manner restriction on the plaintiffs, the court found content-neutrality because the issuance of the permit was not based on content of the speech involved in the event; once issued, the permit could be enforced "in a way that protects the expression of the permitted message, even to the exclusion of some other message." *Id.* However, the court here is allowing a governmental agency to issue a permit on a content-neutral basis that gives an entity the ability to take over a public forum and exclude speech on the basis of content in that public forum. *Pinette*, 515 U.S. at 761 (holding that a state may regulate expressive content "only if such a restriction is necessary, and narrowly drawn, to serve a compelling state interest").

[381] *Sullivan*, 376 U.S. at 270.

[382] *Cohen*, 403 U.S. at 24-25. Within established limits, the court added that these effects are "in truth necessary side effects of the broader enduring values which the process of open debate permits us to achieve. That the air may at times seem filled with verbal cacophony is, in this sense not a sign of weakness but of strength." *Id.* at 25.

[383] *Lamb's Chapel*, 508 U.S. at 394.

[384] 99 F.3d 194 (6th Cir. 1996).

rally. The court, analogizing the case with *Hurley v. Irish-American Gay, Lesbian & Bisexual Group*,[385] found that the Bush campaign had a right to exclude the student's button because allowing her to wear it would unconstitutionally deprive the campaign of autonomy over its message.[386] In *Hurley*, the Supreme Court enunciated the principle underlying the *Sistrunk* court's decision when it ruled that Massachusetts could not require Boston war veteran parade organizers to include a gay-rights group that would have imparted a message in discord with what the organizers sought to communicate.[387] The *Sistrunk* court likened the plaintiff in that case to the gay-rights group and the campaign to the veterans, reasoning that compelling the Bush campaign to allow the plaintiff to attend its rally wearing a Clinton button would be analogous to requiring the veterans group to permit gay-rights activists to march in the Boston parade. The court stated this would be the same because "participating in the rally as a member of the audience is more akin to marching in the parade itself as one of the less visible marchers."[388]

The *Sistrunk* dissent contended that this analysis "turned the narrow holding of *Hurley* on its head."[389] According to the dissent, the *Sistrunk* plaintiff's attendance at the rally was not akin to marching in the parade, but to standing in the crowd lining the parade route; marching in the parade, instead, is equivalent to standing at the podium and speaking at the rally.[390] The dissent in *Sistrunk* promotes the better view because an audience member at a

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[385] 515 U.S. 557 (1995).
[386] *Sistrunk*, 99 F.3d at 199.
[387] *Hurley*, 515 U.S. at 559, 574.
[388] *Sistrunk*, 99 F.3d at 199. The court further supported the proposition that the campaign could exclude dissenting voices from the public forum that they occupied by finding that the campaign sought attendees to "send the media a message" that Bush was going to win the election. *Id.* (internal quotation marks omitted).
[389] *Id.* at 200 (Spiegel, J., dissenting).
[390] *Id.* at 201.

rally wearing a campaign opponent's button or even carrying a sign has no more effect on the message the speaker at the podium conveys than a dissenter standing along a parade route, who is part of the parade's audience.[391] More significantly, the fundamental question in *Sistrunk* was "how much control over a traditional public forum may a municipality cede to a private group."[392] The Strongsville, Ohio campaign rally cases, thus, present an intriguing question of whether, in temporarily privatizing a public forum by issuing a permit to a political speaker, a governmental entity is able to turn the public forum into a location allowing viewpoint discrimination. Considering the extent to which courts protect free expression in the public fora and the proposition that "the nature of certain public forums cannot be altered, either by government fiat or private will,"[393] the answer to this question should be a resounding "No."[394]

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[391] *See id.*

[392] *Id.* at 202. The record was not sufficient to determine this issue.

[393] *Id.* (quoting Bishop v. Reagan-Bush '84, No. 86-3287, 1987 U.S. App. LEXIS 6669, at * 6 (6th Cir. May 22, 1987) (internal quotation marks omitted)).

[394] To be fair, limiting speech-making in a public forum with the purpose of facilitating simultaneous expression of views by groups hostilely opposed to one another—as opposed to merely handing a public forum to proponents of one point of view by the act of granting a permit to use a park, as was the case in *Sistrunk* and *Schwitzgebel*—may be more readily justified. For example, in *Grider v. Abramson*, 994 F. Supp. 840 (W.D. Ky. 1998), Louisville, Kentucky authorities used fencing and a buffer zone to separate simultaneous rallies by the Ku Klux Klan and an opposing group in a downtown public park and the adjacent courthouse steps. *Id.* at 841-43. The purpose was to ensure that each group could express views "violently opposed" to the other, within sight of the other, while reasonably secure that violence would not break out. *Id.* at 843, 848. The plaintiffs challenged the safety regime, in part, because it barred anyone besides scheduled speakers from making a speech. *Id.* at 843. The court upheld this provision, reasoning that the state should guarantee citizens "the right to participate in events or demonstrations of their own choosing without being subjected to interference by other citizens." Sanders v. United States, 518 F. Supp. 728, 730 (D.D.C. 1981). This limit on speech-making is more justifiable than the limits upheld in *Sistrunk* and *Schwitzgebel* because its purpose was to facilitate the simultaneous

Fortunately, a more recent case, *Parks v. City of Columbus*,[395] rejected the denial of First Amendment speech in a public forum that was temporarily privatized. The court distinguished the facts in that case from those in *Sistrunk* and *Schwitzgebel* because the event for which a public forum was privatized did not convey any particular message.[396] In *Parks*, the city issued a permit to the Arts Council to close a city street to vehicular traffic for an arts festival that was free and open to the public.[397] As the plaintiff walked on the city street during the arts festival wearing a sign bearing a religious message and distributing literature, a fully-uniformed off-duty police officer who was hired to provide security told him that the event sponsors "did not want him there" and threatened to arrest the plaintiff if he did not leave.[398] The court found state

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expression of deeply disparate views, the kind of "uninhibited, robust and wide-open" debate that the First Amendment, at its core, protects. *See id.* at 848 (quoting *Sullivan*, 376 U.S. at 270) (internal quotation marks omitted). One court indicated that when a governmental entity grants a private entity the use of a public forum, the private entity's right to constrain speech and have such constraints enforced by the governmental entity should be limited to situations where the restricted speech is disruptive. Garthright v. City of Portland, 315 F. Supp. 2d 1099, 1105 (D. Or. 2004). This reflects reasonable thinking, so long as it is applied to speech-making that actually disrupts. Merely wearing a button or holding a sign while standing mute in a public forum that was temporarily privatized (as was the case in *Sistrunk* and *Schwitzgebel*, respectively) should not be considered disruptive under such a doctrine.

[395] 395 F.3d 643 (6th Cir. 2005).

[396] *Id.* at 651. The court concluded:

> While it is unclear that the Arts Festival was actually expressing a particular message, the City "submitted that the collective message of the Greater Columbus Arts Council is to bring visual and performing artists to the City to be enjoyed by those who wish to go to the festival." This is not an expressive message, but merely a purpose for the event. The Arts Festival is an event that most likely has many artists who are expressing various messages of their own.

Id. (internal citation omitted).

[397] *Id.* at 645.

[398] *Id.* at 646.

action on the part of the city and concluded that "it [was] difficult to conceive that Parks's removal was based on something other than the content of his speech."[399] Because the restriction was content-based, the city had to show that its action was "necessary to serve a compelling state interest and [was] narrowly drawn to achieve that end."[400] The city failed to make such showing because it had "not offered an interest, let alone a compelling one, to explain why it prohibited Parks from exercising his First Amendment rights in a traditional public forum."[401]

VI. Conclusion

In its frenzied rush to fortify its bellicose foreign policy, the government in recent years has turned a cold shoulder not only towards dissenters, but the teachings of earlier generations of American jurists. Not all modern thinkers are guilty of following this trend, however. As a New York judge recently noted, "We have long since made clear that a state of war is not a blank check for the President when it comes to the rights of the Nation's citizens."[402] Even—and especially—in wartime, the search for truth carried out through unbridled political expression and robust debate is critical to the continued political freedom of the nation. According to Justice Harlan:

> The constitutional right of free expression is powerful medicine in a society as diverse

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[399] *Id.* at 654.

[400] *Id.* (quoting *Perry Educ. Ass'n*, 460 U.S. at 45) (internal quotation marks omitted).

[401] *Parks*, 395 F.3d at 654. "The City offered no explanation as to why the sponsor wanted the [plaintiff] removed. There is no evidence that the Arts Council had a blanket prohibition on the distribution of literature or that others engaging in similar constitutionally protected activity were removed from the permitted area." *Id.*

[402] Hamdi v. Rumsfeld, 542 U.S. 507, 603 (2004) (citing Youngstown Sheet & Tube v. Sawyer, 343 U.S. 579, 587 (1952)).

> and populous as ours. It is designed and intended to remove governmental restraints from the arena of public discussion, putting the decision as to what views shall be voiced largely into the hands of each of us, in the hope that use of such freedom will ultimately produce a more capable citizenry and more perfect polity and in the belief that no other approach would comport with the premise of individual dignity and choice upon which our political system rests.[403]

Concomitant with the right of free expression is the right to gather in public places to give voice to political views in order to convey them to authorities.[404] In modern times, however, authorities demean public gathering for the expression of political views because they assume that such gatherings will take a violent form, thus presuming guilt until innocence is proven.[405] Ironically, it can be argued that the greater the constraints the government places on dissidents through penning protesters, discriminating by viewpoint, and privatizing away the public forum, the greater the likelihood of civil disobedience to express views the public otherwise would have voiced lawfully.[406] Yet, along with the general perils inherent in civil disobedience comes a newer, harsher threat of lengthy incarceration in federal penitentiaries should the government choose to employ section 802 of the Uniting and Strengthening America by Providing Tools Required to Intercept and

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[403] *Cohen*, 403 U.S. at 24.

[404] "The very idea of a government, republican in form, implies a right on the part of its citizens to meet peaceably for consultation in respect to public affairs and to petition for a redress of grievances." *Cruikshank*, 92 U.S. at 552.

[405] Mitchell, *supra* note 11, at *39.

[406] *Id.* at *44 ("closing off of space to protest has made civil disobedience all the more necessary").

Obstruct Terrorism Act of 2001 (the "Patriot Act")[407] against demonstrators. This prospect is no flight of fancy.[408]

The government has already so compromised the free use of the public forum that the only way to take it back may be through widespread civil disobedience. But because such a course would put many in danger, and because, in a civilized democracy, the citizenry should not have to resort to such extremes to engage in speech activity the Constitution already protects, a better course would be to rethink current policy toward those who use public places to express their political views. Courts, no doubt, have a significant role to play in this process and should remain astute to governmental attempts to displace dissidents by restricting access to the public forum. Specifically, courts should be particularly wary of and should treat with great suspicion schemes that: (1) corral or pen protesters so they effectively are unable to get their message across to the targets of their speech; (2) discriminate according to viewpoint by banishing opponents of government policies to distant or unseen locations; and (3) propose to accomplish, through privatization what the First Amendment otherwise would not permit. By remaining vigilantly against such free expression-compromising schemes, courts can hold the other two branches of government to a constitutional standard so that the people of this country may reclaim the public forum.

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[407] Uniting and Strengthening America by Providing Tools Required to Intercept and Obstruct Terrorism Act of 2001, Pub. L. 107-56, 115 Stat. 272.

[408] Section 802 of the Patriot Act reaches those who violate a criminal law in the commission of an act dangerous to human life the purpose of which is to influence government policy through intimidation or coercion. *See* NANCY CHANG, SILENCING POLITICAL DISSENT 112-13 (Seven Stories Press 2002); Mitchell, *supra* note 11, at *44-*45.