Reclaiming the Public Forum: Courts Must Stand Firm Against Governmental Efforts to Displace Dissidence

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

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I. Introduction

As the 21st 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 to be 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 of globalized media outlets and big-money political campaigns, which in concert tend to constrain considerably the range of debate on important issues,[4] an important component of the health of American democracy is the ability of the general public – that vast majority who lack means to convey their message via the media or directly to lawmakers[5] – to make their grievances known by taking to the streets without undue governmental hindrance.

This escalating government clampdown on free expression, along with current trends toward privatization of public functions,[6] governmental secrecy[7] and gagging of citizens,[8] should give anyone

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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 (2004).

[2] *See, e.g.*, United for Peace & Justice v. Bloomberg, 2004 NY Slip Op 24389 (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.

[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 are fundamentally anti-democratic (the FCC ignored these messages). Steve Barnett, *Media: 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. (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[.] [I]t'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, In general, the federal government has been operating under ever-greater secrecy in recent years, especially since the Sept. 11, 2001 terrorists attacks in New York and Washington, D.C. For example, the number of documents government has classified jumped forty percent between 2001 and 2003, while in 2003 only one fifth as many documents were

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 along with other Americans of Japanese ancestry during World War II in an internment camp in Arizona, said, "It's happening all over again."[10] The intersection of the new repressive state apparatus spawned by the Sept. 11, 2001 attacks on American soil and jurisprudence that confines where free speech may take place, argues Professor Mitchell, "portends a frightening new era in the history of speech and assembly in America."[11]

Protecting core rights such as that of 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 Comment catalogs manifold methods the government has employed to constrain free speech and 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

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declassified as in 1997. Edward Epstein, *White house takes secrecy to new levels, coalition reports*, S.F. CHRONICLE, Aug. 27, 2004 at A7. "[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." *Administration Unbound*, ST. PETERSBURG TIMES, Oct. 2, 2004, at 16A. In addition, hearings for immigrants caught up in sweeps following the Sept. 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 arrest and even the number detained has 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 Judge 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 without probable cause of Internet, library and university records. *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 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, No. 04 Civ. 2614, 2004 U.S. Dist. Lexis 19343, at *11 (S.D.N.Y. Sept. 28, 2004).

of 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 crimes charged against detained demonstrators, and holding those demonstrators for unreasonably long periods of time in ignominious conditions. Part IV examines how such government actions violate constitutional protections of speech by deterring participation in public debate. Beyond such street tactics, government in recent years has begun placing public fora off limits by forcing dissenters into protest pens, determining based on viewpoint where they may engage in political expression, or limiting the landscape of free speech via privatization schemes. Part V analyzes the First Amendment 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 limiting 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] The nation's founders believed that only with the widest possible access to information would democratic government be possible.[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, and thus it receives heightened protection.[16] A variation on this theory posits that the right of free

[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 (Sheila Suess Kennedy ed., 1999), at xviii.

[15] *Id*.

[16] "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 (2d prtg. 1969); RODNEY A. SMOLLA, FREE SPEECH IN AN OPEN SOCIETY 12 (1992). Professor Smolla lists five ways in which free speech is related to self-governance, through: participation (debating issues, casting votes, joining decision-making processes), the pursuit of political truth, augmentation of majority rule, restraint on "tyranny, corruption and ineptitude," and societal stability. *Id*. at 12-13. *See also* New York Times v. Sullivan, 376 U.S. 254, 270 (1964) (citing "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").

expression is needed for citizens to develop the intellectual tools necessary to assimilate and evalueate widely ranging viewpoints.[17] Commentators additionally have cited as an underlying purpose of free speech the marketplace theory, by which truth competes in the marketplace with falsity and ultimately triumphs.[18] Free speech also is often justified as an end, tied to human autonomy and dignity.[19] Thus, under the 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, developed in Medieval England, to petition government for redress of grievances.

A. The right of free expression: ancient roots

The right of free expression as a means toward affecting change in governmental policy well predates the founding of the United States. Some authors suggest that the 1215 Magna Carta, although it contains no language directly protecting free speech, 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

[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 (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, 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*.

[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 15, 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 (1998). "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 the 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*.

redress, which finds reference in the Magna Carta[22] but more direct support in later texts.[23] Yet even close to 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 got an early start in North America, codified in the Body of Liberties adopted in 1641 by the Massachusetts Bay Colony.[25]

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 allowed even the disenfranchised to participate in political life.[27] Furthermore, like some street demonstrations carried out by the disenfranchised or their sympathizers in the 1960s as well as more recently,[28] petitioning during

[22] According to one author who cites an unpublished Ph.D. dissertation, the right to petition predates even the Magna Carta, and while the King regularly provided redress, it was provided when beneficial to the King and 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, 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 and accompanying text. The King and his counselors had discretion over how to treat petitions, but even those rejected or not acted on had to be read. *Id*. at 2168; *see also* HOWARD, *supra* note 21, at 52, quoting the Magna Carta, ch. 61 ("[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").

[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 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. "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 (footnotes omitted).

[25] *See* Wishnie, *supra* note 23, at 688. *See also* Mark, *supra* note 22, at 2177, which quotes from the Body of Liberties: "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."

[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 (footnotes omitted).

[27] *Id*. at 687.

[28] See, e.g., Symposium, *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).

colonial times succeeded at effecting change to governmental policy.[29] And, of course, the Declaration of Independence refers to unsuccessful petitions for redress from the King of England made "in the most humbleTerms" but which "have been answered only by repeated Injury." [30] Finally, the First Amendment itself provides for petitioning,[31] yet although originally seen as central to the relationship between government and the governed, the courts (not to mention academics) historically have paid it 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, under the pseudonym "Cato," wrote:

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

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

[30] Declaration of Independence, para. 30.

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

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

[33] *Id*. at 2154, 2155-56. 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, 908-910, 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 is to restrain trade and even if the restraint causes an antitrust injury. *Id*. at 909-10, 913. Professor Minda questions the validity of the *Noerr-Pennington* doctrine, however, because

> [t]he 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] *Id*. at 2154.

> Submission grew the only means of Preferment, and indeed of Safety; Men durst not open their Mouths, but to flatter.[35]

Yet thinkers of the time frequently followed the teaching of 18th century English commentator Blackstone, whose conception of free expression consisted of barring government from prior restraint of speech while allowing subsequent punishment.[36] Arguably it was this sort of thinking that underlay 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 prospect of war against France, provoked immediate public furor.[39] Thomas Jefferson assailed the constitutionality of the acts – and rightfully so, according to author Chafee – and when he became the nation's third president in 1801, he pardoned all prisoners.[40] Popular indignation with prosecutions under the acts destroyed the Federalist party, and Congress paid back all the fines.[41]

Despite all this, the United States Supreme Court 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 speech or press rights.[43] One reason the Court rarely reached First

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[35] Letter from Cato number 15, entitled "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 (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 Blackstone's 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.

[38] The Sedition Act punished with up to two years in prison and a $2,000 fine any act wherein a person should "write, print, utter or publish … any false, scandalous or malicious" materials against the government, president or Congress of the United States with intent to defame them, bring them "into contempt or disrepute," excite hatred of the people against them or "stir up" sedition. Law of July 14, 1798 §2, 1 Stat. at 596-97. Truth was a defense. *Id*. §3, 1 Stat. at 597.

[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* New York Times v. Sullivan, 376 U.S. 254, 276 (1964).

[42] *New York Times v. 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*.

[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.*, Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 80 (1873) ("The right to

Amendment questions during the 19th century is that the prospect of mob violence or economic punishment discouraged parties from going to any court to assert their rights to free speech, and thus few cases or controversies respecting speech made their way to the Supreme Court.[44]

Indeed, it was not until well into the 20th 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 among a series of cases in which various agitators against the draft for World War I or socialists who advocated violent overthrow of the government had been hauled into court for violating the Espionage Act of 1917[47] or a similar state statute, and their convictions had been upheld.[48] Even in the 1925 case of *Gitlow v. New York*[49], which serves as a free-speech milestone by holding for the first time that the First Amendment was "incorporated" into the Fourteenth Amendment Due Process Clause[50] and thereby to be applied to the states, the majority held that legislatures could prohibit classes of speech that they consider to be

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peaceably assemble and petition for redress of grievances … are rights of the citizen guaranteed by the Federal Constitution"); 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").

[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). For example, the New York Times in 1869 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 19th century free speech jurisprudence. *Id*. at 270-71.

[45] 250 U.S. 616 (1919).

[46] *Id*. at 630.

[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 [hereinafter Espionage Act].

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

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

[50] *Gitlow*, 268 U.S. at 666 (1925) ("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"). 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 (1971)).

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 test as a limit on government prosecution of speech, such that "only 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] But during the Great War era, perhaps it was Learned Hand, sitting as a District Court judge, who most eloquently defended the right of free speech in an Espionage Act case wherein he issued an injunction requiring the Postmaster to distribute a magazine containing anti-war poetry, cartoons and other writings[57] (and was overturned on appeal[58]):

> 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

[51] "[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 (1927).

[54] *Id*. at 377.

[55] *Id*. at 375.

[56] *See, e.g.*, New York Times v. Sullivan, 376 U.S. 254, 276 (1964) (enunciating the actual malice standard in defamation of public figures); Noto v. United States, 367 U.S. 290 (1961) (teaching of the moral propriety or necessity of resort to force not sufficient for conviction); Brandenberg v. Ohio, 395 U.S. 444 (1969) (overturning Ohio law punishing advocacy of violence as a means to achieve industrial or political reform). In *Brandenberg*, Justice Douglas criticized the courts for too readily punishing advocacy by characterizing it as a threat: "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). 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.

[58] Masses Pub. Co. v. Patten, 246 F. 24 (2d. Cir. 1917).

> 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. …[59]

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 protection, especially because the mass media may not accurately reflect the voices of the public, and much of the public lacks access to the media.[60] Indeed, for much of the 20th 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, and courts' First Amendment rulings sought to protect such methods,[61] because the financially flush 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.[62] Underscoring the importance to the less well-financed of street protesting, Supreme Court Justice

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[59] Masses Pub. Co. v. Patten, 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]." Masses Pub. Co. v. Patten, 244 F. at 540.

[60] "[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, 121-122 (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.

Adderly v. Florida, 385 U.S. 39, 49-51 (1966) (citations omitted). In *Adderly*, 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. (internal quotation marks omitted).

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

[62] Kreimer, *supra* note 60, 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*, TORONTO STAR, Jan. 13, 2002, at D14 (book review). A letter writer contends that members of the public will take to the streets when – as is now the case – they are "deliberately bypassed by those in power." Postbag, *Don't be a stooge of globalization*, BANGKOK POST, Oct. 3, 2000 (letter to the editor).

Douglas noted that "[t]hose 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."[63]

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 has been found to serve more as a highly efficient organizational, research, and interpersonal communication tool than a replacement for the town square.[64] Still, beyond doubt the Internet has allowed groups large and small representing the entire political spectrum the chance to make their views available to readers all over the world.[65] And they have been able (so far) to elide government and media censorship in doing so.[66] For protest groups, posting a Web site means giving readers a view of marches – and police reactions – that the broadcast media may ignore.[67] Moreover, use of Internet chat rooms, e-mail and Web sites allows dissident groups to provide volumes of information (including, for example, complaints and court decisions) that would have been inconceivable without the computer-based medium. Groups, moreover, employ online resources to facilitate recruitment and mobilization.[68]

However, Professor Kreimer contends that for all its ability to move information and reach globally, the Internet has not developed into a cyber-town square.[69] Primary among the reasons for this include what he calls the "digital attention deficit:" Dissident groups' sites, no matter who comprehensive, exist in a world wide cacophony of billions of Web sites trying to attract readers with

[63] *Adderly*, 385 U.S. at 50-51.
[64] *See generally* Kreimer, *supra* note 60; *see also* Frederick W. Mayer, *Labor, Environment and the State of U.S. Trade Politics*, 6 NAFTA L. & BUS. REV. AM. 335, 339 (2000).
[65] *See generally* Kreimer, *supra* note 60, at 125. A good example of such a Web site may be found at http://www.indymedia.org.
[66] "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." *Id*. at 127. Professor Kreimer cites as examples the Mexican Zapatista rebels' ability to convey their accounts to the world, Vietnamese dissenters' efforts to post banned novels, Serbian radio stations' Web-based broadcasts to get by airwave jamming by the government, and the posting of a DVD encryption-decoding computer program. *Id.* at 127-29. 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.
[67] *Id*. at 125, 126.
[68] *Id*. at 131-37.
[69] Kreimer, *supra* note 60, at 140.

only 24 hours in a day.[70] Moreover, protest site publishers may be able to post links on portals that attract heavy traffic or host more easily found "sucks" sites,[71] 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 the public's attention.[72] "On the Internet, there are neither malls nor sidewalks."[73]

While the argument is thus strong that the Internet has yet to and as it currently functions lacks the potential to serve as a substitute for the town square, even if it could, the Internet unlikely could replicate the emotive impact of street protest. Though his renown and expertise lay in copyright, Professor 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*.[74] In *Cohen*, Justice Harlan adopted Nimmer's own phrasing[75] 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."[76]

Because the Internet cannot foreseeably duplicate a true public meeting place and the majority of the citizenry lacks meaningful access to the mass media, most political dissenters continue to face a lack of alternatives to the public forum to make their views known.

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

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[70] *Id*. at 142-43.
[71] *E.g.* homedepotsucks.com, paypalsucks.com, halliburtonsucks.com. *See Id.* at 152-53
[72] *Id*. at 147-48.
[73] *Id*. at 148.
[74] 403 U.S. 15 (1971) (overturning defendant's conviction of disturbing the peace for 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).
[75] Van Alstyne, *supra* note 74, at 1656-57.
[76] *Cohen*, 403 U.S. at 26 (quoting Baumgartner v. United States, 322 U.S. 665, 673-674 (1944)).

utilize a forum traditionally dedicated to political expression. Though frequently recited in First Amendment literature, the words of Justice Roberts, penned in 1939 in *Hague v. Committee for Industrial Organization*,[77] bear repeating here:

> 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.[78]

While this proclamation of privilege should resonate like a favorite tune to the ear of any street demonstrator, one should note that Justice Douglas stressed in the same paragraph that citizen use of public streets and parks for free expression is not absolute, but relative, and may be regulated "in the interest of all."[79]

Yet while recognizing a governmental prerogative to regulate in the interest of peace and order, Justice Douglas nonetheless admonished that government must not use "the guise of regulation" to abridge or deny free speech.[80] Since *Hague* was decided the Court has developed a regulation scheme that categorizes the use of public spaces for political expression based on their relative availability to the public. Thus, the *Hague* court referred to what generally is known as the traditional public forum, the streets, sidewalks and parks found by the Supreme Court to be "natural and proper" places for political expression.[81] These are places that "by long tradition or by government fiat have been devoted to assembly and debate."[82] The Court also has defined limited or designated public fora and nonpublic fora,[83]

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[77] 307 U.S. 496 (1939).
[78] *Id*. at 515.
[79] *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*.
[80] *Id*. at 516.
[81] 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) (citing Hague, 307 U.S. at 515) (internal quotation marks omitted).
[82] Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983).
[83] Limited or designated public fora include university meeting facilities and municipal theaters, places that the government deliberately has 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 endowed with abundant case

but the focus of this comment rests on the traditional public forum to elucidate the ways in which recent government actions have sharply limited its availability for political expression.

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.[84] That government is barred from regulating speech based on its substantive content or its messages is "axiomatic,"[85] and to be valid, a content-based regulation "must be shown to protect some vital state interest, or to prevent some clearly identifiable harm."[86] An egregious form of content-related regulation is that based on viewpoint.[87] "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."[88]

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.[89] The government's purpose is the controlling factor in determining such content neutrality.[90] When the purpose served is unrelated to the content of the expression, a restriction

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citation, *see* Kevin Francis O'Neill, *Disentangling the Law of Public Protest*, 45 LOY. L. REV. 411, 418-462 (1999); *see also* Knolls Action Project v. Knolls Atomic Power Laboratory, 771 F.2d 46 (2d. Cir. 1985).

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

[85] Moreover, "[d]iscrimination against speech because of its message is presumed to be unconstitutional." Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 828 (1995). Professor O'Neill lists five categories in which courts have found impermissible governmental acts that restrict speech based on content: categorically suppressing or favoring a particular message; blocking access to a forum because of a speaker's intended message; charging higher fees for certain speakers to use a forum (because the speech is likely to generate controversy and require more police protection); withholding a subsidy to which a speaker, but for her message, would be entitled; and 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 83, 429-433; *see also* Rosenberger, 515 U.S. at 828 (government offends the First Amendment when it imposes financial burdens on certain speakers based on the content of their expression).

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

[87] Rosenberger, 515 U.S. at 829.

[88] *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. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 46 (1983)).

[89] 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, *The Orange Order Looks to the First Amendment: Would it Protect Their Parades?*, 17 J. L. & POLITICS 553, 565 (2001).

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

will be deemed content-neutral, even if it has an incidental effect on some speakers or messages but not others.[91] 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"[92] – and leave open ample alternate avenues through which to convey the information.[93] An alternative is not ample if the speaker is prevented from reaching her intended audience.[94] 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."[95]

III. Bullying With Billy Clubs: Government Discourages Participation

As discussed at length in this part, governmental agencies across the nation of late have undertaken extensive (and expensive) efforts that have the ostensible purpose of enhancing public safety, but in reality have had the effect of curtailing the ability of political dissidents to win the attention of their intended audience. Much as government officials in the late 18th and early 20th centuries were facing war when they passed laws clamping down on speech,[96] 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

[91] *Id*. (citing Renton v. Playtime Theatres, Inc., 475 U.S. 41 (1986) (zoning ordinance upheld 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)).
[92] *Id*. at 791, 798-99. 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.
[93] Ward v. Rock Against Racism, 491 U.S. at 801. *See also* Bay Area Peace Navy v. United States, 914 F.2d 1224, 1229 (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 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*. (citations, emphasis, internal quotation marks omitted)(alteration in original). *See also* Weinberg v. City of Chicago, 310 F.3d 1029, 1042 (7th Cir. 2002) (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*.
[94] Bay Area Peace Navy, 914 F.2d at 1229 (internal quotation marks omitted).
[95] *Id*.
[96] *See* discussion of Alien and Sedition Acts and Espionage Act, *supra* Part II. A.

street demonstrators,[97] the government has, under the auspices of the war on terror, sought to permanently gag certain entities subject to Federal Bureau of Investigation searches.[98] A New York District Court judge recently found the law prohibiting disclosure in such cases facially unconstitutional, commenting, "as our sunshine laws and judicial doctrine suggest, democracy abhors undue secrecy, in recognition that public knowledge secures freedom."[99]

But beyond the federal government's current obsession with secrecy is its concentrated and multifaceted assault on protesters and their use of public spaces to engage in political speech. As this part discusses in some detail, government agencies at the federal and local level intimidate protesters from participating, denounce them as violent often when such a description is unjustified, 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 – not infrequently ignoring manufacturers' suggested limitations on their use – round them up in mass arrests, seek exaggerated charges, and abuse them while they are in custody.

A. Denouncing the Participants

Before demonstrators even show up for their rally, authorities frequently have already begun to denigrate or intimidate them.[100] This takes the form of taunts, thinly veiled threats or apocalyptic predictions of demonstrator-derived violence. Sometimes officials seem to base these predictions on little more than evidence that isolated incidences of vandalism or infrequent cases of violence have marked previous marches in other cities.

1. Protesters' propensity for violence exaggerated

[97] *See infra*, part III. B.
[98] *See* 18 U.S.C. § 2709 (2000 & Supp. 2003); Doe v. Ashcroft, No. 04 Civ. 2614, 2004 U.S. Dist. Lexis 19343, at *16-*19 (S.D.N.Y. Sept. 28, 2004).
[99] *Doe v. Ashcroft*, 2004 U.S. Dist. Lexis 19343, at *143, *159.
[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 (internal quotation marks omitted) (on file with author). New York Police Commissioner Kelly made public statements about the threats "hard-core" and "dangerous" protesters posed to New York City. *Id*. (internal quotation marks omitted).

For example, based on disruptions caused by dressed-in-black anarchists, who constituted small percentage of the 20,000 marchers who protested globalization and the World Trade Organization (WTO) in Seattle in December 1999,[101] the Los Angeles Police Department (LAPD) "painted a dire picture" of civil disobedience and mass protests prior to the Democratic National Convention scheduled in their city for August 2000.[102] During a presentation to the Los Angeles City Council, the LAPD stirred fear of pandemonium by showing a dramatic video of the demonstrations in Seattle[103] – the tenor of this video accurately could be compared to that of the famous anti-marijuana 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 "quaking with fear" over the prospect of the public

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[101] 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*, WASHINGTON POST, Dec. 12, 1999, at 40. Most protesters left property alone, but a small group of youths dressed in black, faces covered with ski masks or bandanas, committed acts of 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 50-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.

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

[103] *Id*.

[104] The author of this Comment, 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.

[105] Chris Ford, *Police Outline Plan To Handle Protest*, L. A. DAILY JOURNAL, June 29, 2000 (on file with author).

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]

2. Protesters depicted as "terrorists"

Preparing to host the Republican party's 2004 national convention, New York City officials, no doubt still haunted by images of the September 11, 2001 attacks on their city, understandably were concerned about a repeat during the GOP political event. However, their concerns over terrorist threats morphed into a practice of lumping demonstrators and terrorists together.[108] The media gave voice this effort. A top police official, for example, was quoted as citing "terrorist threats and the escalating plans of anarchist groups to disrupt the city of New York."[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 criminal intent on the part of demonstrators, making statements to the press that they "came here to get arrested."[111] Likewise, the mayor of Philadelphia anticipated the arrival of demonstrators to the 2000 Republican National Convention by belittling them, calling them "idiots,"[112] then issued his warning: "Some will come here to disrupt, to make a spectacle of what's going on. They are going to get a very

[106] Garry Abrams, *Spines in Short Supply, Wimp City Faces Dreadful Electoral Pestilence*, L.A. DAILY JOURNAL, July 11, 2000 (on file with author).
[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. Todd S. Purdum, *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; Threats 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] Glenn Thrush, *Mayor to ex-detainees: Plead Guilty*, NEWSDAY, Sept. 20, 2004, at A15 (internal quotation marks omitted).
[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." *Id*. (internal quotation marks omitted). 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) (internal quotation marks omitted). Mayor Bloomberg further made public statements that those engaging in free speech were "terrorists and guilty criminals." Class Action Complaint, MacNamara v. New York (S.D.N.Y. filed 2004) para. 62 (internal quotation marks omitted) (on file with author).
[112] "We've got some idiots coming here. Some will whatever obnoxious things they want to say and go home." BOGHOSIAN, *supra* note 1, at 20-21.

ugly response."[113] While Philadelphia's and New York's mayors made no effort to hide their hostility toward free expression, a spokesman for the anti-terrorism section of the California Department of Justice recently was even more blatant, outright designating anti-war protesting as a form of terrorism.[114]

Similarly, police training in preparation for anti-globalization demonstrations that coincided with a 2003 meeting in Miami of Western Hemisphere leaders attempting to create a Free Trade Area of the Americas (FTAA) emphasized violent protests and gave little regard to protection of free speech.[115] The media build-up 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 dramatic show of force."[117] Disconcertingly, this mindset inhibited police from performing such basic tasks as assisting members of the public.[118]

However, 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 them to demonstrate in a protest zone so harsh that the court itself said it creates the "overall impression … of an internment camp."[119] Despite finding the protest zone to be "a grim, mean and oppressive place," the court justified the city of Boston's

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[113] *Id*. at 21.

[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. CHRONICLE, Jan. 4, 2004, 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) [hereinafter Miami report].

[116] *Id*. at 6.

[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. policy in Central America. Stephen Koff, *City police accused of spying at rallies*, ST. PETERSBURG TIMES, Feb. 14, 1988, at 1.

[119] Bl(a)ck Tea Society v. Boston, 327 F. Supp. 2d 61, 74 (D. Mass. 2004).

security measures in light of the surmised potential for protesters to engage police in "hand-to-hand combat."[120]

B. Penalizing the participants

The government arguably has tended to further chill expression and limit access to the public forum through intimidating and violent treatment of protesters, denial of access to public spaces or of ingress to and egress from marches, mass arrests that sometimes include bystanders not involved in political expression, and abusive treatment during detention.

1. Show of force intimidates

Police agencies prepare for demonstrations almost as though they are headed to war with a violent enemy rather than to into a public forum to ensure safety for First Amendment expression.[121] For example, In Los Angeles in 2000, police projected their rough-and-ready image prior to the Democratic National Convention by staging a training for television cameras to film a mock containment of protesters.[122] Protest planners became so frustrated by pre-convention harassment by police – who, for example, questioned them about their identification, told them walking the streets without identification was illegal, buzzed their planning center with low-flying helicopters and taunted them with threats of raids on the planning center – that they sued the city of Los Angeles to get it to stop taking actions "aimed at chilling [their] speech."[123] During the convention, police, their uniforms bristling with pepper-spray canisters, tear-gas guns and other weaponry, menaced would-be protesters.[124] The city sent overwhelming

[120] *Id*. at 67, 75.
[121] Chris Ford, *Commission Praises LAPD for Handling of Protest Marches*, L.A. DAILY JOURNAL, Aug. 23, 2000 (on file with author).
[122] 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.
[123] D2K Convention Planning Coalition v. Parks, CV-00 08556 (C.D. Cal., filed Aug. 8). *See* Chris Ford, *Lawyers Will Be Keeping a Close Eye on the LAPD*, L.A. DAILY JOURNAL, Aug. 11, 2000 ("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…") (on file with author).
[124] Ford, *supra* note 121.

numbers of heavily armed officers even to small gatherings.[125] One Los Angeles City Councilmember noted, "There were demonstrations I was at where there were more police than demonstrators."[126]

Police frequently project a menacing presence at demonstrations by showing up in heavy riot gear, which critics deride as "Darth Vader" uniforms.[127] A Miami police review board, after examining how police handled the demonstrations during the FTAA meeting, 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 events."[128] At one point, Miami police in riot gear blocked access to a church service, even though there was no demonstration at the time.[129]

The intimidation of protesters is not always pressed at the tip of a billy club. In 2002 the Justice Department lifted restricted restrictions imposed in 1976 on the FBI, allowing it to spy on Americans' everyday lives.[130] The FBI encouraged its agents to enhance "paranoia" by increasing the number of interviews it conducts with anti-war activists.[131] Doing so "will further service [sic] to get the point across that there is an FBI agent behind every mailbox."[132]

2. Use of force causes injuries

While the so-called Miami Model came in for 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 plainclothes officers in full body armor, "wearing ski masks, jumping out of

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[125] *Id*.
[126] *Id*. (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 going just to overtime pay for police officers. *Id*. The difference between the estimated and ultimate policing cost was "more than this city 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." Chris Ford, *Council Rails at Heavy DNC Police Presence*, L.A. DAILY JOURNAL, Dec. 4, 2000 (internal quotation marks omitted) (on file with author).
[127] "Having witnessed the Chicago Police Department's 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." *Letters*, CHICAGO SUN-TIMES, Nov. 18, 2002, at 34 (letter to the editor).
[128] *Id*.
[129] *Id*.
[130] Bovard, *supra* note 114.
[131] *Id*. (quoting from an internal FBI newsletter) (internal quotation marks omitted).
[132] *Id*. (internal quotation marks omitted).

vans and dragging protesters off."[133] Others of these snatch squads would drag protesters behind three-row police lines, preventing legal observers from identifying the detainees and access to them by medics.[134] Moreover, legal observers in Miami obtained arrest reports listing "brutality, beatings and such – tasers, wooden and rubber bullets, many cops beating one person, concussion grenades, electrical shields, etc."[135]

In Los Angeles, the police department's policy-making board questioned officers' use of "less-than-lethal" weapons at a demonstration against police brutality in October 2000.[136] There, police shot demonstrators with weapons designed, according to their manufacturer, for use against "subjects heavily dressed and in a violent mindset."[137] Among the weapons used that day was one intended for use against armed or violent individuals and was described as "an excellent tool" for cell extractions or cellblock-clearing operations in prisons.[138]

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 pepper spray.[139] Police claimed that protesters were interfering with the ability of attendees to reach the site of the event and ordered the crowd to move back 120 feet.[140] After demonstrators allegedly ignored the order, officers assaulted the crowd with pepper spray and shot crowd members with rubber bullets.[141] Plaintiffs in the resulting civil rights lawsuit allege that officers sprayed peaceful protesters in the face with pepper spray and other chemical agents.[142] Police forcefully blocked the exit of one family with small children, including an 11-month-old who had been

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[133] Christopher Getzan, *Infamous 'Miami Model' of Protest Clampdown, Coming to a town Near You*, THE NEW STANDARD, June 8, 2004, *at* http://www.newstandardnews.net/content/?action=show_item&itemid=488&printmode=true (last visited Nov. 9, 2004).
[134] BOGHOSIAN, *supra* note 1, at 53.
[135] *Id*. at 54.
[136] Chris Ford, *Panel Checks 'Less-Lethal' Weapons*, L.A. DAILY JOURNAL, Dec. 20, 2000 (on file with author).
[137] *Id*. (internal quotation marks omitted). It should be noted that while the weapons are designed for use against "heavily dressed" subjects, October sun in Los Angeles typically generates summer-like temperatures – in fact, the average high temperature in Los Angeles in October is 78 degrees – so 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, *available at* http://www.wrh.noaa.gov/lox/climate/cvc.php (last visited Feb. 13, 2005).
[138] *Id*. (internal quotation marks omitted).
[139] Marbet v. City of Portland, No. CV-02-1448 HA, 2003 U.S. Dist. LEXIS 25685 at *2 (D. Ore. Sept. 8, 2003).
[140] *Id*. at *2-*3.
[141] *Id*.
[142] *See generally* Second Amended Complaint, Marbet v. City of Portland, No. CV-02 1448-HA (D. Ore. Sept. 8, 2003).

sprayed, even though they were screaming in pain and attempting to seek medical attention.[143] Police gave no warning before spraying the parents and their three children.[144]

3. Checkpoints and denial of access to public fora

During some events that have drawn strong opposition from protesters, police have 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.[145] One reporter observed, "Security fences cut up downtown like a jigsaw puzzle, with numerous checkpoints."[146]

Police in Los Angeles during the 2000 Democratic National Convention protests and at another demonstration later that year used a slightly different tactic, among others: blocking ingress to and egress from ongoing demonstrations in public places.[147] 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."[148] These actions, the

[143] *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, causing one extreme pain and chemical burns. *Id*. paras. 4.6-4.7. In another incident, the family with children ages 6, 3, and 11 months, 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, stating, "[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."

[144] Ryan Frank, Maxine Bernstein 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).

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

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

[147] National Lawyers Guild v. City of Los Angeles, No. CV-01 6877 FMV (C.D. Cal. Dec. 2, 2003)(order granting in part and denying in part defendants' motion for summary judgment) *available at* http://www.nlg-la.org/NLG_v._City.pdf (last visited Dec. 3, 2004). 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).

[148] National Lawyers Guild v. City of Los Angeles, No. CV-01 6877 FMV, at 10 (C.D. Cal. Dec. 2, 2003) (order 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 permitted political protests "without

court found, permit a reasonable inference that police unconstitutionally chilled the demonstrators' First Amendment right to free expression.[149]

4. Mass arrests, exaggerated charges

Also during events that attract large numbers of protesters, police have engaged in mass arrests or round-ups and have tended to file exaggerated charges – or even charges for crimes that do not exist – against those arrested. For example, in New York during the 2004 Republican National Convention, 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.[150]

In addition, while posting smaller numbers of arrestees, the Los Angeles police during the 2000 Democratic National Convention 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. An attorney representing a group of animal rights activists who

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cause," used excessive force against those engaged 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.

[149] *Id*. at 9. A New York court related the account of a family whose participation a 2003 anti-war demonstration was effectively thwarted (and thus their expression chilled) through the use by New York City police 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 v. City of New York, No. 03 Civ. 9162, 2004 U.S. Dist. LEXIS 13350, at *13 (S.D.N.Y. July 19, 2004).

[150] Virasami, *supra* note 108; Class Action Complaint, MacNamara v. New York, (S.D.N.Y. filed 2004) paras. 87A., 87B (on file with author). . (police used "orange nets[] to arrest groups of people lawfully standing on sidewalks in Times Square, including legal observers and members of the media"), paras. 87C., 87D. (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"), paras. 87E., 142 (one march had not even proceeded a full block when police officers surrounded more than 200 people, using the orange nets, and arrested them all, even though they had remained on the sidewalk without blocking it and had complied with police instructions), para. 161 (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), para. 185 (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* Shiller v. New York, (S.D.N.Y. filed 2004) para. 24 (on file with author). ("[a]t Convention-related demonstrations there were … 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.

Dinler v. New York (S.D.N.Y. filed 2004) para. 3 (on file with author).

were arrested *en masse* during the Los Angeles convention characterized the round-up as "an unlawful effort to suppress expressions of dissent."[151]

The forty-two animal rights activists were arrested after they marched into a 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.[152] The store owner became frantic and closed the metal security grate, prompting some to kick or bang on the grate.[153] Police rounded up these protesters, sixteen of whom were juveniles, forced them against a wall with their hands up and later to sit in the hot sun and in a police bus for hours, and charged them with conspiracy to commit vandalism.[154] A judge threw out the charges for all but two of them for lack of probable cause.[155] In another incident shortly before the 2000 convention began, 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.[156] Their alleged crime: jaywalking.[157]

While police lacked probable cause to arrest the animal rights demonstrators, they charged a group of bicyclists with reckless driving, a violation that under California law does not apply to bike riders.[158] Advocating the increased use of bicycles instead of cars, this group of 71 were bicycling through

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[151] "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 JOURNAL, Sept. 22, 2000 (on file with author).
[152] Ted Rohrlich & Henry Weinstein, *Convention-Related Arrests Cause Little Stir in Legal System*, L.A. TIMES, Aug. 19, 2000 at A22.
[153] *Id*. Anne La Jeunesse, *DNC Anti-Fur Activist Pleads No Contest*, L.A. DAILY JOURNAL, Nov. 16, 2000 (on file with author).
[154] Houston, *supra* note 151; Anne La Jeunesse, *Observers See Protest Photos Taken by Police*, L.A. DAILY JOURNAL, Aug. 18, 2000 (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 … conduct")(on file with author); Susan McRae, *Volunteer Cameraman Sees the Rougher Side*, L.A. DAILY Journal, Aug. 18, 2000 (on file with author). A student filming the animal rights protest and subsequent arrest was clubbed by an police officer in full riot gear and not informed of the charges against him. *Id*.; Rohrlich & Weinstein, *supra* note 152.
[155] La Jeunesse, *supra* note 154. 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*.; La Jeunesse, *supra* note 153.
[156] Ford, *supra* note 121.
[157] *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. …" *Id*.
[158] Flynn McRoberts, *Dear Mother Tribune, Send Bail Money*, CHICAGO TRIBUNE, 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*.

downtown Los Angeles as part of a sanctioned demonstration, when they suddenly were swarmed by motorcycle officers, who shouted, "Put your bikes down," and subjected to mass arrest.[159] All charges were later dropped.[160] Bicyclists in a similar event in New York in 2004 endured like treatment.[161]

5. Abuses in detention

The 23 women among the bicyclists in Los Angeles were strip searched twice – once after a judge already had ordered their release.[162] Los Angeles County sheriff's deputies walked the women, many in biking shorts and tank tops, right past holding cells filled with jeering male prisoners.[163] 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.[164] Los Angeles-area taxpayers shelled out $3.625 million to settle lawsuits that arose from this treatment.[165] In 2003, FTAA protesters also were strip searched.[166] 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.[167]

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[159] *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!'" 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).

[160] Fox, *supra* note 159.

[161] In New York during the 2004 Republican National Convention, once-cooperative police 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." Class Action Complaint, MacNamara v. New York (S.D.N.Y. filed 2004 para. 87A (on file with author).

[162] Fox, *supra* note 159. Also after the judge ordered their release, the 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 152. "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*.

[163] Rohrlich & Weinstein, *supra* note 152.

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

[165] The women received $70,000 apiece and the men $5,000 each in the $2.75 million settlement with Los Angeles County. Fox, *supra* note 159; Fernandez, *supra* note 164. 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.

[166] Haney v. Miami-Dade County, 2004 U.S. Dist. Lexis 19552, *4-*6 (S.D. Fla. Aug. 24, 2004).

[167] *Id*.

Aside from strip searches, denial of access to medicine and phone calls,[168] and being held beyond their release date, members of the public who have participated in political speech have been subjected to other abuses in detention, such as lack of access to restroom facilities and lengthy detention in cold, toxin-suffused quarters.[169] Protesters and others corralled in the 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.[170] 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."[171]

The New York arrestees 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 them to get skin rashes and blisters.[172] The facilities not only lacked adequate restroom facilities, but there was neither toilet paper nor a place to wash up.[173] During the arrest process, demonstrators and bystanders were handcuffed for hours, causing pain, numbness and swelling, and denied access to restroom facilities and medical attention.[174] Some plaintiffs contended that the city of

[168] *E.g. supra* note 162.
[169] *See supra*, part III. B. 4.; Gorov, *supra* note 101 (Seattle police arrested hundreds, holding them "face-down on the wet streets, their hands bound with plastic handcuffs); Class Action Complaint, MacNamara v. New York (S.D.N.Y. filed 2004) (on file with author). All arrestees were fingerprinted, even if accused of only minor offenses for which fingerprinting is not necessary. *Id*. para 64.
[170] Class Action Complaint, MacNamara v. New York (S.D.N.Y. filed 2004), paras. 66, 78, 90, 95, 110, 126, 176, 193 (on file with author).
[171] *Id*. para. 67.
[172] 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*. paras. 67, 77, 78, 93.
[173] *Id*. para. 93.
[174] *Id*. 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), paras. 95, 96, 97, 98 (plaintiff a P.hD. 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), paras. 102, 107, 108, 112, 113, 114, 118, 119, 123, 124, 133, 134, 137, 138, 143, 144, 146, 151, 152, 173, 174, 177, 178, 182, 186, 191, 195 (extremely tight handcuffing for many hours caused plaintiffs extreme pain, discomfort and numbness); Diane Cardwell, *Lawyers' Group Sues City Over Arrests of Protesters*, N.Y. TIMES, Oct. 8, 2004, at B3. ("marchers suddenly swept into orange nets, languishing for hours 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* Dinler v. New York (S.D.N.Y. filed 2004) (on file with author); Shiller v. New York (S.D.N.Y. filed 2004) (on file with author).

New York deliberately detained protesters and others for lengthy periods and could have processed them more quickly using existing booking facilities around the city.[175]

IV. Intent to Silence Implied: How Governmental Acts 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."[176] Consequently, the city deterred the expression of core political speech.[177]

It is true that city officials need at least to be prepared to maintain order in case crowds – or even a small 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.[178] In New York in 2004, city leaders were attempting to ensure that the streets remain safe for city residents and visiting politicians alike, a concern overlain by the specter of a reprisal of the terrorist attack on the city on Sept. 11, 2001.[179] 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.[180] "First Amendment jurisprudence teaches that banning speech is an unacceptable means of planning for potential misconduct."[181]

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[175] They further pointed out that in 1982 the city processed 1,600 demonstrators and released them the same day, often within several hours. Class Action Complaint, MacNamara v. New York (S.D.N.Y. filed 2004) paras. 63, 65 (on file with author).
[176] *Id*. para 61.
[177] *Id.*
[178] Kaiser & Burgess, *supra* note 101.
[179] Nat'l Council of Arab Ams. v. City of New York, 331 F. Supp. 2d 258, 265 (S.D.N.Y. 2004).
[180] "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 v. United States, 914 F.2d 1224, 1228 (1990) (citations omitted).
[181] Service 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 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

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 likely 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.[182] While this requirement "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."[183] A court thus will examine "whether an official's acts would chill or silence a person of ordinary firmness from future First Amendment Activities."[184]

The intent component of this principle was at issue in *Mendocino Environmental Center v. Mendocino County*.[185] There, a bomb went off under the car of an environmental activist while she was driving it, severely injuring her.[186] Police and Federal Bureau of Investigations (FBI) agents ascribed responsibility for the explosion to the activist and her passenger and released incriminating information

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actually engage in such conduct, rather than to suppress legitimate First Amendment conduct as a prophylactic measure." *Collins*, 110 F.3d at 1372 (citation omitted).

[182] Mendocino Environmental Center v. Mendocino County, 192 F.3d 1283, 1300 (9th Cir. 1999) (internal quotation marks omitted).

[183] *Id*. (internal quotation marks omitted). The court looks to intent because "Because it would be unjust to allow a defendant to escape liability for a First Amendment violation merely because an unusually determined plaintiff persists in his protected activity." *Id*.

[184] *Id*. (citing Crawford-El v. Britton, 93 F.3d 813 (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, 258 (5th Cir. 2002). It is settled law among federal appellate circuits 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.

[185] 192 F.3d 1283 (9th Cir. 1999).

[186] *Id*. at 1287.

about them that later proved false; charges against the activists were never filed.[187] They 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.[188] 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"[189] and spreading misinformation, evincing a desire to cast their group in a negative light and thus harm its activities.[190]

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 their position to refrain from further condemnation of the coach's practices to protect their son from further harm.[191] 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.[192] 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.[193]

Many of the cases applying the "ordinary firmness" standard involve retaliation,[194] but it has been followed recently in a protester case. 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 using sidewalks, and using low-flying helicopters that interfered with speakers' ability to

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[187] *Id*. at 1287-88.
[188] *Id*. at 1288.
[189] *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.
[190] *Id*.
[191] Cain v. Tigard-Tualatin School District 23J, 262 F. Supp. 2d 1120, 1130 (D. Ore. 2003).
[192] *Id*. at 1123, 1124-25, 1130.
[193] The coach turned the teammates against the plaintiffs' son by telling them (falsely) 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 him and isolated him, and the coached harassed him during school hours in front of his friends. *Id*. at 1124.
[194] *E.g*. Crawford-El v. Britton, 93 F.3d 813 (D.C. Cir. 1996); *see* Mendocino Environmental Center, 192 F.3d at 1300 (collecting decisions).

communicate "permits a reasonable inference that [the LAPD's] acts would deter a person of ordinary firmness from participating in future First Amendment activities."[195]

If government intent to chill speech can be found when law enforcement officials call environmental activists "terrorists" and otherwise spread misinformation about their group,[196] then intent to chill equally likely could be found when mayors and police officials liken protesters to terrorists and say they take to the streets to get arrested.[197] If a person of ordinary firmness would be chilled from engaging in free speech because a coach is harassing her son;[198] 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;[199] or a policeman's paramour's expression by way of operating topless bars is silenced by a mayor's campaign against such bars and their owners,[200] then surely assaulting demonstrators in the face with pepper spray, shooting them with rubber bullets, rounding them up in plastic orange nets and detaining them in substandard conditions[201] would deter a person of ordinary firmness from returning to the streets to engage in protected expression. As mentioned, a court has found it plausible that some LAPD actions did just that during the 2000 Democratic National Convention. Therefore, even taking into account the need to maintain street order and security, the vast array of recent government actions taken against protesters 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, and thus these actions arguably violate the First Amendment.

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

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[195] National Lawyers Guild v. City of Los Angeles, No. CV-01 6877 FMV (C.D. Cal. Dec. 2, 2003)(order granting in part and denying in part defendants' motion for summary judgment) *available at* http://www.nlg-la.org/NLG_v._City.pdf (last visited Dec. 3, 2004).
[196] Mendocino Environmental Center v. Mendocino County, 192 F.3d 1283, 1287-88 (9th Cir. 1999).
[197] See *supra*, part III. A.
[198] Cain v. Tigard-Tualatin School District 23J, 262 F. Supp. 2d 1120, 1130 (D. Ore. 2003).
[199] Tatro v. Kervin, 41 F.3d 9, 18 (1st Cir. 1994).
[200] 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" – but it 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. …" *See Id*. at 82.
[201] See *supra* part III. B.

Harsh street tactics are not the only governmental acts that have taken a toll on First Amendment expression. Government has further muted voices of dissent in public places by fencingn off 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 outright yanking the forum for expression out from under the public's feet through privatization.

A. Protest pens: the ghettoization of demonstration[202]

Protest pens, otherwise known as protest zones or demonstration zones, essentially are a legacy of the WTO protests in Seattle,[203] and courts have split on the constitutionality of their use. The extent to which they keep protesters at a distance that hinders their ability to communicate their message, they have been struck down. For example, in *Bay Area Peace Navy v. United States*,[204] the plaintiffs were a group of boaters who 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.[205] The government had claimed that a 75- to 100-yard buffer around the pier imposed by the Coast Guard was needed to protect against terrorist acts.[206] But the court found that the buffer zone was not narrowly tailored because it burdened "substantially more speech than is necessary to further the government's legitimate interests."[207] 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), and it upheld a lower court injunction limiting the buffer zone to no more than 25 yards.[208]

1. Protest zones found unconstitutional

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[202] Mitchell, *supra* note 11 at *38.
[203] Bl(a)ck Tea Society v. Boston, 327 F. Supp. 2d 61, 74 (D. Mass. 2004).
[204] 914 F.2d 1224 (1990).
[205] The demonstrators parade in formation in pleasure craft ranging from kayaks to 30-foot boats while the Naval display takes place farther out in the San Francisco Bay. *Id*. at 1225-26.
[206] *Id*. at 1227.
[207] *Id*. at 1227 (quoting Ward v. Rock Against Racism, 491 U.S. 781, 799 (1989)). The Peace Navy's message could not effectively be conveyed effectively 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.
[208] *Id*. at 1226, 1227-28, 1231.

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.[209] The court in *Service Employee Int'l Union v. City of Los Angeles* granted the injunction that protest groups sought against the security zone because its vastness made it not narrowly tailored to serve the government's significant interest in delegate safety and its distant protest pen did not provide an adequate alternate means of communication.[210] "[A]lthough it may be more convenient for delegates to have exclusive access to the immediate area, *convenience can never predominate over the First Amendment*."[211]

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 blocked expressive activities 24 hours a day.[212] Acknowledging that 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.[213] The court in *Stauber v. City of New York*[214] appears to share this view.[215]

The *Stauber* court also agrees 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

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[209] Service Employee Int'l Union v. City of Los Angeles, 114 F. Supp. 2d 966, 968, 971 (C.D. Cal. 2000).
[210] *Id.* at 971-72.
[211] *Id.* at 971 (emphasis added).
[212] *Id.*
[213] *Id.* at 970 n.1.
[214] No. 03 Civ. 9162, 2004 U.S. Dist. LEXIS 13350, (S.D.N.Y. July 19, 2004)
[215] "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.

demonstrators.[216] The New York Police Department (NYPD) has created large pens using interlocking metal barricades that run the length of the block and have an exit at one end.[217] When a pen fills up with protesters, police physically close off the entrance and require participants to enter a pen farther from the center of the demonstration.[218] The result is that protesters cannot leave the pens even to use the restroom or 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.[219] Thus, some groups have tried to keep their events small and omit the use of a sound system as a means to avoid NYPD involvement.[220] The *Stauber* court enjoined the NYPD's use of the pens, because they unreasonably restrict access to and participation in protests.[221]

2. Hollow Victory: Dissenters reduced to negotiating for the public forum

Both the *Stauber* and the *Service Employees Int'l Union* courts reached the correct result by finding that the cities' practices unconstitutionally restricted free expression. However, the latter case, decided in 2000 just months after the WTO protests in Seattle, turned out to be a hollow victory for free-speech advocates, argues Prof. Mitchell. 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 deign to let them engage in protected speech.[222]

For example, one protest group seeking to demonstrate on the Great Lawn in New York's Central Park declined to engage in this sort of negotiating over geography, and the court refused to grant an

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[216] *Stauber*, 2004 U.S. Dist. LEXIS 13350, at *80. Because the court found the city's restriction to be not narrowly tailored, it declined to reach whether the city provided adequate alternative means of expression. *Id*.
[217] *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.
[218] *Id*. at *25-*27.
[219] Furthermore, "once the pens are full and declared closed, people experience considerable problems getting out of the pens." *Stauber*, 2004 U.S. Dist. LEXIS 13350, at *26-*27 (S.D.N.Y. July 19, 2004).
[220] *Id*. at *28.
[221] *Id*. at *95.
[222] "[A]dvocates of speech rights [must argue] the fine points of geography, pouring 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.

injunction overturning the city's denial of a permit to use the Great Lawn for a protest against the 2004 Republican National Convention.[223] The court appeared almost huffy at the groups' refusal to negotiate, stating, "Simply because Plaintiffs feel that no other location in New York City is worthy of their cause … does not make it so."[224] In another case, an organization of dissenters in Philadelphia found themselves in a position of 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.[225] And another group that did attempt to negotiate a protest route for the 2004 Democratic National Convention in Boston got stuck with a siting 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."[226]

3. Protest zones upheld

Seemingly steeped in a deep fear that the public might disrupt the Democrats' convention, the city of Boston 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, the subway, the principal railway station serving routes to other parts of New England, the Charles River and even an Interstate highway (from several hours before to some hours after the convention's daily activities).[227] On what limited number of public streets surrounding the convention site that were not cut off from public access the city placed a severe limit the number of people allowed to demonstrate.[228] Because only a twenty-foot strip of a main street leading to the convention site was made available to the public and cut off from an area open to delegates and officials by an eight-foot-high fence covered with a

[223] Nat'l Council of Arab Ams. v. City of New York, 331 F. Supp. 2d 258, 260 (S.D.N.Y. 2004).
[224] *Id*. at 271.
[225] Amended Complaint, ACORN v. City of Philadelphia, No. 03-4312, 2004 U.S. District LEXIS 8446 (E.D. Pa. May 6, 2004).
[226] Bl(a)ck Tea Society v. Boston, 327 F. Supp. 2d 61, 67 (D. Mass. 2004).
[227] *Id*. 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 views will be willing or even able to transport themselves to the convention venue to protest.
[228] "Anywhere in the soft zone, leafleting and small stationary demonstrations of twenty persons or less may be conducted without a permit. Demonstrations of between twenty-one and fifty people require a permit." *Id*. Police would not let any more than 12,000 in all the side streets combined. *Id*. at 66.

material designed to prevent visibility, even those small groups in streets open to the public that were allowed to demonstrate were not seen by the delegates and officials on the other side.[229]

If that was not enough to deter those intent on expressing dissent, the worst of horrors was reserved for participants with the fortitude to enter the demonstration zone. "The [zone] conveys the symbolic sense of a holding pen where potentially dangerous person are separated from others … a place … not just on the wrong side of the tracks but literally under them."[230] Its capacity was a paltry 1,000 people.[231] The roof of the zone was at best as high as an adult stands and was supported by a "forest of girders," and the tracks above were bedecked with razor wire and patrolled by armed police and National Guard officers.[232] The portion of the zone that was not under the tracks was covered overhead by mesh netting.[233] More significant than demonstration zone's profoundly oppressive nature, however, was there was little chance that 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.[234] The outer fence covered with a mesh the stated purpose of which was to prevent liquids from being squirted into the protected area but which had the effect of impairing visibility and altogether preventing leafleting.[235] 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 "[f]eedom 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."[236]

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[229] *Id*. at 65-66.
[230] *Id*. at 74.
[231] The city had calculated that 4,000 would fit, but under questioning by the court conceded that it "must limit the capacity … to no more than 1,000 persons." Bl(a)ck Tea Society v. Boston, 327 F. Supp. 2d 61, 67 (D. Mass. 2004).
[232] *Id*.
[233] *Id*.
[234] *Id*.
[235] "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 from … 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 67-68.
[236] Martin v. Struthers, 319 U.S. 141, 147 (1943).

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.[237]

Nonetheless, the *Bl(a)ck Tea Society* court upheld Boston's security scheme[238] even though it admitted that it could not find that the restrictions on prospective protesters were narrowly tailored[239] – and despite its acknowledging that the *Stauber* court "considered detailed evidence" before enjoining the use of protest pens in New York,[240] *and* despite that it called the design of the Boston demonstration zone "an offense to the spirit of the First Amendment" and "a brutish and potentially unsafe place for citizens who wish to express their First Amendment rights,"[241] 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."[242] The court also based its decision on "past experience at comparable events" such as the 2000 Democratic National Convention in Los Angeles.[243] 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 Angeles in 2000 reveal that there were no major injuries and minimal property damage.[244]

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[237] *See id*. *Struthers* concerns an ordinance prohibiting door-to-door distribution of leaflets. If the state is constitutionally disallowed from prohibiting distribution of circulars door-to-door, *id*. at 149, then arguably it cannot with constitutional blessing completely prevent dissidents from passing handbills to important government officials and those to whom they are close.

[238] *Id*. at 77. A more recent case distinguished *Bl(a)ck Tea Society*, finding that a regulation that kept demonstrators between 260 and 265 feet away from the targets of their speech was unconstitutional. Kuba v. 1-A Agric. Ass'n, 387 F.3d 850, 854, 863 (9th Cir. 2004). The *Kuba* court found that the government's interest in preventing traffic congestion and ensuring public safety significant but "less weighty" than the "substantial" interest found in *Bl(a)ck Tea Society*. *Id*. at 858 n.9 (citing *Bl(a)ck Tea Soc'y v. City of Boston*, 378 F.3d 8, 12 (1st Cir. 2004)).

[239] Bl(a)ck Tea Society v. Boston, 327 F. Supp. 2d 61, 75, (D. Mass. 2004).

[240] *Id*. at 74.

[241] *Id*. at 76.

[242] Bl(a)ck Tea Society v. Boston, 327 F. Supp. 2d 61, 74, (D. Mass. 2004).(quoting Oliveri v. Ward, 801 F.2d 602, 607 (2d. Cir. 1986)) (internal quotation marks omitted).

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

[244] 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*, WASHINGTON 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*, DALLAS MORNING NEWS, Aug. 18, 2000, at 23A ("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.

The U.S. Court of Appeals for the First Circuit, however, disagrees with this viewpoint, because it upheld the *Bl(a)ck Tea Society* court,[245] and should be criticized for doing so. First, while it correctly characterized time, place or manner analysis as "intermediate scrutiny,"[246] the court applied what sounds much more like a rational basis test.[247] Secondly, the appellate panel raises the same concerns as the lower court did regarding harm done during past large gatherings such as those in 2000 in Los Angeles – which, as mentioned, amounted to practically nothing besides the injuries sustained by protesters and journalists[248] – yet it fails to list specific allegedly violent incidents to justify its concerns.[249] Therefore, unlike the courts in *Stauber* and *Service Employees Int'l Union*,[250] the *Bl(a)ck Tea Party* appellate court found that Boston's security measures, "though extreme," were narrowly tailored and left open viable alternative means of communication.[251] This conclusion is open to question.[252]

B. Viewpoint discrimination in "pro-con" cases

Dion Haynes and Vincent J. Schodolski, *Immigrants, the Rights of Workers Top Final Rally*, CHICAGO TRIBUNE, Aug. 18, 2000, at 15 (no reports of serious injury).

[245] Bl(a)ck Tea Society v. City of Boston, 378 F.3d 8 (1st Cir. 2004).

[246] *Id*. at 12.

[247] *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 ends deserves considerable respect.").

[248] *See supra* note 244.

[249] See, e.g., Bl(a)ck Tea Society v. City of Boston, 378 F.3d 8, 14 (1st Cir. 2004) ("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' evidence was sufficient to allow the trier to weigh it in the balance"); *Id*. at 13 ("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"). It should be noted that there was no report of attempts to break through the security fence in Los Angeles in 2000. On the other hand, author of this comment, then a reporter covering the demonstrations concerning 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-size welts on his shirtless torso.

[250] *See supra* part V. A. 1.

[251] *Bl(a)ck Tea Society*, 378 F.3d at 14.

[252] The alternate means 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.

Besides employing the constitutionally dubious tactic of corralling protesters into fenced-off *cordon-sanitaires*,[253] government also has engaged in what can only be seen as obvious viewpoint discrimination[254] by creating special protest pens into which dissidents are shunted that are distant and often hidden from the protesters' target of speech while allowing demonstrators who favor government policy within view of elected officials. A variant from this "pro-con" approach is to simply banish all demonstrators of whatever stripe from the public official's view while allowing those expressing no opinions to be located closer to the official.[255] While this trend has accelerated where opponents of President George W. Bush's policies have attempted to make their views known to the president, it has roots in the early Clinton administration.

In *Johnson v. Bax*,[256] a critic of Clinton in 1993 stood at a New York street corner near where the president was speaking, bearing a sign that read "Mr. Clinton: STOP CAMPAIGNING AND LEAD!"[257] Police told him he had to go to a designated protest zone, and when he resisted the police took away his sign, committing a "clear violation" of his free-speech rights.[258] The critic made another sign, returned to the street corner, was again told to leave and didn't, and was arrested.[259] Police had set up "pro" and "anti" demonstration areas, with which the court had no quarrel, but because police, rather than the

[253] Mitchell, *supra* note 11, at *39.
[254] Justice Kennedy reminds that viewpoint discrimination is "an egregious form of content discrimination." Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 829 (1995). *See also* Lamb's Chapel v. Center 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 (1984)).
[255] This happened, for example, in Seattle following the 1999 WTO protests that were marred by a small minority's vandalism spree. *See supra* note 101. Seattle's mayor called in the National Guard to clear the streets, declared a state of emergency and closed public spaces in 50-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.
[256] No. 93 Civ. 3530, 1996 U.S. Dist. LEXIS 8850, at *2 (S.D.N.Y. June 25, 1996) (order granting preliminary injunction).
[257] *Id*. at *2.
[258] *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 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.
[259] 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." *See Id*. at *3, *4-*5.

demonstrators themselves, were the ones directing demonstrators into the pens based on the content of their speech, the court found the practice impermissible.[260]

The *Bax* court noted that while "spectators" who cheered in support were allowed to stand across the street from where the president, dissenters were kept at least 75 yards away at all times.[261] This practice, the court indicated, appeared to be an unconstitutional discrimination, but the court was not prepared to rule on this issue.[262] While the police in *Bax* kept dissidents 75 yards from President Clinton – which would appear to be unconstitutional under *Bay Area Peace Navy*[263] – the George W. Bush Administration has ordered dissenters much farther away – as much as a half mile away from where the president is speaking – while letting supporters or those expressing no opinion remain closer.[264] Faithful to Orwellian tradition, these remote protest pens have been dubbed "designated free speech zone[s]."[265]

1. Dissenters Hidden from Presidential Motorcade

When Bush went to Pittsburg in 2002, for example, police cleared the motorcade path of all critical signs, while allowing supporters to line the route, and required dissidents to go to a distant baseball field that had been designated for them.[266] Police confiscated the sign of one participant, who was arrested for disorderly conduct and detained until the president had left town.[267] A court threw out the disorderly-conduct charge.[268] 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.[269] Regarding the zone, the arrestee later told Salon, "I could see these people behind the fence, with their faces up against

[260] *Id*. at *8.
[261] Johnson v. Bax, No. 93 Civ. 3530, 1996 U.S. Dist. LEXIS 8850, at *9-*10 (S.D.N.Y. June 25, 1996) (order granting preliminary injunction).
[262] *Id*. at *10.
[263] *See supra* notes 204-08 and accompanying text.
[264] "These zones routinely succeed in keeping protesters out of presidential sight and outside the view of them edia covering the event." Bovard, *supra* note 114.
[265] *Id*.
[266] *Id*.
[267] *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 Dec. 5, 2004).
[268] 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 Dec. 5, 2004).
[269] *Id*.

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.'"[270]

The Pittsburgh case is not isolated. One protest group provided a court fifteen examples from all over the country.[271] For example, two grandmothers were arrested for displaying handwritten signs critical of Bush, declining to go to a designated zone hundreds of yards from the entrance to the venue the president visited.[272] In South Carolina, police arrested a man on "trespassing" charges for holding a "No War For Oil" sign among hundreds of Bush supporters.[273] He had refused to remove himself to the designated zone a half mile from where Bush was to speak.[274] The state dropped the trespassing charges because they do not apply to public property, but the federal government, undaunted, 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.[275] This 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."[276] Not only has the government engaged in blatant viewpoint discrimination by relegating dissenters to distant designated zones while allowing supporters and others to be within view of the president, police in once instance even forbade the media from entering a protest area to speak to dissidents and banned the latter from exiting the zone to express themselves to the media.[277]

2. Court declines to enjoin practices

In Philadelphia, a dissident organization sought to enjoin the government from keeping its members farther away from where the President was to appear than supporters were allowed to be.[278] In once instance a police line blocked the dissenting protesters a third of a block from where a presidential

[270] David Lindoff, *Keeping Dissent Invisible*, SALON, *at* http://archive.salon.com/news/feature/2003/10/16/secret_service/index_np.html (last visited Dec. 5, 2004).
[271] ACORN v. City of Philadelphia, No. 03-4312, 2004 U.S. District LEXIS 8446, at *5 (E.D. Pa. May 6, 2004).
[272] Bovard, *supra* note 114.
[273] *Id*.
[274] *Id*.
[275] *Id*.
[276] *Id*. (internal quotation marks omitted).
[277] Bovard, *supra* note 114.
[278] ACORN v. City of Philadelphia, No. 03-4312, 2004 U.S. District LEXIS 8446, at *2-*3 (E.D. Pa. May 6, 2004).

motorcade was to pass while allowing supporters to stand closer.[279] In another, police parked several large vans directly in front of dissenting protesters, ensuring that the president was unlikely to see them.[280] 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.[281] The plaintiffs in *ACORN* sought declaratory as well as injunctive relief and an order requiring government officials to comply with the 1988 consent decree.[282] However, the court rejected the plaintiffs' claim for lack of standing,[283] despite conceding that the government "may indeed have violated" the protesters' rights, because the latter failed to show a concrete likelihood that the government would violate their constitutional rights, and because they were unable to specify future dates and times of official events at which violations were likely to occur. [284]

While the *ACORN* court denied a dissident group standing for purposes of an injunction, the court in *Stauber v. City of New York*[285] found that the New York Civil Liberties Union (NYCLU) had standing by showing it had sponsored protest events in the past and planned to do so in the future.[286] 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."[287] Clearly, the standard followed in *Stauber* – the requirement that plaintiff show that it is 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*, and thus *Stauber* enunciates the more correct and just standard. The *ACORN* court effectively concedes that its standard is unlikely to be met

[279] Amended Complaint, ACORN v. City of Philadelphia, No. 03-4312, 2004 U.S. District LEXIS 8446 (E.D. Pa. May 6, 2004).
[280] *Id*.
[281] ACORN v. City of Philadelphia, No. 03-4312, 2004 U.S. District LEXIS 8446, at *1-*2 (E.D. Pa. May 6, 2004).
[282] *Id*. at *3-*4
[283] *Id*. at *7.
[284] "In my view, plaintiffs' claims are too amorphous to be justiciable at this point in time" *Id*. at *5, *6-*7.
[285] *See* Stauber v. City of New York, No. 03 Civ. 9162, 2004 U.S. Dist. LEXIS 13350 (S.D.N.Y. July 19, 2004).
[286] *Id*. at *40.
[287] *Id*.

when it notes that the plaintiffs "usually cannot learn of the scheduling of such events in sufficient time to enable them to obtain judicial relief."[288]

Moreover, the *ACORN* court appears to rely to an improper extent on the fact that Secret Service regulations forbid its agents from regulating speech based on viewpoint.[289] The court then essentially instructs the plaintiffs to sue individual Secret Service agents over First Amendment violations,[290] 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. But this finding is questionable, since in general "the internal guidelines of a federal agency, that are not mandated by statute or the constitution, do not confer substantive rights on any party."[291] Because the internal regulations of the Secret Service unlikely conferred rights on the plaintiffs, a useful purpose indeed would be served by issuing the declaratory judgment that the *ACORN* plaintiffs sought.

Courts in the future should not follow *ACORN* but 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 the ample evidence that the Secret Service is engaging in a practice of banishing dissenters to remote fields or pens while allowing supporters much closer to the President. Furthermore, this is an issue that 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 still, Congress could accomplish the goal of requiring equal treatment of all who engage in political speech by passing a statute that punishes with incarceration or stiff fines government officials who discriminate by viewpoint.

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, would not be thought to raise many questions, the advent of public-private partnerships as a substitute for public investment in a time of chronic government budget shortages has begun to blur the

[288] ACORN v. City of Philadelphia, No. 03-4312, 2004 U.S. District LEXIS 8446, at *5 (E.D. Pa. May 6, 2004).
[289] "[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*. at *6.
[290] Agents who violate Secret Service policy cannot successfully assert a qualified-immunity defense. *Id.* at *6.
[291] United States v. Craveiro, 907 F.2d 260, 264 (1st Cir. 1990).

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 it is 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.[292] 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."[293] Congress "may not by its own *ipse dixit* destroy the 'public forum' status of streets and parks which have historically been public forums."[294]

On the other hand, the Supreme Court treats private spaces differently. Despite the increased function of shopping malls during the late 20th century as a central gathering place for Americans, for example, the Court has ruled these private properties outside the scope of First Amendment protection. The court in *Lloyd Corp. v. Tanner*,[295] for example, reversed an Oregon district court's injunction prohibiting a shopping mall owner from interference with peaceful, noncommercial handbilling by draft and antiwar demonstrators, holding that a property such as a mall does not "lose its private character

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[292] "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, 179-80 (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 40 U.S.C. § 13k, 63 Stat. 617).

[293] *Id*. at 180.

[294] *Grace*, 461 U.S. at 180. (quoting United States Postal Service v. Greenburgh Civic Assns., 453 U.S. 114, 133 (1981)) (internal quotation marks omitted).

> 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 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 at all have ruled on the 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 (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*. at 188 (internal quotation marks omitted).

[295] 407 U.S. 551 (1972).

merely because the public is generally invited to use it for designated purposes."[296] In doing so it distinguished *Marsh v. Alabama*.[297] Writing in 1972 for the four 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.[298]

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.[299] Nonetheless, some jurists have urged that because shopping malls do function as public gathering places, mall owners have a reduced expectation of privacy and must allow political expression.[300] Answering the Supreme Court's invitation to employ alternate analyses or read their own constitutions more broadly than the Supreme Court interprets the federal Constitution,[301] 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.[302] The California Supreme Court, for example, held in *Robbins v. Pruneyard Shopping Ctr*.[303] that that state's Constitution "protects speech and petitioning, reasonably exercised," in privately

[296] *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.*
[297] 326 U.S. 501, 507 08 (1946) (upholding the right to distribute leaflets in company-owned towns).
[298] *Lloyd*, 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).
[299] Hudgens v. NLRB, 424 U.S. 507, 520-21 (1976).
[300] *E.g*. Eastwood Mall v. Slanco, 626 N. E. 2d. 59, 67 (Ohio 1994) (Wright, J., dissenting) Justice Wright advocated 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. *Id*. The justice 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*.
[301] City of Mesquite v. Aladdin's Castle, 455 U.S. 283, 294 (1982).
[302] O'Neill, *supra* note 83, at 455; Horton Plaza Associates v. Playing for Real Theatre, 228 Cal. Rptr. 817, 823 (Cal. App. 1986) (collecting decisions). Ten other states have not. O'Neill, *supra* note 83 at 455-56.
[303] 592 P.2d 341 (Cal. 1979).

owned shopping centers.[304] 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.[305]

1. Hoarding Horton Plaza

One such battle took place over Horton Plaza Park in San Diego, California.[306] In an attempt to revitalize commercial activity in the downtown area, San Diego leaders permitted the development of a shopping mall adjacent to the park, which was to serve as the mall's pedestrian entrance.[307] To increase the odds of the malls financial success, the city altered the park's landscaping and furniture – by removing benches and replacing lawn areas with prickly plants – with the purpose of making the park a less attractive to gather as a means of encouraging people to pass through Horton Plaza Park and into the eponymous shopping mall.[308] 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."[309]

In a nod to *Pruneyard*, the shopping mall owners set up a (highly restrictive) permitting scheme governing how political expression was to occur.[310] The Playing for Real Theatre applied to perform a ten-minute skit in the mall reenacting U.S. bombings in El Salvador that was to involve eight actors and

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[304] *Id*. at 347. This is based on CAL. CONST art. I, § 2 (affirmatively 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 (granting right to "petition government for redress of grievances"). *See id*. at 345, 346.
[305] O'Neill, *supra* note 83, at 456.
[306] *See generally* Mitchell, *supra* note 11, at *17-*26; Horton Plaza Associates v. Playing for Real Theatre, 228 Cal. Rptr. 817 (Cal. App. 1986).
[307] Mitchell, *supra* note 11, at *22.
[308] The redesign "simply made it impossible to hang out at the park." *Id*.
[309] *Id*. at *21-*22, *26.
[310] Horton Plaza Assoc. v. Playing for Real Theatre, 228 Cal. Rptr. 817, 820-21 (Cal. Ct. App. 1986). 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*.

Id. at 821 (emphasis added).

include leafleting as part of the skit.[311] The mall manager denied the request for the play but approved the leafleting.[312] 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, winning a preliminary injunction against any dramatic performances by the group and requiring 72 hours' advance notice for any leafleting.[313] The court in *Horton Plaza* distinguished *Pruneyard* and like cases, limiting their holdings to protect only leafleting and signature-gathering, and not "expressive conduct" such as putting on plays.[314] 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.[315] *Horton Plaza* serves as a warning that creeping privatization of public spaces heralds a concomitant muting of dissenting voices.[316]

2. New York: the great grass debate

As the 20th century progressed, courts came to the conclusion that property rights, though vital, are not as important as personal rights when considering whether to rule in equity. Relatively early in the century a Texas court announced, "[P]ersonal rights of citizens are infinitely more sacred and by every test are of more value than things measured in dollars and cents."[317] The California Supreme Court toward the middle of the 20th century commented that treating property rights more favorably than personal

[311] *Id*. at 828 (Butler, J., dissenting).
[312] *Id*.
[313] *Id*. at 820, 821, 822, 828.
[314] *Id*. at 824.
[315] "Chicken little and Henny Penny are alive and well," dissenting Justice Butler added. Horton Plaza Assoc. v. Playin for Real Theatre, 228 Cal. Rptr. 817, 828, 832 (Cal. Ct. App. 1986) (Butler, J., dissenting). 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.
[316] *See* Mitchell, *supra* note 11, at *26.
[317] Hawkes v. Yancey, 265 S.W. 233, 237 (Tex. Civ. App. 1924); *see also* Whitney v. California, 274 U.S. 357, 374 (1927) (Brandeis, J., concurring) ("The powers of the courts to strike down an offending law are no less when the interests involved are not property rights, but the fundamental personal rights of free speech and assembly").

rights bespeaks a doctrine "wholly at odds with the fundamental principles of democracy"[318] – especially in cases involving First Amendment rights.[319] This doctrinal development represented a move away from the common law requirement that plaintiff assert a property interest before court would grant an injunction.[320] Yet in this nascent century where the rights of dissidents are concerned, what is old apparently is new again.

For example, the court in *Nat'l Council of Arab Ams. v. City of New York*, which denied protest groups the use of the Great Lawn in New York's Central Park, made extensive reference to the threat to the condition of the Great Lawn posed by a mass rally and appeared far more concerned about the condition of the grass than about the groups' free-speech rights.[321] The court expressly points out that the Great Lawn was restored in 1997 at a cost of more than $18 million.[322] Whether the city got its money's worth is questionable, because only after the restoration did the city impose restrictions on the size of crowds allowed in the park and the requirement that events be canceled if they take place during or shortly following rainy weather.[323] What the court did not mention was some of the $18 million restoration cost came largely from private, corporate donors (who are allowed to use the Great Lawn for

[318] Orloff v. Los Angeles Turf Club, Inc., 30 Cal. 2d 110, 117 (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.*

[319] "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 v. Alabama, 326 U.S. 501, 509 (1946) (citation, internal quotation marks omitted). *See also* Robbins v. Pruneyard Shopping Ctr., 592 P.2d 341, 347 (Cal. 1979) ("the public interest in peaceful speech outweighs the desire of property owners for control over their property").

[320] *See Hawkes*, 265 S.W. at 237. ("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").

[321] Nat'l Council of Arab Ams. v. City of New York, 331 F. Supp. 2d 258, 261, 262, 263-264,270 (S.D.N.Y. 2004).

[322] *Id*. at 263.

[323] *Id*. at 261, 263-64. The court, shown "dramatic photos" by city officials of a pre-restoration Great Lawn in a careworn 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 the Central Park 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.

their large events, unless the grass is wet).[324] In communicating with the plaintiffs, the city emphasized that underlying its use-restriction plan was that "restoration accomplished through significant public and private investment can be preserved."[325] Thus, while *Nat'l Council of Arab Ams*. 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, their private functions will receive precedence over free-speech activities.[326] Most disconcerting, however, is that the court seemed to bolster its decision not to grant an injunction on behalf of the plaintiffs that the city permit them to use the Great Lawn because to open the park to the dissident groups might encourage more people to attend their event.[327] 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 as 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

[324] Nat'l Council of Arab Ams. v. City of New York, 331 F. Supp. 2d 258, 263 (S.D.N.Y. 2004); Complaint, Nat'l Council of Arab Ams. v. City of New York, 04 Civ. 6602, 331 F. Supp. 2d 258 (S.D.N.Y. 2004), paras. 8, 16, 47, 59.

[325] Complaint, Nat'l Council of Arab Ams. v. City of New York, 04 Civ. 6602, 331 F. Supp. 2d 258 (S.D.N.Y. 2004), para. 47 (internal quotation marks omitted).

[326] City officials contended that the predicted 250,000 participants in the rally the plaintiffs sought to permit would "decimate" the Great lawn and require a lengthy closure. Nat'l Council of Arab Ams. v. City of New York, 331 F. Supp. 2d 258, 264 (S.D.N.Y. 2004). On the other hand, the city boasted in a press release cited in the opinion that the restored lawn "consisted 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 public forum for all and is not privatized or subject to the discriminatory urges of [the conservatory's] corporate sponsors." Complaint, Nat'l Council of Arab Ams. v. City of New York, 04 Civ. 6602, 331 F. Supp. 2d 258 (S.D.N.Y. 2004), para. 59.

[327] The court quoted this statement from plaintiffs at trial: "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. v. City of New York, 331 F. Supp. 2d 258, 272 (S.D.N.Y. 2004).

the area using a private-public financing scheme.[328] The result, a five-block pedestrian zone closed to traffic, was dubbed the "Fremont Street Experience." However, wishing to minimize interference with commercial activity such as shopping in the new pedestrian zone, the city outlawed various free-speech activities, including leafleting, solicitation and using a table set up in a public space for the purpose of distributing literature or collecting signatures (a practice called "tabling").[329] After police dispersed a small rally called to protest the restrictions, the American Civil Liberties Union of Nevada sued.[330]

Of interest is that the district court declared the pedestrian mall a nonpublic forum, upholding the solicitation and tabling bans while denying summary judgment to the city on the leafleting prohibition because it probably violated the First Amendment even under the more relaxed standard of scrutiny for nonpublic fora.[331] 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 that had been 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.[332]

The Court of Appeals for the Ninth Circuit rejected this reasoning, holding that the Fremont Street Experience was a public forum as are 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.[333] Although U.S. appellate courts apply "a jumble of overlapping factors" when determining public forum status, they typically consider compatibility of the uses of the forum with expressive activity.[334] Public thoroughfares, such as the Fremont Street pedestrian mall in Las Vegas, are "inherently compatible" with free speech.[335] Courts also seek to protect the reasonable expectation that speech will be

[328] American Civil Liberties Union of Nevada v. City of Las Vegas, 333 F.3d 1092, 1094-95 (9th Cir. 2003), *cert. denied*, 124 S. Ct. 1077 (2004).
[329] *Id*. at 1095, 1096.
[330] *Id*.
[331] *Id*. at 1096.
[332] *Id*.
[333] In such determinations, courts consider historical use. American Civil Liberties Union of Nevada v. City of Las Vegas, 333 F.3d 1092, 1103-04, 1106 (9th Cir. 2003), *cert. denied*, 124 S. Ct. 1077 (2004).
[334] *Id*. at 1099-1100.
[335] *Id*. at 1101.

protected where, for example, a location in question is indistinguishable from other public fora.[336] Even the use of distinctive pavement and landscaping is not sufficient to change the character of a public forum.[337] The appellate court concluded, "The Fremont Street Experience is still a street."[338]

More noteworthy, perhaps, than the court's holding was that it echoed the concern voiced 31 years earlier by Justice Marshall that as cities unresistingly are drawn down the path of financing public projects with private funds, citizens may encounter greater difficulty in effectively communicating their views.[339] "Although governmental attempts to control speech are far from novel, they have new potency in light of societal changes and trends toward privatization."[340] 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[341] and at Horton Plaza in San Diego.[342]

D. *Sistrunk* and *Schwitzgebel*: viewpoint discrimination meets privatization

While the Supreme Court in *United States v. Grace* cut short government attempts to destroy public forum status of places traditionally used as pubic fora, more recent attempts by private actors – typically political campaigns – to temporarily privatize a traditional public forum by, for example, obtaining a permit to use a park for an event, have drawn mixed judicial responses.[343] During such events, the campaign committee typically treats the park as though it were private property and excludes dissidents or conditions admittance to the venue on absence of support for the campaign's opponent.[344] 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.

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[336] "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)).
[337] *Id*. at 1102.
[338] *Id*. at 1103.
[339] *See supra* note 298 and accompanying text.
[340] American Civil Liberties Union of Nevada v. City of Las Vegas, 333 F.3d 1092, 1097 (9th Cir. 2003), *cert. denied*, 124 S. Ct. 1077 (2004).
[341] *See supra* part V. C. 2.
[342] *See supra* part V. C. 1.
[343] *See generally* O'Neill, *supra* note 83, at 459-462.
[344] Id. at 459.

In *Schwitzgebel v. City of Strongsville*,[345] 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.[346] 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 campaign.[347] The plaintiffs entered with concealed signs criticizing Bush's AIDS policy, and when they displayed the signs, a brouhaha ensued, resulting in their being taken out of the park and arrested on various misdemeanor charges.[348] The *Schwitzgebel* court found that despite the issuance of the permit, the park at which the campaign held the rally was a traditional public forum, and the government could not convert it into something less protective of free speech.[349] 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.[350]

Although the court found that when a permitted event, the admittance to which is restricted to ticket-holders, is held a public park, the park retains its public forum status, it nonetheless upheld the exclusion of the plaintiffs from the event by applying what Professor O'Neill characterizes as a "tortured time, place, and manner analysis."[351] Following *Saunders v. United States*,[352] 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.[353] It also sought by its ruling to avoid "cacophony" by barring opponents from events held in public fora.[354] The

[345] 898 F. Supp. 1208 (N.D. Ohio 1995).
[346] Tickets generally were made available to whoever wanted them. *Id*. at 1211-12.
[347] *Id*. at 1212. The campaign provided its own signs for participants to use during the rally. *Id*.
[348] The charges were later dropped. *Id*. at 1212-13.
[349] *Id*. at 1216.
[350] *Id*.
[351] O'Neill, *supra* note 83, at 461 n.262.
[352] 518 F. Supp. 728, 729-30 (D.D.C. 1981), *aff'd without op.*, 679 F.2d 262 (D.C. Cir. 1982).
[353] Schwitzgebel v. City of Strongsville, 898 F. Supp. 1208, 1218 (N.D. Ohio 1995).
[354] *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, court here is allowing a government 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. Capitol Square Review & Advisory Bd. v. Pinette, 515

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…"[355] and that free debate may carry with it "verbal tumult, discord, and even offensive utterance."[356] Thus, the *Schwitzgebel* court's justification for using a permit system to stifle dissent lacks validity. Essentially, government is using a privatization scheme to do an end-run around the First Amendment's ban on viewpoint discrimination[357] by handing a traditional public forum to a private entity that does the discriminating. This is a practice that courts should not countenance.

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*[358] 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 the Bush rally. The court, analogizing to *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*,[359] found that the Bush campaign had a right to exclude the student's button because requiring that the campaign allow her to wear it would unconstitutionally deprive the campaign of autonomy over its message.[360] The Supreme Court in *Hurley* enunciated the principle underlying the *Sistrunk* court's decision when it ruled that Massachusetts could not require war veteran parade organizers to include in their Boston procession a gay-rights group that would have imparted a message in discord with what the organizers sought to communicate.[361] 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

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U.S. 753, 761 (1995) (state may regulate expressive content "only if such a restriction is necessary, and narrowly drawn, to serve a compelling state interest").

[355] New York Times v. Sullivan, 376 U.S. 254, 270 (1964).

[356] Cohen v. California, 403 U.S. 15, 24-25 (1971). Within established limits these effects are, the court added, "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.

[357] Lamb's Chapel v. Center Moriches Union Free Sch. Dist., 508 U.S. 384, 394 (1993).

[358] 99 F.3d 194 (6th Cir. 1996).

[359] 515 U.S. 557 (1995).

[360] *Sistrunk*, 99 F.3d at 200.

[361] Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston, 515 U.S. 557, 559, 574 (1995).

activists to march in the Boston parade, 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."[362]

This analysis, however, "turned the narrow holding in *Hurley* on its head," the *Sistrunk* dissent contended.[363] According to the dissent's view, the *Sistrunk* plaintiff's attendance at the rally is 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.[364] The dissent in *Sistrunk* promotes the better view, because an audience member at a 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.[365] More significantly, the fundamental question in *Sistrunk* was "how much control over a traditional public forum a municipality may cede to a private group."[366] 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 government entity is able turn the public forum into a location where viewpoint discrimination can take place. Considering the extent to which courts protect free expression in public fora and the proposition that "the nature of certain public forums cannot be altered, either by government fiat or by private will,"[367] the answer to this question should be a resounding "no."

VI. Conclusion

In its frenzied rush to fortify its bellicose foreign policy, the government in recent years has turned a cold shoulder towards not only 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

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[362] *Sistrunk*, 99 F.3d at 199. The court further supported the proposition that the campaign could exclude dissenting voices from the public forum 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).
[363] *Id*. at 200 (Spiegel, J., dissenting).
[364] *Id*. at 201.
[365] See *id.*
[366] The record was not sufficient to determine this issue. *Id*. at 202, 203.
[367] *Sistrunk*, 99 F.3d at 202 (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)).

comes to the rights of the Nation's citizens."[368] 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 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.[369]

Concomitant with the right of free expression is that to gather in public places to give voice to political views such that they may be conveyed to authorities.[370] In modern times, authorities demean public gathering for expression of political views by assuming such gatherings will take a violent form, thus presuming guilt until innocence be proven.[371] It is argued that, ironically, 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 that the public may turn to civil disobedience – that is, law-breaking – to express views it otherwise would have voiced lawfully.[372] 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 Obstruct Terrorism Act of 2001 (Patriot Act)[373] against demonstrators. This prospect is no flight of fancy.[374]

The government already has 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

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[368] Hamdi v. Rumsfeld, 124 S. Ct. 2633, 2650 (2004) (citing Youngstown Sheet & Tube v. Sawyer, 343 U.S. 579, 587 (1952)).
[369] Cohen v. California, 403 U.S. 15, 24-25 (1971).
[370] "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." United States v. Cruikshank, 92 U.S. 542, 552 (1876) (*quoted in* Hague v. Committee for Industrial Organization, 307 U.S. 496, 513 (1939)).
[371] Mitchell, *supra* note 11, at *39.
[372] Id. at *44 ("closing off space to protest has made civil disobedience all the more necessary…").
[373] Public Law 107-56.
[374] 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* Mitchell, *supra* note 11, at *44-*45; NANCY CHANG, SILENCING POLITICAL DISSENT 112-13 (2002).

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 take to 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 vigilant 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.