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Disentangling the Law of Public Protest

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DISENTANGLING THE LAW OF PUBLIC PROTEST

*Kevin Francis O'Neill**

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I. INTRODUCTION

First Amendment law governing public protest has been shaped by the turbulent political events of the past century.¹ As protesters took to the streets again and again—voicing opposition to U.S. military involvement in World War I,² Vietnam,³

1. See G. Edward White, *The First Amendment Comes of Age: The Emergence of Free Speech in Twentieth-Century America*, 95 MICH. L. REV. 299 (1996); William E. Lee, *Lonely Pamphleteers, Little People, and the Supreme Court: The Doctrine of Time, Place, and Manner Regulations of Expression*, 54 GEO. WASH. L. REV. 757 (1986).

2. See, e.g., *Debs v. United States*, 249 U.S. 211, 212–13 (1919) (upholding an Espionage Act conviction and a ten-year jail sentence based on the anti-war sentiments expressed by the defendant in a public speech); *Frohwerk v. United States*, 249 U.S. 204, 205–06 (1919) (sustaining an Espionage Act conviction and a ten-year jail sentence for preparing and publishing anti-war articles in Missouri’s German language newspaper); *Schenck v. United States*, 249 U.S. 47, 48–51 (1919) (upholding an Espionage Act conviction of the Socialist Party General Secretary who, in opposition to World War I, mailed to draft-age men certain leaflets urging resistance to the draft, denouncing conscription, and impugning the motives of those backing the war effort).

3. See, e.g., *Hess v. Indiana*, 414 U.S. 105, 105–07 (1973) (holding that a campus anti-war protester who joined other demonstrators in blocking a street could not be punished for declaring, after police dispersed the crowd, “[w]e’ll take the fucking street later”); *Bachellar v. Maryland*, 397 U.S. 564, 568–71 (1970) (setting aside the disorderly conduct convictions of anti-war protesters who inspired a hostile reaction among 100 onlookers while demonstrating at an Army recruiting station); *Washington Mobilization Comm. v. Cullinane*, 566 F.2d 107, 111 (D.C. Cir. 1977) (rejecting claims by anti-war protesters for injunctive restrictions on the crowd-control tactics used by Washington, D.C. police after plaintiffs adduced in a three-week trial evidence that D.C. police, in an effort to quell Vietnam War protests in 1969–1971, used stationary police lines to block the progress of marches; used moving police lines, or “sweeps,” to enforce dispersal orders; and made widespread use of the District’s “failure to move on” statute to conduct mass arrests of nonviolent demonstrators); *Wolin v. Port Auth.*, 392 F.2d 83, 84–85 (2d Cir. 1968) (affording injunctive relief to anti-war protesters who sought access to New York City’s Port Authority Bus Terminal for the purpose of expressing their views on Vietnam by distribut-

and the Persian Gulf;⁴ clamoring for racial integration⁵ and civil rights;⁶ raising their voices on abortion,⁷ AIDS,⁸ and nuclear

ing leaflets, carrying placards, and conducting discussions with passers-by); *United States v. Sroka*, 307 F. Supp. 400, 401 (E.D. Wis. 1969) (rejecting First Amendment defense by anti-war protesters who assembled in a federal building corridor to read the names of soldiers killed in Vietnam); *United States v. Akeson*, 290 F. Supp. 212, 213-14, 217 (D. Colo. 1968) (rejecting First Amendment defense by anti-war protesters who ventured into a government building to interfere with the processing of individuals being admitted into the military); *Hurwitt v. City of Oakland*, 247 F. Supp. 995, 998, 1000, 1007 (N.D. Cal. 1965) (enjoining city officials from prohibiting a parade intended to protest U.S. military intervention in Vietnam—even though plaintiffs' previous marches had been disrupted by angry spectators, including the Hell's Angels, who hurled tear gas bombs, broke through a police cordon, ripped banners, and disabled loudspeakers, and where plaintiffs and their followers had always remained nonviolent).

4. *See, e.g., Ohio v. Lessin*, 620 N.E.2d 72, 73-74, 79 (1993) (overturning conviction of Revolutionary Communist Party member who burned an American flag to protest President George Bush's decision to send troops to the Persian Gulf, and holding that flag-burner's inciting-to-violence conviction could not rest upon angry crowd reaction to her provocative expression).

5. *See, e.g., Brown v. Louisiana*, 383 U.S. 131, 143 (1966) (setting aside breach-of-the-peace convictions of civil rights protesters who staged a sit-in at a racially segregated public library).

6. *See, e.g., Gregory v. City of Chicago*, 394 U.S. 111, 112-13 (1969) (overturning disorderly conduct convictions of civil rights protesters whose march to and picketing before the mayor's residence produced a hostile reaction by onlookers); *Cox v. Louisiana*, 379 U.S. 536, 538-39, 558 (1965) (setting aside a breach-of-the-peace conviction of a civil rights activist who led a peaceful march by 2000 students to a courthouse where, with songs, prayers, and speeches, they protested the incarceration of fellow activists, who were being held in the adjacent jail); *Edwards v. South Carolina*, 372 U.S. 229, 230-33, 238 (1963) (setting aside breach-of-the-peace convictions of 187 civil rights protesters who, after marching peacefully on a sidewalk around State House grounds, refused a police dispersal order and, after 15 minutes of singing and speech-making, were arrested); *Dr. Martin Luther King, Jr. Movement, Inc. v. City of Chicago*, 419 F. Supp. 667, 672-73, 677-78 (N.D. Ill. 1976) (involving a civil rights organization that sought to march through Caucasian neighborhood, where its previous foray there having been curtailed when bystanders pelted the procession with rocks, bricks, and explosive devices, city officials violated the First Amendment in denying organizers a permit for a second march through the same neighborhood, proposing instead an alternate route through an all-black neighborhood); *Williams v. Wallace*, 240 F. Supp. 100, 102-03, 111 (M.D. Ala. 1965) (granting civil rights activists injunctive relief ordering the State of Alabama to permit and not to interfere with the plaintiffs' plans to march from Selma to Montgomery).

7. *See, e.g., Schenck v. Pro-Choice Network*, 519 U.S. 357, 357-58, 361 (1997) (striking down an injunction that imposed a "floating buffer zone," requiring anti-abortion protesters to stay 15 feet from those entering or leaving an abortion clinic; but upholding, on the other hand, a "fixed buffer zone" injunction, requiring protesters to remain 15 feet from clinic driveways and doorways); *Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753, 757-58, 776 (1994) (analyzing a speech-restrictive injunction aimed at anti-abortion protesters who, in willful violation of previous injunctions, had continued to block clinic driveways and doorways and had used loudspeakers and bullhorns that were audible in the clinic's surgery and recovery rooms and upholding the injunction's noise restrictions and its 36-foot buffer zone around the clinic, but

arms;⁹ and urging social reforms concerning gay rights,¹⁰ the

striking down such other provisions as a 300-foot no-approach zone around the clinic and a sweeping ban on "images observable" by patients inside the clinic); *Mahoney v. Babbitt*, 105 F.3d 1452, 1453-54, 1460 (D.C. Cir. 1997) (rejecting National Park Service attempt to privatize sidewalks lining the route of President Clinton's inaugural parade in an effort to thwart anti-abortion protesters who sought to display banners there); *Cannon v. City of Denver*, 998 F.2d 867, 869-70, 879 (10th Cir. 1993) (disallowing police officers the ability to assert qualified immunity defense to a section 1983 action brought by anti-abortion protesters who they arrested for carrying signs reading "The Killing Place"); *United States v. Lynch*, 952 F. Supp. 167, 168, 172 (S.D.N.Y. 1997) (holding that in a criminal contempt proceeding against an elderly bishop and a young monk who blocked access to an abortion clinic in violation of a permanent injunction, the defendants, who sat quietly praying in the clinic driveway, did not manifest the requisite willfulness to be convicted of criminal contempt, acting as they did from a sense of conscience and sincere religious conviction), *aff'd mem.*, 104 F.3d 357 (2d Cir.), *cert. denied*, 520 U.S. 1170 (1997); *Fischer v. City of St. Paul*, 894 F. Supp. 1318, 1321-23, 1329 (D. Minn. 1995) (upholding police segregation of pro-choice and anti-abortion demonstrators outside a Planned Parenthood clinic during a 10-day Operation Rescue campaign—including a police order fencing off the clinic's front sidewalk and banning all public access to it except by Planned Parenthood invitees seeking entry to the clinic); *United States v. Terry*, 802 F. Supp. 1094, 1096, 1103 (S.D.N.Y. 1992) (involving criminal contempt proceedings against an anti-abortion protester who, in violation of district court's injunction, presented then-Governor Bill Clinton with a fetus).

8. *See, e.g.*, *Schwitzgebel v. City of Strongsville*, 898 F. Supp. 1208, 1211, 1219 (N.D. Ohio 1995) (rejecting First Amendment claims by two AIDS activists who, while attending a campaign speech by President George Bush in a traditional public forum, were ejected and arrested after silently unfurling signs critical of Bush's policy on AIDS), *aff'd mem.*, 97 F.3d 1452 (6th Cir. 1996), *cert. denied sub. nom.*, *DeLong v. City of Strongsville*, 522 U.S. 827 (1997); *ACT-UP v. Walp*, 755 F. Supp. 1281, 1284, 1292 (M.D. Pa. 1991) (holding that police, in their effort to shield the governor from criticism and thwart a planned protest by AIDS activists, violated the First Amendment by closing the state legislature's public gallery for the first time ever during the governor's annual address).

9. *See, e.g.*, *United States v. Albertini*, 472 U.S. 675, 680, 690-91 (1985) (upholding the conviction of the defendant who, after being barred from a military base for having previously destroyed secret Air Force documents by pouring animal blood on them, illegally re-entered the same base to protest the nuclear arms race); *Hale v. Department of Energy*, 806 F.2d 910, 913, 917-18 (9th Cir. 1986) (rejecting a First Amendment challenge by nuclear weapons protesters to Energy Department regulations governing demonstrations at the Nevada Nuclear Weapons Test Site); *United States v. Quilty*, 741 F.2d 1031, 1032, 1034 (7th Cir. 1984) (affirming federal trespass convictions of anti-nuclear protesters who staged an unauthorized demonstration at the Rock Island Arsenal); *United States v. Shiel*, 611 F.2d 526, 527-28 (4th Cir. 1979) (affirming defendant's conviction for lying down in Pentagon passageway during nuclear arms protest).

10. *See, e.g.*, *Hurley v. Irish-American Gay, Lesbian & Bisexual Group*, 515 U.S. 557, 581 (1995) (holding that Massachusetts could not invoke its public accommodations law to force private organizers of St. Patrick's Day Parade to include a contingent of Irish gays and lesbians who would impart a message that the organizers did not wish to convey; compelling the inclusion of this group effectively altered the expressive content of the organizers' parade, thereby violating the First Amendment); *Olivieri v. Ward*, 801 F.2d 602, 603, 607-08 (2d Cir. 1986) (holding that advocates and opponents of gay rights who sought access to the same unique forum—the sidewalk in front of St. Patrick's Cathedral—in order to raise their voices in re-

homeless,¹¹ and the environment¹²—the courts gradually developed a complex jurisprudence to balance the competing interests in free expression and public order.

The purpose of this Article is to alleviate the confusion that so frequently surrounds the law of public protest. Much of that confusion can be avoided, when analyzing a given case, by zeroing in on *who* is regulating the speech in question. There are four regulatory players, who act in four distinct settings: restrictions enacted by legislative bodies, the issuance of permits and fees by government administrators, speech-restrictive injunctions imposed by the judiciary, and the influence of police as a regulatory presence on the street. Discrete lines of precedent attend each of these players. Legislators and judges, for example, are governed by a *different* legal standard when they impose time, place, or manner restrictions on public protest.¹³

sponse to New York City's annual Gay Pride Parade were entitled to equal recognition of their First Amendment rights and equal time in the desired forum for conducting their demonstrations), *cert. denied*, 480 U.S. 917 (1987); *Irish Lesbian & Gay Org. v. Giuliani*, 918 F. Supp. 732, 735, 749 (S.D.N.Y. 1996) (denying injunctive relief to gay rights organization that sought to stage its own St. Patrick's Day parade, commencing 90 minutes before, and covering exactly the same route through New York City, as the traditional parade).

11. *See, e.g.*, *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 299 (1984) (upholding as a reasonable time, place, and manner restriction a National Park Service regulation prohibiting camping in Lafayette Park and the Mall, even though enforcing the regulation against plaintiffs prevented them from sleeping overnight in "tent cities" they had erected under permit as part of a larger demonstration publicizing the plight of the homeless); *Community for Creative Non-Violence v. Kerrigan*, 865 F.2d 382, 383, 391 (D.C. Cir. 1989) (holding that a regulation prohibiting the maintenance of props on U.S. Capitol grounds in excess of any 24-hour period did not violate the First Amendment rights of protesters who, in carrying out a seven day vigil to publicize the plight of the homeless, sought to employ a 500-pound clay statue of a man, woman, and child huddled over a steam grate, even though dismantling the statue every evening would prove enormously difficult and, consequently, the 24-hour provision effectively thwarted their plans to use the statue in their week-long protest).

12. *See, e.g.*, *United States v. Fee*, 787 F. Supp. 963, 964-65, 970 (D. Colo. 1992) (convicting nine environmental protesters for willfully defying a special order of the National Forest Service that closed a portion of a national forest for logging activities, and holding that the closure order did not violate the First Amendment because its issuance had been precipitated by prior protests in which demonstrators occupied a tree for 12 days, locked themselves to a cattle guard, blocked motor vehicles, rolled logs into the road, and surrounded both loggers and trees to prevent cutting).

13. *Injunctions* that impose content-neutral time, place, or manner restrictions are subject to a heightened form of intermediate scrutiny, under a test that is slightly more stringent than that for legislation. *See Madsen*, 512 U.S. at 765. Observing that "[i]njunctions . . . carry greater risks of censorship and discriminatory application than do general ordinances," the Supreme

Administrators are governed by a special body of precedent when they issue permits for parades or demonstrations.¹⁴ And street-level decisionmaking by police is governed by yet another line of cases.¹⁵ Failure to distinguish among these four regulatory players, and failure to recognize the distinct bodies of precedent that have grown up around each of them, are salient causes for the confusion that so often plagues the law of public protest.

Accordingly, this Article is aimed at disentangling lines of precedent that are all too frequently entwined by urging an analysis of public protest cases that distinguishes among the four regulatory players. Thus, this Article devotes separate sections to the regulatory roles of legislators,¹⁶ administrators,¹⁷ judges,¹⁸ and police,¹⁹ with an introductory section on the doctrinal bedrock in this field: the public forum doctrine.²⁰

Court held in 1994 that speech-restrictive injunctions should be subjected by appellate courts to more "stringent" First Amendment scrutiny than comparable legislation, stating that, "when evaluating a content-neutral *injunction*, we think that our standard time, place, and manner analysis is not sufficiently rigorous." *Madsen*, 512 U.S. at 764-65 (emphasis added). Announcing a new standard of review for content-neutral *injunctions*, the Court held that, rather than inquiring whether the order is narrowly tailored to serve a significant governmental interest, "[w]e must ask instead whether the challenged provisions of the injunction *burden no more speech than necessary* to serve a significant government interest." *Id.* at 765 (emphasis added).

14. A permit scheme will run afoul of the First Amendment if: (1) it vests unbridled discretion in the licensing official, *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 150-53, (1969); (2) it allows the licensor to charge a higher police-protection fee based on the anticipated level of hostility among onlookers, *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 133-36 (1992); or (3) it imposes advance registration requirements that build into the application process a lengthy delay before the licensee may speak, *NAACP v. City of Richmond*, 743 F.2d 1346, 1356-57 (9th Cir. 1984).

15. Though police have an affirmative duty to protect speakers who inspire a hostile audience reaction, *Glasson v. City of Louisville*, 518 F.2d 899, 905-06 (6th Cir. 1975), *cert. denied*, 423 U.S. 930 (1975), courts are generally quite deferential to police-imposed time, place, or manner restrictions, *Concerned Jewish Youth v. McGuire*, 621 F.2d 471, 472-78 (2d Cir. 1980), *cert. denied*, 450 U.S. 913 (1981), and to on-the-street judgments by police to arrest or disperse demonstrators, *Washington Mobilization Committee v. Cullinane*, 566 F.2d 107, 120 (D.C. Cir. 1977).

- 16. Section IV—*infra* notes 268-408 and accompanying text.
- 17. Section V—*infra* notes 409-474 and accompanying text.
- 18. Section VI—*infra* notes 475-513 and accompanying text.
- 19. Section VII—*infra* notes 514-570 and accompanying text.
- 20. Section II—*infra* notes 21-263 and accompanying text.

II. THE PUBLIC FORUM DOCTRINE

A. Origins and Basic Principles

Access to public property for speech-related activity is governed by the public forum doctrine.²¹ Though judges and scholars disagree on the doctrine's source,²² the Supreme Court has repeatedly²³ identified its inspiration as *Hague v. CIO*,²⁴ where Justice Roberts, finding a constitutional right to use "streets and parks for communication of views,"²⁵ based that right on the fact that "streets and parks . . . 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."²⁶

21. See *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 757-70 (1995) (holding that Ohio could not bar Ku Klux Klan from erecting a cross in traditional public forum, the statehouse grounds, where the forum was open to all prospective speakers and where the government, even in denying the Klan a permit, granted a rabbi's application to erect a menorah in the very same location, stating that "[t]he right to use government property for one's private expression depends upon whether the property has by law or tradition been given the status of a public forum, or rather has been reserved for specific official uses"). For an excellent discussion of the public forum doctrine, see Robert C. Post, *Between Governance and Management: The History and Theory of the Public Forum*, 34 UCLA L. REV. 1713 (1987), and Geoffrey R. Stone, *Fora Americana: Free Speech in Public Places*, 1974 SUP. CT. REV. 233.

22. Compare *Irish Subcomm. v. Rhode Island Heritage Comm'n*, 646 F. Supp. 347, 353 n.3 (D.R.I. 1986) (tracing the doctrine to *Hague v. CIO*, 307 U.S. 496 (1939), and describing it as a "response to increasing efforts by government to cut back, restrict, and close off access to forums which were historically, traditionally, and, perhaps, inherently wide open for all types of expression" (quoting *Toward a Gayer Bicentennial Comm. v. Rhode Island Bicentennial Foundation*, 417 F. Supp. 632, 639 n.10 (D.R.I. 1976))), with Post, *supra* note 21, at 1718-19 (tracing the doctrine to an article by Harry Kalven, *The Concept of the Public Forum: Cox v. Louisiana*, 1965 SUP. CT. REV. 1, cited in *Police Dep't v. Mosley*, 408 U.S. 92, 95 n.3, 99 n.6 (1972)).

23. *International Soc'y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 679 (1992); *Frisby v. Schultz*, 487 U.S. 474, 480-81 (1988); *Members of City Council v. Taxpayers for Vincent*, 466 U.S. 789, 813-14 (1984); *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983); *Carey v. Brown*, 447 U.S. 455, 460 (1980).

24. *Hague*, 307 U.S. at 501-18 (striking down an ordinance that, *inter alia*, imposed a flat ban on public distribution of printed materials, and required a permit issued based on the uncontrolled discretion of the public safety director for all public meetings and demonstrations).

25. *Id.* at 515-16.

26. *Id.* at 515.

But, the right to engage in public protest has never entailed free access to all types of government property.²⁷ The government, no less than a private property owner, “has the power to preserve the property under its control for the use to which it is lawfully dedicated.”²⁸ “Nothing in the Constitution requires the Government freely to grant access to all who wish to exercise their right to free speech on every type of Government property without regard to the nature of the property or to the disruption that might be caused by the speaker’s activities.”²⁹ The First Amendment has never meant that people who want to engage in public protest “have a constitutional right to do so whenever and however and wherever they please.”³⁰

B. The Supreme Court’s Division of Public Property into Three Discrete Categories: “Traditional,” “Designated,” and “Nonpublic” Fora

In light of these principles, the Supreme Court has adopted a “forum-based” approach to assessing restrictions that the government seeks to place on the use of its property.³¹ Government-owned property has been divided into three categories for purposes of forum analysis: (1) “traditional” public fora; (2) “designated” public fora; and (3) “nonpublic” fora, the last category comprising all of the government property not embraced within the first two.³²

27. See *Pinette*, 515 U.S. at 761 (“It is undeniable, of course, that speech which is constitutionally protected against suppression is not thereby accorded a guaranteed forum on all property owned by the State.”); *Cornelius v. NAACP Legal Defense & Educ. Fund, Inc.*, 473 U.S. 788, 799 (1985) (“Even protected speech is not equally permissible in all places and at all times.”).

28. *Greer v. Spock*, 424 U.S. 828, 836 (1976) (quoting *Adderly v. Florida*, 385 U.S. 39, 47 (1966)); accord *Lee*, 505 U.S. at 679–80.

29. *Cornelius*, 473 U.S. at 799–800.

30. *Greer*, 424 U.S. at 836 (quoting *Adderly*, 385 U.S. at 48).

31. See *Lee*, 505 U.S. at 677–83 (reaffirming the Court’s commitment to a forum-based analysis and holding that airport terminals are nonpublic fora, thereby rejecting the challenge by the Krishnas to the port authority’s ban on soliciting money inside the terminals).

32. See *id.* at 678–79. For an especially clear account of this tripartite framework, see *Paulsen v. County of Nassau*, 925 F.2d 65 (2d Cir. 1991), where a challenge was brought by an evangelical Christian group whose members had been arrested for leafletting outside a heavy metal concert. See *id.* at 66–71. The court held that the county coliseum where the leafletting took place was a designated public forum such that the county could not impose a total ban on leafletting conducted outside the facility. See *id.* at 71. The Supreme Court first established the tripartite framework in *Perry Education Association v. Perry Local Educators’ Association*, 460

Traditional public fora are places that “by long tradition or by government fiat have been devoted to assembly and debate”³³—including, for example, such areas as public streets, parks and sidewalks,³⁴ and the curtilage of legislative seats.³⁵ Designated public fora are places that the government “has opened for expressive activity by part or all of the public”³⁶—including, for example, university meeting facilities³⁷ and municipal theaters.³⁸

U.S. 37 (1983), and held that teacher mailboxes and an interschool mail system constituted nonpublic fora, so that granting access to the exclusive bargaining representative of the teachers union and denying access to a rival union did not violate First Amendment rights of the rival union. *Perry*, 460 U.S. at 44–46.

33. *Id.* at 45.

34. See *Cornelius*, 473 U.S. at 802; see also *Frisby v. Schultz*, 487 U.S. 474, 476–88 (1988) (holding that residential streets are no less traditional public fora than their downtown counterparts—so that restrictions on residential picketing must be judged under the same stringent standards that govern the regulation of speech in public fora); *United States v. Grace*, 461 U.S. 171, 172–84 (1983) (striking down the statutory prohibition against leafletting or displaying signs on the U.S. Supreme Court’s sidewalk and holding that a traditional public forum cannot be transformed by government fiat into a nonpublic forum, the Court concluded that the sidewalk lining its perimeter must be treated as a public forum, so that the sweeping ban on expressive activity there could not be justified as a reasonable place restriction).

35. See *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 761 (1995) (holding that the Ohio Statehouse grounds where the Ku Klux Klan sought to erect a cross constituted a traditional public forum); *Jeannette Rankin Brigade v. Chief of Capitol Police*, 342 F. Supp. 575, 577–88 (D.D.C.) (striking down federal statute flatly prohibiting all parades and assemblages on U.S. Capitol grounds and relying on *Edwards v. South Carolina*, 372 U.S. 229 (1963), a three-judge district court held that a sweeping ban on expressive activity near the seat of the legislature cannot be justified on the sole governmental interest cited by defendants: to enable Congress “to function in the ‘serenity’ of a ‘park-like setting’”), *aff’d mem.*, 409 U.S. 972 (1972).

36. *Lee*, 505 U.S. at 678; see also *Cornelius*, 473 U.S. at 802 (“In addition to traditional public fora, a public forum may be created by government designation of a place or channel of communication for use by the public at large for assembly and speech, for use by certain speakers, or for the discussion of certain subjects.”).

37. See, e.g., *Widmar v. Vincent*, 454 U.S. 263 (1981) (holding that where a state university had an express policy of making its meeting facilities available to registered student groups, those facilities constituted a designated public forum and the university was not free to exclude students from the forum based on their desire to hold religious meetings).

38. See *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 547–62 (1975). In *Conrad*, a municipal board charged with managing a city auditorium and a city-leased theater refused to permit the staging in either facility of the rock musical “Hair,” because it asserted that the production would not be “in the best interest of the community.” *Id.* at 548. The Court found that the board’s refusal to permit the performance was a prior restraint that violated the First Amendment because it was effected under a scheme that gave unfettered discretion to the board and afforded applicants no procedure for prompt judicial review. See *id.* at 562. As a result, the

Nonpublic fora are places that, by tradition, nature, or design, “are not appropriate platforms for unrestrained communication”³⁹—including, for example, military installations⁴⁰ and federal workplaces.⁴¹ In a series of famous decisions, the Su

Court held that the municipal auditorium and city-leased theater here were “public forums designed for and dedicated to expressive activities.” *Conrad*, 420 U.S. at 555.

39. *Paulsen*, 925 F.2d at 69. For example, in *Community for Creative Non-Violence v. Hodel*, 623 F. Supp. 528 (D.D.C. 1985), a public advocacy group was rebuffed by the National Park Service in its request to include a controversial statue depicting a homeless man sleeping on a steam grate in the Christmas Pageant of Peace, a “national celebration event” held annually on the Ellipse in Washington, D.C. *See id.* at 529. The court found that the Pageant was a nonpublic forum and concluded that the National Park Service was free to select only “traditional” Christmas displays for inclusion in the event, and that plaintiffs’ First Amendment rights would not be violated if they were permitted to erect their statue on the Ellipse *outside* the Pageant boundary. *See id.* at 529, 533. The court concluded that the Pageant was a nonpublic forum because the National Park Service has never treated it as “a forum for all expression on the subject of Christmas, or for all displays on that subject,” and because the National Park Service “carefully selects only a few displays and does not routinely accept displays from those who tender them.” *Id.* at 533. As a result, the court held that in a nonpublic forum, the government may deny access to any prospective speaker, so long as its decision is “reasonable and viewpoint neutral.” *Id.*

40. *See, e.g., United States v. Albertini*, 472 U.S. 675, 677–91 (1985) (involving a defendant, barred from a military base for having previously destroyed secret Air Force documents by pouring animal blood on them, who was convicted of illegally re-entering the base to protest the nuclear arms race; the Court upheld the defendant’s conviction and reaffirmed that “[m]ilitary bases are not generally public fora,” and that “[t]here is ‘no generalized constitutional right to make political speeches or distribute leaflets’ on military bases, even if they are generally open to the public”); *see also, e.g., Greer v. Spock*, 424 U.S. 828, 830–42 (1976) (holding that military bases are nonpublic fora and rejecting a challenge to a base regulation that banned all speeches and demonstrations of a partisan political nature); *United States v. Corrigan*, 144 F.3d 763, 765–69 (11th Cir. 1998) (holding that military bases are non-public fora, the court affirmed the trespass convictions of protesters who staged an unauthorized demonstration at Fort Benning, Georgia to commemorate the murders of six Jesuit priests in El Salvador); *United States v. LaValley*, 957 F.2d 1309, 1314 (6th Cir.) (military base is not a public forum), *cert. denied*, 506 U.S. 972 (1992); *United States v. McCoy*, 866 F.2d 826, 830–34 (6th Cir. 1989) (holding that a military base is not a public forum and, even if its driveway were deemed a public forum, the government could still prohibit leafletting there); *Hale v. Department of Energy*, 806 F.2d 910, 911–18 (9th Cir. 1986) (rejecting a First Amendment challenge by nuclear weapons protesters to Energy Department regulations governing demonstrations at the Nevada Nuclear Weapons Test Site and holding that the road on the test site property leading to the main guard gate was not a public forum, even though the general public was afforded unrestricted access as far as the guard gate); *United States v. Quilty*, 741 F.2d 1031, 1032–34 (7th Cir. 1984) (affirming federal trespass convictions of anti-nuclear protesters who staged an unauthorized demonstration at the Rock Island Arsenal and holding that a military arsenal is not a public forum).

41. *See, e.g., Sefick v. Gardner*, 164 F.3d 370, 371–73 (7th Cir. 1998) (holding that a federal courthouse is a nonpublic forum, the court affirmed the denial of an injunction where an artist sought to display his satirical sculpture in the lobby of Chicago’s federal court building), *cert.*

preme Court likewise identified as nonpublic fora utility poles,⁴² residential letterboxes,⁴³ an interschool mail system,⁴⁴ and a workplace charity drive aimed at government employees.⁴⁵

C. How the Level of Judicial Scrutiny Hinges on Whether the Property is Deemed a Traditional, Designated, or Nonpublic Forum

In forum analysis, the government's power to impose speech restrictions depends on how the affected property is categorized; the level of judicial scrutiny hinges on whether the property

denied, 119 S. Ct. 2393 (1999); *United States v. Sachs*, 679 F.2d 1015, 1016–22 (5th Cir. 1982) (upholding the conviction of an anti-draft protester who sat down in a federal building elevator and obstructed its use); *United States v. Shiel*, 611 F.2d 526, 526–28 (4th Cir. 1979) (affirming the defendant's conviction for lying down in a Pentagon passageway during a nuclear arms protest); *Arbeitman v. District Court*, 522 F.2d 1031, 1032–34 (2d Cir. 1975) (affirming a conviction of a Vietnam war protester who blocked an entrance to a federal building); *United States v. Jones*, 365 F.2d 675, 676–79 (2d Cir. 1966) (affirming the disorderly conduct convictions of civil rights protesters who chained themselves to a federal courthouse entranceway); *United States v. Sroka*, 307 F. Supp. 400, 401–02 (E.D. Wis. 1969) (rejecting a First Amendment defense by anti-war protesters who assembled in a federal building corridor to read the names of soldiers killed in Vietnam); *United States v. Akeson*, 290 F. Supp. 212, 213–17 (D. Colo. 1968) (rejecting First Amendment defense by anti-war protesters who ventured into a government building to interfere with the processing of individuals being admitted into the military).

42. For example, in *Members of City Council v. Taxpayers for Vincent*, 466 U.S. 789, 814–15 (1984), a political candidate's challenge to an ordinance that banned the posting of signs on public property, and effectively proscribed his practice of attaching campaign signs to utility pole crosswires was unsuccessful because the Court held that the property covered by the ordinance, which included lampposts, curbstones, fire hydrants, and tree trunks, was not a public forum. *See id.* The Court ruled that the ordinance satisfied the reasonableness test as a content-neutral restriction on visual clutter. *See id.* at 816–17.

43. *See United States Postal Service v. Council of Greenburgh Civic Ass'ns*, 453 U.S. 114, 126–27 (1981) (holding that residential letterboxes do not constitute a public forum, and rejecting a First Amendment challenge to a federal statute prohibiting the deposit of unstamped mailable matter in such letterboxes).

44. *See Perry*, 460 U.S. at 46–48, 54–55 (holding that teacher mailboxes and an interschool mail system constituted a nonpublic forum so that the granting of access to the exclusive bargaining representative of the teachers union, and denying access to a rival union, did not violate the First Amendment rights of the rival union).

45. *See Cornelius*, 473 U.S. at 802–06, 813 (distinguishing between public and nonpublic fora, the Court held that a charity drive aimed at federal employees was a nonpublic forum, and ruled that the federal government did not violate the First Amendment rights of legal defense and political advocacy organizations by excluding them from participation in the drive).

is deemed a traditional, designated, or nonpublic forum.⁴⁶ Traditional public fora “may be regulated only via content-neutral time, place, and manner restrictions.”⁴⁷ To survive judicial scrutiny, such restrictions must be (1) “justified without reference to the content of the regulated speech,” (2) “narrowly tailored to serve a significant governmental interest,” and (3) must “leave open ample alternative channels for communication of the information.”⁴⁸ Governmental restrictions on the *content* of public forum speech are presumptively unconstitutional;⁴⁹ they will be struck down unless shown to be “necessary, and narrowly drawn, to serve a compelling state interest.”⁵⁰

These same standards govern the second cate-

46. See *Lee v. International Soc’y for Krishna Consciousness, Inc.*, 505 U.S. 672, 678–79 (1992).

47. *Paulsen v. County of Nassau*, 925 F.2d 65, 69 (2d Cir. 1991); see also *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 761 (1995) (In a public forum, “a State’s right to limit protected expressive activity is sharply circumscribed: it may impose reasonable, content-neutral time, place, and manner restrictions . . . but it may regulate expressive content only if such a restriction is necessary, and narrowly drawn, to serve a compelling state interest.”).

48. *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (quoting *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984)); accord *United States v. Grace*, 461 U.S. 171, 177 (1983). Time, place, and manner restrictions need not be the least restrictive or least intrusive means of achieving the stated governmental interest; rather, “the requirement of narrow tailoring is satisfied ‘so long as the . . . regulation promotes a substantial government interest that would be achieved less effectively absent the regulation.’” *Ward*, 491 U.S. at 798–99 (quoting *Albertini*, 472 U.S. at 689 (1985)). A more thorough treatment of time, place, and manner restrictions may be found *infra* in sections IIE and IVB of this Article.

49. See *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 828 (1995). “It is axiomatic that the government may not regulate speech based on its substantive content or the message it conveys. . . . Discrimination against speech because of its message is presumed to be unconstitutional.” *Id.* (citations omitted).

50. *Pinette*, 515 U.S. at 761; see *Lee*, 505 U.S. at 678; *United States v. Kokinda*, 497 U.S. 720, 726 (1990); *Cornelius*, 473 U.S. at 800; *Grace*, 461 U.S. at 177; *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 45 (1983). For a rare example of a content-based restriction on public forum speech surviving strict scrutiny see *Burson v. Freeman*, 504 U.S. 191 (1992), which upheld a Tennessee statute prohibiting the solicitation of votes and the display or distribution of campaign materials within 100 feet of a polling place entrance. See *id.* at 211. The Court concluded that this restriction was narrowly tailored to serve the compelling state interest in preventing voter intimidation and election fraud. See *id.* The dissent asserted that strict scrutiny was not the appropriate standard here and that the statute should have been sustained as a viewpoint-neutral regulation of a nonpublic forum. See *id.* at 214 (Scalia, J., concurring). “Because restrictions on speech around polling places on election day are as venerable a part of the American tradition as the secret ballot, [the challenged statute] does not restrict speech in a traditional public forum, and the ‘exacting scrutiny’ that the plurality purports to apply is inappropriate.” *Id.*

gory—restrictions on speech in *designated* public fora.⁵¹ Though the government may limit access to certain speakers (e.g., student groups⁵²) or certain subjects (e.g., school board business⁵³), and though it need not keep such a forum open indefinitely, its restrictions must be applied evenhandedly to all similarly situated parties.⁵⁴

Judicial scrutiny is substantially relaxed, however, vis-à-vis the third category—restrictions on speech in nonpublic fora. Here, the government enjoys “maximum control over communicative behavior” because its role “is most analogous to that of a private owner.”⁵⁵ The challenged regulation need only be reasonable, so long as it is not an effort “to suppress expression merely because public officials oppose the speaker’s view.”⁵⁶ “Indeed, ‘control over access to a nonpublic forum can be based on subject matter and speaker identity, so long as the distinctions drawn are reasonable in light of the purpose served by the forum and are viewpoint neutral.’”⁵⁷ Ultimately, “the Government’s decision to restrict access to a nonpublic forum ‘need only be *reasonable*; it need not be the most reasonable or the only reasonable limitation.’”⁵⁸

In distinguishing among these three categories, the Supreme Court has advanced narrow definitions of both traditional and designated public fora. Traditional public fora “are those places which ‘by long tradition or by government fiat have been devoted to assembly and debate,’”⁵⁹ places whose “principal purpose

51. See, e.g., *Lee*, 505 U.S. at 678–79; *Kokinda*, 497 U.S. at 726–27; *Cornelius*, 473 U.S. at 800; *Perry*, 460 U.S. at 46.

52. See, e.g., *Widmar v. Vincent*, 454 U.S. 263 (1981).

53. See, e.g., *City of Madison Joint Sch. Dist. v. Wisconsin Pub. Employment Relations Comm’n*, 429 U.S. 167 (1976).

54. See *Perry*, 460 U.S. at 45–46 & n.7, 48.

55. *Paulsen*, 925 F.2d at 69.

56. *Perry*, 460 U.S. at 46; see *Lee*, 505 U.S. at 679; *Kokinda*, 497 U.S. at 730; *Cornelius*, 473 U.S. at 800.

57. *Kokinda*, 497 U.S. at 730 (quoting *Cornelius*, 473 U.S. at 806).

58. *Id.* (quoting *Cornelius*, 473 U.S. at 808) (emphasis added). But see *Board of Airport Comm’rs v. Jews for Jesus, Inc.*, 482 U.S. 569, 575 (1987) (holding that even if an airport terminal were deemed a nonpublic forum, a sweeping ban on “all First Amendment activities” is facially invalid under the overbreadth doctrine “because no conceivable governmental interest would justify such an absolute prohibition of speech”).

59. *Cornelius*, 473 U.S. at 802.

... is the free exchange of ideas.”⁶⁰ Designated public fora are likewise narrowly conceived. The government does not create such a forum “by inaction,”⁶¹ or by allowing the public “freely to visit,”⁶² or by “permitting limited discourse”⁶³ there; instead, such a forum is created only where the government “intentionally open[s] a nontraditional forum for public discourse.”⁶⁴ Under these definitions, public forum status has eluded such heavily frequented public spaces as airport terminals,⁶⁵ state fairgrounds,⁶⁶ post office sidewalks,⁶⁷ public housing complexes,⁶⁸

60. *Cornelius*, 473 U.S. at 800.

61. *Lee*, 505 U.S. at 680; accord *Cornelius*, 473 U.S. at 802.

62. *Lee*, 505 U.S. at 680 (quoting *Greer v. Spock*, 424 U.S. 828, 836 (1976)); accord *Grace*, 461 U.S. at 177.

63. *Cornelius*, 473 U.S. at 802.

64. *Lee*, 505 U.S. at 680 (quoting *Cornelius*, 473 U.S. at 802); accord *Kokinda*, 497 U.S. at 730 (stressing that a designated public forum is not created unless it is “expressly dedicated” by the government to “expressive activity,” it will not suffice that the government has acquiesced in even a longstanding pattern of leafletting, speaking, and picketing on the premises, and “a practice of allowing some speech activities on [the] property do[es] not add up to the dedication of [that] property to speech activities”). After opening such a forum, there is no requirement that the government keep it open indefinitely. See *Perry*, 460 U.S. at 45–46.

65. See *Lee*, 505 U.S. at 683–85 (holding that airport terminals are nonpublic fora and rejecting a challenge by Hare Krishnas to the port authority’s ban on soliciting money inside the terminals; the regulatory scheme satisfied the reasonableness test given the burden and inconvenience that passengers would face and the fact that soliciting is permitted on the sidewalks outside the terminal buildings); *ISKCON Miami, Inc. v. Metropolitan Dade County*, 147 F.3d 1282, 1287–91 (11th Cir. 1998) (upholding regulations banning solicitation both inside and outside an airport terminal, including its sidewalks and parking lots, and vesting the airport director with discretion to select areas within the airport where other First Amendment activities would be confined), cert. denied, 119 S. Ct. 1032 (1999). But see *Lee v. International Soc’y for Krishna Consciousness, Inc.*, 505 U.S. 830 (1992) (per curiam opinion striking down port authority’s ban on leafletting); *Board of Airport Comm’rs v. Jews for Jesus, Inc.*, 482 U.S. 569, 575 (1987) (holding that even if an airport terminal were deemed a nonpublic forum, a sweeping ban on “all First Amendment activities” in the terminal is facially invalid under the overbreadth doctrine “because no conceivable governmental interest would justify such an absolute prohibition of speech”).

66. For example, in *Heffron v. International Society for Krishna Consciousness, Inc.*, 452 U.S. 640 (1981), the Court upheld as a reasonable time, place, and manner restriction on use of a “limited” public forum a state fair rule that barred selling or distributing any materials on the fairgrounds except from fixed booths rented to all comers on a first-come, first-served basis. See *id.* at 654–55. The Krishnas were unsuccessful in their First Amendment challenge to the ban from circulating freely throughout the fairgrounds without having to rent a booth because the Court held that state fairgrounds were not a traditional public forum, but only a “limited” public forum. See *id.* at 655.

67. See, e.g., *Kokinda*, 497 U.S. at 727 (holding that postal sidewalks are not public fora, thereby rejecting the First Amendment challenge to a Postal Service regulation that restricted speech activities on post office sidewalks, stressing that not every sidewalk falls into the tradi-

and Chicago's municipally-owned pier.⁶⁹

In divining the requisite intent to create a designated public forum, the Court will look to the government's "policy and practice" vis-a-vis the property;⁷⁰ it will likewise inquire whether

tional public forum category, and distinguishing postal sidewalks by observing that they do not function as a "public passageway," but merely provide access to the post office from its adjacent parking lot).

68. See, e.g., *Daniel v. City of Tampa*, 38 F.3d 546, 550 (11th Cir. 1994) (holding that a public housing complex is a nonpublic forum), *cert. denied*, 515 U.S. 1132 (1995).

69. In *Chicago ACORN v. Metropolitan Pier & Exposition Authority*, 150 F.3d 695 (7th Cir. 1998) (Posner, J.), the court held that Chicago's municipally-owned pier, formerly a naval facility but now converted into a recreational and commercial center with pedestrian thoroughfares lined by shops and restaurants, an outdoor amusement park, an indoor shopping mall, and a convention hall, was, in its entirety, a nonpublic forum. See *id.* at 698. When the Democratic National Convention was held there in 1996, the plaintiffs, a collection of political advocacy groups, sought access to the pier in order to engage in a range of expressive activities, namely leafletting, soliciting signatures for petitions, giving speeches, carrying signs and banners, all to advocate an increase in the minimum wage, but the pier's governmental owner turned them away, having rented the entire pier to the Democrats for \$1. See *id.* at 697-98. The court held that the government was free to rent the pier on a first-come, first-served, viewpoint-neutral basis, and during the period of such a rental, other speakers may be excluded insofar as they seek to engage in any expressive activity other than leafletting. See *id.* at 700-01. However, as per *International Society for Krishna Consciousness v. Lee*, 505 U.S. 830 (1992), the pier's pedestrian thoroughfares and its indoor mall, even though they constitute a nonpublic forum, must be left open for leafletting by other speakers. See *id.* at 703.

70. See *Cornelius v. NAACP Legal Defense & Educ. Fund, Inc.*, 473 U.S. 788, 802 (1985). This factor, the government's "policy and practice" toward a given forum, proved pivotal in three recent cases involving advertising space on municipally-owned buses. Compare *Children of the Rosary v. City of Phoenix*, 154 F.3d 972, 979 (9th Cir. 1998) (retired Supreme Court Justice Byron R. White, sitting by designation) (holding that where a city had consistently limited bus advertisements to speech that proposed a commercial transaction, the advertising space constituted a nonpublic rather than a designated public forum so that the city did not violate the First Amendment in rejecting a proposed advertisement by an anti-abortion group), *cert. denied*, 119 S. Ct. 1804 (1999), with *New York Mag. v. Metropolitan Transp. Auth.*, 136 F.3d 123, 130-32 (2d Cir.) (holding that where a transit authority had accepted not only commercial but also political advertising on its buses, the advertising space constituted a designated public forum; thus, the transit authority violated the First Amendment in rejecting an advertisement critical of the mayor), *cert. denied*, 119 S. Ct. 68 (1998), and *United Food & Commercial Workers Union v. Southwest Ohio Reg'l Transit Auth.*, 163 F.3d 341, 351, 358 (6th Cir. 1998) (holding that where a transit authority had accepted bus advertisements reflecting a wide array of political and public-issue speech, such behavior manifested an intent to designate an open forum; thus, the transit authority violated the First Amendment when it rejected a pro-union advertisement as too controversial), and *Christ's Bride Ministries v. Southeastern Pa. Transp. Auth.*, 148 F.3d 242, 249, 255 (3d Cir. 1998) (holding that where a transit authority's stated policy was to "promot[e] 'awareness' of social issues and 'provid[e] a catalyst for change'" in setting aside spaces for posters in its subway and rail stations, those spaces constituted a designated public forum; thus, the transit authority violated the First Amendment when it stripped those spaces of anti-abortion

the property is by nature “compatib[le] with expressive activity.”⁷¹ As the Court observed in *Cornelius*, “We will not find that a public forum has been created in the face of clear evidence of a contrary intent, nor will we infer that the government intended to create a public forum when the nature of the property is inconsistent with expressive activity.”⁷²

These factors help to explain the results in some of the Court’s most famous public forum cases. The government’s “policy and practice” toward its property was decisive in *Widmar*,⁷³ *Conrad*,⁷⁴ *Lehman*,⁷⁵ and *Perry*,⁷⁶ while the property’s

posters), *cert. denied*, 119 S. Ct. 797 (1999)).

71. *Cornelius*, 473 U.S. at 802.

72. *Id.* at 803.

73. *See* *Widmar v. Vincent*, 454 U.S. 263, 267–70, 277 (1981) (holding that where a state university had an express policy of making its meeting facilities available to registered student groups, those facilities constituted a designated public forum and the university was not free to exclude students from the forum based on their desire to hold religious meetings).

74. In *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 547 (1975), a municipal board charged with managing a city auditorium and a city-leased theater refused to permit the staging in either facility of the rock musical “Hair” because it asserted that the production would not be “in the best interest of the community.” *Id.* at 554 n.7. The Court held that the board’s refusal to permit the performance was a prior restraint that violated the First Amendment because it was effected under a scheme that gave unfettered discretion to the board and afforded applicants no procedure for prompt judicial review because it found that the municipal auditorium and city-leased theater here “were public forums designed for and dedicated to expressive activities.” *Id.* at 555.

75. *See* *Lehman v. City of Shaker Heights*, 418 U.S. 298, 304 (1974) (upholding a city’s refusal to accept any political advertising for placement in or upon the city’s rapid transit vehicles; in holding that advertising spaces in and upon a city’s transit system vehicles do not constitute a public forum, the Court ruled that the city’s decision to preclude all political advertising by advancing reasonable governmental objectives of minimizing “chances of abuse, the appearance of favoritism, and the risk of imposing upon a captive audience” did not offend the First Amendment). *See supra* note 70 for recent cases, following in *Lehman*’s wake, that address the public forum status of advertising space on buses.

76. *See* *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 45-49 (1983) (holding that teacher mailboxes and interschool mail system constituted a nonpublic forum, so that granting access to the exclusive bargaining representative of the teachers union, and thereby denying access to a rival union, did not violate the First Amendment rights of the rival union).

free speech “compatibility” proved pivotal in *Lee*,⁷⁷ *Greer*,⁷⁸ *Cornelius*,⁷⁹ and *Adderly*.⁸⁰

In *Conrad* and *Widmar*, respectively, the Court deemed a municipal auditorium and a university meeting center to be designated public fora, because in each case the government had affirmatively dedicated the facilities to specific expressive uses.⁸¹ *Perry* and *Lehman*, by contrast, featured well-established policies disfavoring, respectively, access to a school district’s internal mail system and access to advertising spaces on city transit vehicles.⁸² The Court deemed each, accordingly, a nonpublic forum.

The second factor—inquiring whether the affected property is by nature “compatib[le] with expressive activity”⁸³—explains the results in *Lee*, *Cornelius*, *Greer*, and *Adderly*, where public forum status was denied to an airport terminal, a federal workplace charity drive, a military base, and jailhouse grounds, respectively.⁸⁴ Each of these cases turned on the Court’s declared “reluctan[ce]” to recognize a designated forum “where the principal function of the property would be disrupted by expressive

77. See *Lee*, 505 U.S. at 682–83 (holding that airport terminals are nonpublic fora and rejecting a challenge by a group of Hare Krishnas to the port authority’s ban on soliciting money inside the terminals; the regulatory scheme satisfied the reasonableness test given the burden and inconvenience that passengers would face and the fact that soliciting is permitted on the sidewalks outside the terminal buildings).

78. See *Greer v. Spock*, 424 U.S. 828, 838-40 (1976) (holding that military bases are nonpublic fora, thereby rejecting a challenge to a base regulation that banned all speeches and demonstrations of a partisan political nature).

79. See *Cornelius v. NAACP Legal Defense & Educ. Fund, Inc.*, 473 U.S. 788, 806-11 (1985) (distinguishing between public and nonpublic fora, the Court held that a charity drive aimed at federal employees is a nonpublic forum, and ruled that the federal government did not violate the First Amendment rights of legal defense and political advocacy organizations by excluding them from participation in the drive).

80. See *Adderly v. Florida*, 385 U.S. 39, 44-48 (1966) (rejecting a First Amendment defense to trespass convictions of student civil rights protesters who entered upon jailhouse grounds, blocked vehicular traffic, and refused to leave where there was no evidence that any protesters had ever previously been permitted to gather in the jailhouse curtilage and where there was no evidence that defendants’ message, rather than their physical intrusion, prompted their arrest).

81. See *Cornelius*, 473 U.S. at 802–03 (analyzing *Conrad* and *Widmar*).

82. See *id.* at 803–04.

83. *Id.* at 802.

84. See *Lee*, 505 U.S. at 682–83; *Cornelius*, 473 U.S. at 806-11; *Greer*, 424 U.S. at 838-40; *Adderly*, 385 U.S. at 44-48.

activity.”⁸⁵

D. Content-Based Restrictions on Public Forum Expression

“It is axiomatic,” the Supreme Court has stressed, “that the government may not regulate speech based on its substantive content or the message it conveys.”⁸⁶ In regulating speech, the government may not favor one speaker over another;⁸⁷ discrimination against speech because of its message “is presumed to be unconstitutional.”⁸⁸

When the government targets not subject matter but, even more narrowly, particular *views* on a given subject, the First Amendment violation “is all the more blatant.”⁸⁹ Viewpoint discrimination is thus “an egregious form of content discrimination.”⁹⁰ Accordingly, 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.”⁹¹

Impermissible content-based restrictions appear in a variety of guises; they may be grouped into five discrete categories:

- (1) where the government categorically suppresses or favors a particular topic or message⁹²—as, for

85. *Cornelius*, 473 U.S. at 804.

86. *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 845–46 (1995) (finding viewpoint discrimination in a designated public forum, the Court held that a student religious journal was entitled to the same subsidy from student activity funds that the university consistently furnished to secular student journals); *accord Mosley*, 408 U.S. at 96.

87. *Rosenberger*, 515 U.S. at 828; *accord Members of City Council v. Taxpayers for Vincent*, 466 U.S. 789, 804 (1984).

88. *Rosenberger*, 515 U.S. at 828; *accord Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 641 (1994).

89. *Rosenberger*, 515 U.S. at 829; *accord R.A.V. v. City of St. Paul*, 505 U.S. 377, 391 (1992).

90. *Rosenberger*, 515 U.S. at 829.

91. *Id.*; *accord Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 46 (1983).

92. *See Boos v. Barry*, 485 U.S. 312, 334 (1988). In *Carey v. Brown*, 447 U.S. 455 (1980), the Court struck down, as a content-based restriction on public forum speech, a statute that banned the picketing of residences or dwellings but exempted from its prohibition the picketing of any place of employment involved in a labor dispute. *See id.* at 457, 471. The lawsuit stemmed from plaintiffs’ arrest under the statute for protesting the racial integration policies of

example, in *Boos v. Barry*,⁹³ where a District of Columbia statute banned the display of any sign criticizing a foreign government within 500 feet of its embassy;⁹⁴

- (2) where the government serves as a content-conscious *gatekeeper*, selectively blocking access to a forum based on the speaker's intended message⁹⁵—as, for

Chicago's mayor by picketing on the sidewalk before his home. *See Carey*, 447 U.S. at 457.

On its face, the Act accords preferential treatment to the expression of views on one particular subject; information about labor disputes may be freely disseminated, but discussion of all other issues is restricted. The permissibility of residential picketing under the [Act] is thus dependent solely on the nature of the message being conveyed.

Id. at 460–61. In *Police Department of Chicago v. Mosley*, 408 U.S. 92 (1972), the Court struck down, as a content-based restriction on public forum speech, an ordinance that prohibited all picketing within 150 feet of a school, except for picketing of any school involved in a labor dispute. *See id.* at 97–98.

93. 485 U.S. 312 (1988).

94. *See id.* at 318–19 (striking down the provision as a content-based restriction on political speech).

95. *See Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 758, 769–70 (1995) (holding that a state could not constitutionally bar the Ku Klux Klan from erecting a cross in a traditional public forum (i.e., the Ohio Statehouse grounds), where the grounds were open to all prospective speakers and where the government, even in denying the Klan a permit, granted a rabbi's application to erect a menorah in the very same location); *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384, 393–94 (1993) (involving viewpoint discrimination in denying access to a “nonpublic” forum) (school district opened its facilities for after-hours use by community groups for a broad range of social, civic, and recreational purposes, the school district unconstitutionally denied access to a church group that sought to exhibit a film series addressing family values and child-rearing from a “Christian perspective”); *Widmar v. Vincent*, 454 U.S. 263, 277 (1981) (involving content-based discrimination in denying access to designated public forum) (state university that made its meeting facilities generally available to registered student groups violated the First Amendment by closing those facilities to a registered student group desiring to use them for religious worship and religious discussion); *Mahoney v. Babbitt*, 105 F.3d 1452, 1459–1460 (D.C. Cir. 1997) (involving content-based discrimination in a public forum) (National Park Service could not ban speech because it might be offensive to the organizers of a public event); *Eagon v. Elk City*, 72 F.3d 1480, 1487–88 (10th Cir. 1996) (involving content-based discrimination in public forum) (affirming the trial court's grant of summary judgment to the First Amendment plaintiffs, Teenage Republican Club members, whose sign was excluded a from city's Christmas in the Park event under a policy that banned from the event any signs conveying a “partisan message”); *Congregation Lubavitch v. City of Cincinnati*, 997 F.2d 1160, 1167 (6th Cir. 1993) (involving viewpoint discrimination in restricting access to a traditional public forum) (in order to discourage holiday displays by the KKK and a Jewish organization, the City of Cincinnati enacted an ordinance that banned overnight displays in Fountain Square by private groups but permitted such displays by public groups, and then proceeded to “co-sponsor” certain heretofore private displays (e.g., an Oktoberfest celebration), thereby excepting *favored* groups from the newly-minted ban while leaving *disfavored* groups like the Klan under its sway); *Women Strike for Peace v. Morton*, 472

example, in *Mahoney v. Babbitt*,⁹⁶ where the National Park Service sought to prevent anti-abortion protesters from displaying banners along the route of President Clinton's inaugural parade,⁹⁷

- (3) where the government subjects unpopular speakers to a higher fee for using a forum⁹⁸—as, for example,

F.2d 1273, 1274–76 (D.C. Cir. 1972) (involving an anti-war group who fought with the Interior Department for three years in a futile effort to secure a permit to erect a temporary display in the Ellipse (comprised of 11 styrofoam tombstones) commemorating those who died in Vietnam; the government kept denying the plaintiffs a permit, each time offering a different reason, and all the while allowing more extensive displays to be erected in the Ellipse for the annual Christmas pageant; here, the D.C. Circuit affirmed the grant of injunctive relief, and permitted the plaintiffs to erect their display in the Ellipse but not in that portion of the park occupied by the Christmas pageant). In *Bledsoe v. City of Jacksonville Beach*, 20 F. Supp. 2d 1317 (M.D. Fla. 1998), the court struck down as a content-based restriction on access to traditional public forum a city's permit scheme for rallies at outdoor pavilion. *See id.* at 1324. Under this permit scheme, which allowed only those events that advertised the city, promoted the city, or promoted "family values," the plaintiff marijuana advocacy group was barred from using the pavilion. *Id.* at 1324. Noting that this permit scheme "actually requires [city officials] to consider the content of the proffered speech," the court observed that "[t]his type of content[–based] idea filtering, although quaint in a Mayberry R.F.D. aspirational way, takes on an Orwellian aspect when applied in the real world." *Id.*; *see also* *ACT-UP v. Walp*, 755 F. Supp. 1281, 1289 (M.D. Pa. 1991) (holding that police, in their effort to shield the governor from criticism and thwart planned protest by AIDS activists, violated the First Amendment by closing the state legislature's public gallery for first time ever during the governor's annual address because the gallery closure constituted a content-based restriction on access to a "limited" public forum).

96. 105 F.3d 1452 (D.C. Cir. 1997).

97. *See id.* at 1457. "[T]he government granted itself a permit for the sidewalks from which it then sought to ban the 'inconsistent' First Amendment protected activity of [the protesters]." *Id.* Siding with the protesters, the D.C. Circuit flatly refused "[to] permit the government to destroy the public forum character of the sidewalks along Pennsylvania Avenue by the *ipse dixit* act of declaring itself a permittee" because "the government here is attempting to ban, on a viewpoint-determined basis, First Amendment activity from a quintessential public forum." *Id.* at 1457–58. The court concluded that the government cannot possibly justify its five-month suspension of demonstration permits along Pennsylvania Avenue merely "in order to protect the President or the inaugural celebrants from dissenters for a few hours on a single day". *Id.* at 1459.

98. *See* *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 137 (1992). In *Central Florida Nuclear Freeze Campaign v. Walsh*, 774 F.2d 1515 (11th Cir. 1985), a nonprofit anti-nuclear organization's First Amendment challenge of an Orlando ordinance that required persons wishing to demonstrate in city streets and parks to prepay the amount of costs for additional police protection, to be determined at a police chief's discretion, was struck down both facially and as applied. *Id.* at 1525. The court found that

[t]he principle of equality of expression, inherent in the First Amendment, means that in the context of a public forum, the government must afford all points of view an equal opportunity to be heard. It forbids content discrimination and denies the government the power to determine which messages

in *Forsyth County v. Nationalist Movement*,⁹⁹ where, under a local permit scheme, the fee for police protection could be increased if the speaker was likely to generate controversy;¹⁰⁰

- (4) where the government withholds a service or subsidy to which the speaker would otherwise be entitled if not for his message—as, for example, in *Rosenberger v. Rector & Visitors of the University of Virginia*,¹⁰¹ where a student religious journal was denied the same subsidy for printing costs that the university furnished to all other student publications;¹⁰² and
- (5) where the government alters the speaker's intended message as the price for use of a forum¹⁰³—as, for

shall be heard and which suppressed.

Walsh, 774 F.2d at 1525; *see also* *Invisible Empire of the Knights of the Ku Klux Klan v. Mayor of Thurmont*, 700 F. Supp. 281, 291 (D. Md. 1988) (holding that town officials unconstitutionally denied the KKK a parade permit where, *inter alia*, the KKK was required to pay cost of police protection).

99. 505 U.S. 123 (1992).

100. *See id.* at 134, 137 (striking down an ordinance permitting a government administrator to vary the fee for assembling or parading to reflect the estimated cost of maintaining public order, and holding that the ordinance unconstitutionally required the administrator to examine the *content* of the prospective speaker's message and to charge a higher fee for controversial viewpoints because "[s]peech cannot be financially burdened, any more than it can be punished or banned, simply because it might offend a hostile mob").

101. 515 U.S. 819 (1995).

102. *See id.* at 831. In holding that the university policy withholding the subsidy from student religious journals was viewpoint discrimination in a limited public forum, the Court noted:

[T]he University does not exclude religion as a subject matter but selects for disfavored treatment those student journalistic efforts with religious editorial viewpoints. Religion may be a vast area of inquiry, but it also provides, as it did here, a specific premise, a perspective, a standpoint from which a variety of subjects may be discussed and considered. The prohibited *perspective*, not the general subject matter, resulted in the [subsidy denial].

Id. (emphasis added).

103. *See* *Hurley v. Irish-American Gay, Lesbian & Bisexual Group*, 515 U.S. 557, 558 (1995); *City of Cleveland v. Nation of Islam*, 922 F. Supp. 56 (N.D. Ohio 1995). Minister Louis Farrakhan, gearing up for his Million Man March, sought to lease the Cleveland Convention Center for a "men only" meeting, but city officials refused. *Id.* The court, issuing declaratory and injunctive relief granting Farrakhan the access he sought, held that the city, which had twice granted the Billy Graham Crusade single-gender access to the very same facility, could not withhold comparable access to Farrakhan; and, consistent with *Hurley*, the city could not invoke public accommodations laws to force Farrakhan to admit females, since doing so would effectively alter the content and character of his speech, given the Nation of Islam's 60-year religious tradition of holding separate men-only and women-only sermons. *Id.*; *see also* *New York County Bd. of Ancient Order of Hibernians v. Dinkins*, 814 F. Supp. 358 (S.D.N.Y. 1993)

example, in *Hurley v. Irish-American Gay, Lesbian & Bisexual Group*,¹⁰⁴ where, as the price for securing their permit, the private organizers of a St. Patrick's Day parade were compelled by the government to include a contingent of gay and lesbian marchers, whose very presence would impart a message that the organizers did not wish to convey.¹⁰⁵

E. Regulating the Time, Place, and Manner of Public Forum Expression

As explained above,¹⁰⁶ restrictions on the time, place, and manner of public protest are examined under less exacting scrutiny than that reserved for content-based regulation.¹⁰⁷

(where a private sponsor of a St. Patrick's Day Parade refused to allow a gay and lesbian organization to march in the parade under its own banner, the New York City Human Rights Commission intervened, and concluded that the parade was a public accommodation, ruling that the sponsor had violated the city's human rights ordinance by excluding the gay and lesbian group; when the city ordered the sponsor to admit the gay rights group as a precondition to securing its parade permit, the sponsor sought and received injunctive relief from the district court judge, who ruled that the city's order was a content-based alteration of the sponsor's message and thus offended the First Amendment); *Invisible Empire of the Knights of the Ku Klux Klan v. Mayor of Thurmont*, 700 F. Supp. 281, 289 (D. Md. 1988) (holding that town officials unconstitutionally denied the KKK a parade permit where licensing officials were vested with unfettered discretion, the Klan was required to pay the cost of police protection, and issuance of the permit hinged on a never-before-imposed "nondiscrimination condition" that effectively entitled blacks to march in the Klan's parade because "the KKK's message of white separatism would be destroyed if blacks were to march with them. . . . Allowing blacks to march with the KKK would change the primary message which the KKK advocates").

104. 515 U.S. 557 (1995).

105. *See id.* at 578-79. Massachusetts could not invoke its public accommodations law to force the private organizers of the parade to include a contingent of gay and lesbian marchers who would impart a message that the organizers did not wish to convey. *See id.* at 580-81. The Court found that compelling the inclusion of this group effectively altered the expressive content of the organizers' parade, thereby violating the First Amendment, and that the "selection of contingents to make [up] a parade" is entitled to full First Amendment protection, no less than the editorial compilation of viewpoints on a newspaper's opinion page. *Id.* at 570. Finally, the Court concluded that the government, by injecting itself into the selection of contingents for a privately-sponsored parade, was using the public accommodations law "to limit speech in the service of orthodox expression. The Speech Clause has no more certain antithesis." *Id.* at 579.

106. *See supra* section IIC.

107. To survive judicial scrutiny, such restrictions must be "justified without reference to the content of the regulated speech," must be "narrowly tailored to serve a significant governmental interest," and must "leave open ample alternative channels for communication of the information." *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (quoting *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984)).

Such restrictions come in many forms—imposing limits on the noise level of speech,¹⁰⁸ imposing caps on the number of protesters who may use a given forum,¹⁰⁹ barring early-morning or late-evening demonstrations,¹¹⁰ and restricting the size or placement of signs on government property.¹¹¹ Such regulations are frequently upheld¹¹² and represent a common part of the regula-

108. In *Ward*, the Court rejected a First Amendment challenge by a rock concert promoter to New York City's use guidelines for its bandshell in Central Park. See *Ward*, 491 U.S. at 803. The guidelines were upheld as a reasonable time, place, and manner restriction because they were designed to limit the noise level of bandshell concerts by requiring the performers to use a sound system and sound technician furnished by the city; the technician, while deferring to the performers as to sound mix, retained sole control over sound volume. See *id.*; see also *Grayned v. City of Rockford*, 408 U.S. 104, 120-21 (1972) (upholding as a reasonable time, place, and manner restriction an anti-noise ordinance prohibiting a person while on grounds adjacent to a school building from willfully making a noise or diversion that tends to disturb classes in session); *Kovacs v. Cooper*, 336 U.S. 77, 89 (1949) (upholding an ordinance prohibiting the use on city streets of sound trucks emitting "loud and raucous" noises); *Stokes v. City of Madison*, 930 F.2d 1163, 1165, 1173 (7th Cir. 1991) (upholding the arrest of demonstrators protesting U.S. policy toward El Salvador when they attempted to use sound amplification equipment to address a rally without first having obtained the requisite permit for use of such equipment; the court upheld the sound amplification ordinance as a reasonable time, place, and manner restriction); *Medlin v. Palmer*, 874 F.2d 1085, 1090 (5th Cir. 1989) (upholding as a legitimate time, place, and manner regulation a noise ordinance prohibiting the use of any hand-held amplifier within 150 feet of an abortion clinic or other medical facility).

109. See, e.g., *Blasecki v. City of Durham*, 456 F.2d 87, 94 (4th Cir.) (upholding an ordinance that prohibited more than 50 people from assembling in a small downtown park), *cert. denied*, 409 U.S. 912 (1972).

110. See, e.g., *Nationalist Movement v. City of Cumming*, 92 F.3d 1135, 1140 (11th Cir. 1996) (upholding an ordinance banning Saturday morning parades as a reasonable time, place, and manner restriction), *cert. denied*, 519 U.S. 1058 (1997); *Abernathy v. Conroy*, 429 F.2d 1170, 1174 (4th Cir. 1970) (upholding an ordinance that limited parades to the hours between 8:00 a.m. and 8:00 p.m.); *Friedrich v. City of Chicago*, 619 F. Supp. 1129, 1142-45 (N.D. Ill. 1985) (holding, *inter alia*, that a provision banning street performances during a narrow span of hours on Friday and Saturday nights in a narrow sector of the city's entertainment district did not violate the First Amendment or the Equal Protection rights of street performers, since the ban applied only during periods when the area was most crowded and when performers, especially breakdancers, had drawn crowds large enough to force pedestrians into the street).

111. See, e.g., *United States v. Musser*, 873 F.2d 1513, 1518 (D.C. Cir.) (rejecting a First Amendment challenge to a federal regulation prohibiting unattended signs in a local park), *cert. denied*, 493 U.S. 983 (1989); *White House Vigil for the ERA Comm. v. Clark*, 746 F.2d 1518, 1534-35, 1538-39, 1541 (D.C. Cir. 1984) (upholding as reasonable time, place, and manner restrictions on demonstrations taking place on the White House sidewalk regulations that limited the size, construction, and placement of signs on the sidewalk; restricted, but did not prohibit, demonstrations within the "center zone" of the sidewalk; and prohibited the placement, except momentarily, of parcels upon the sidewalk).

112. Section IVB offers examples of permissible and impermissible time, place, and manner regulations.

tory landscape in most cities.

Time, place, and manner analysis is governed by a three-part test, requiring separate inquiry into three distinct issues: (1) whether the regulation is truly content neutral; (2) whether the regulation is narrowly tailored to serve a significant government interest; and (3) whether the regulation leaves open sufficient alternative channels of communication.¹¹³ In the next three subsections, those issues are addressed in turn.

1. Assessing "Content Neutrality"

The principal inquiry in determining content neutrality—in speech cases generally and in time, place, and manner cases particularly—is whether the government “has adopted a regulation of speech because of disagreement with the message it conveys.”¹¹⁴ The controlling factor is the government’s purpose or intent.¹¹⁵ “A regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others.”¹¹⁶ Government regulation of expressive activity is content neutral so long as it is “justified without reference to the content of the regulated speech.”¹¹⁷

Employing these standards, courts have held that the following speech restrictions—even though they imposed a greater hardship upon particular speakers or messages—were nonetheless content neutral:¹¹⁸

113. See *Ward*, 491 U.S. at 791; *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984); accord *United States v. Grace*, 461 U.S. 171, 177 (1983).

114. *Ward*, 491 U.S. at 791; accord *Clark* 468 U.S. at 295.

115. See *Ward*, 491 U.S. at 791; *Paulsen v. County of Nassau*, 925 F.2d 65, 70 (2d Cir. 1991).

116. *Ward*, 491 U.S. at 791 (citing *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 47–48 (1986)).

117. *Id.* at 791–92 (quoting *Clark*, 468 U.S. at 293); accord *Heffron v. International Soc’y for Krishna Consciousness, Inc.*, 452 U.S. 640, 648 (1981).

118. For a speech restriction that flunked the content neutrality test, see *Boos v. Barry*, 485 U.S. 312 (1988), in which the Supreme Court struck down a District of Columbia statute that criminalized the display of any sign criticizing a foreign government within 500 feet of its embassy. See *Boos*, 485 U.S. at 334. The Court held that the statute’s display clause was content-based because its sole justification was “to protect the dignity of foreign diplomatic personnel by shielding them from speech that is critical of their governments.” *Id.* at 321. This

- (1) a noise regulation limiting the decibel level at Central Park concerts—even though the restriction proved especially burdensome for *rock* musicians—where the government's stated purpose was to preserve the quietude of adjacent property;¹¹⁹
- (2) a National Park Service ban on camping in Lafayette Park and the Mall—even though its enforcement against homeless advocates prevented them from sleeping overnight in “tent cities” near the White House—where the ban's underlying purpose was to maintain Washington's parks “in an attractive and intact condition”;¹²⁰
- (3) a regulation banning the overnight maintenance of any “props” on the U.S. Capitol grounds—even though it effectively thwarted a plan by homeless advocates to erect, as part of a seven-day vigil, a 500-pound clay statue of a man, woman, and child huddled over a steam grate—where the overnight ban was justified as affording the government meaningful day-to-day control over the Capitol

justification, rather than invoking the “‘secondary effects’ of picket signs in front of embassies,” like congestion, traffic, security, or visual clutter, focused “*only* on the content of the speech and [its] direct impact [upon] listeners”; thus, the statute “must be considered content-based” because it “regulates speech due to its potential primary impact.” *Boos*, 485 U.S. at 321.

Similarly, in *Johnson v. Bax*, 63 F.3d 154 (2d Cir. 1995), the court addressed police enforcement of distinct “pro” and “anti” areas for demonstrators voicing their views about President Clinton during a visit to New York City. *See id.* at 156. Plaintiff, who bore a sign (reading “Mr. Clinton: STOP CAMPAIGNING AND LEAD!”) that he regarded as offering “constructive criticism,” was arrested when he refused to be placed in the “anti” area, asserting that the “anti” area afforded less favorable access to the President, and that being placed there, in the midst of “professional Marxists,” effectively radicalized and thus altered *his* message of constructive criticism. *Id.* at 156, 159 n.2 (discussing the content neutrality analysis in *Boos*).

119. *See Ward*, 491 U.S. at 803 (upholding as a reasonable time, place, and manner restriction bandshell guidelines designed to limit the noise level of Central Park concerts by requiring the performers to use a sound system and sound technician furnished by the city; the technician, while deferring to the performers as to sound *mix*, retained sole control over sound *volume*).

120. *Clark*, 468 U.S. at 294–96, 299 (stressing that “[t]o permit camping—using these areas as living accommodations—would be totally inimical” to the stated governmental purpose, and holding that the expressive nature of plaintiffs’ proposed overnight sleeping does not render the camping ban any less a legitimate time, place, and manner regulation).

grounds,¹²¹ and

- (4) an order banning all expressive activity within a sector of the San Juan National Forest closed for logging activity—even though the ban’s impact was entirely one-sided, since only *environmentalists* sought to protest among the trees—where the government justified its ban as protecting “health and safety and . . . property.”¹²²

These cases illustrate that speech restrictions will be deemed “content neutral,” even if they impinge more severely on a particular speaker or message, so long as the government can justify its regulation as serving purposes that have nothing to do with the content of speech.¹²³

121. See *Community for Creative Non-Violence v. Kerrigan*, 865 F.2d 382, 387 (D.C. Cir. 1989) (upholding an overnight ban as a content-neutral time, place, and manner regulation, even though its enforcement against plaintiffs required them to dismantle the statue every evening and reconstruct it every morning—a task so onerous that their plan to employ the statue was effectively foiled).

122. *United States v. Fee*, 787 F. Supp. 963, 969 (D. Colo. 1992). In *Fee*, nine environmental protesters were convicted for willfully defying a special order of the National Forest Service that closed a portion of the San Juan National Forest for logging activities, where the defendants entered the closed sector of the forest to protest the cutting of ancient trees. See *id.* at 970. The court rejected the protesters’ First Amendment defense, and upheld the special order which banned all expressive activity within the closed sector during a 90-day period of active logging as a reasonable time, place, and manner restriction. See *id.* at 968. The order had been precipitated by prior protests in which demonstrators occupied a tree for 12 days, locked themselves to a cattle guard, blocked motor vehicles, rolled logs into the road, and surrounded both loggers and trees to prevent cutting; moreover, the special order left protesters free to demonstrate inside the national forest at the entrance to the logging area. See *id.* at 969.

123. Closely related to this theme are two strands of precedent that directly implicate the question of content neutrality: the “secondary effects” doctrine and the *O’Brien* doctrine.

Under the secondary effects doctrine, a restriction on speech will be deemed content-neutral, even though its language is content-discriminatory, so long as the government’s regulatory aim is unrelated to the speech’s communicative impact. See *Young v. American Mini-Theatres, Inc.*, 427 U.S. 50, 54–55, 71 n.34 (1976) (upholding Detroit’s “Anti-Skid Row Ordinance,” a zoning restriction on the location of adult theaters that forced their dispersal in order to avert the creation of “red light” districts) (first broaching the secondary effects doctrine).

In *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986), the Court upheld a zoning ordinance that required the concentration of adult movie theaters in order to avoid the spread of blight. See *id.* at 54–55. While conceding that “the ordinance treats theaters that specialize in adult films differently from other kinds of theaters,” the Court upheld the ordinance because it “is aimed not at the content of the films shown . . . but rather at the *secondary effects* of such theaters on the surrounding community.” *Id.* at 47 (emphasis added). Since the regulatory aim of the *Renton* ordinance was directed at the crime and declining property values that frequently

2. Assessing the Requisite "Narrow Tailoring"

To be upheld under the First Amendment, a time, place, and manner restriction must be "narrowly tailored to serve a significant governmental interest."¹²⁴ Though this requirement is technically comprised of two discrete components—*narrow tailoring* to advance a *significant governmental interest*—the latter factor is rarely dispositive. The state can always identify, and judges seldom question, the presence of a "significant" governmental interest.¹²⁵ Invariably, then, these disputes turn on the presence or absence of narrow tailoring.¹²⁶ And, the narrow tailoring requirement is by no means stringently enforced. The Supreme Court has stressed that time, place, and manner restrictions need not be the least restrictive or least

accompany adult theaters, not the sexually explicit content of the films they exhibit, the ordinance "is completely consistent with our definition of 'content-neutral' speech regulations as those that 'are justified without reference to the content of the regulated speech.'" *Renton*, 475 U.S. at 48 (emphasis added) (quoting *Virginia Pharmacy Bd. v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 771 (1976)).

For purposes of this Article, it is important to stress that the secondary effects doctrine has had little impact on the right to engage in public protest. The government invoked the doctrine unsuccessfully in *Boos*, where it sought to justify a ban on the display of any sign criticizing a foreign government within 500 feet of its embassy. See *Boos v. Barry*, 485 U.S. 312, 320-21 (1988). The government argued that the ban was content-neutral because "the real concern is a secondary effect, namely, our international law obligation to shield diplomats from speech that offends their dignity." *Id.* at 320. The Court rejected this argument and invalidated the ban under strict scrutiny, holding that "[l]isteners' reactions to speech are not the type of 'secondary effects' we referred to in *Renton*." *Id.* at 321.

Like the secondary effects doctrine, the *O'Brien* doctrine erects a shield of content neutrality when the government regulates expressive activity for reasons other than its communicative impact. See *United States v. O'Brien*, 391 U.S. 367, 382 (1968). Under *O'Brien*, where the government regulates conduct that has a communicative quality, the regulation will nevertheless survive a First Amendment challenge if the governmental justification for restricting the conduct is important and is unrelated to the suppression of ideas. See *id.* 377. In *O'Brien*, the Court upheld a federal statute criminalizing the burning of draft cards, notwithstanding a legislative history that revealed an overriding impulse to punish such conduct precisely because of its anti-war message, and the government justified the prohibition as furthering its administration of the Selective Service system. See *id.* at 385-86.

124. *Ward*, 491 U.S. at 791 (quoting *Clark*, 468 U.S. at 293).

125. See, e.g., *Clark*, 468 U.S. at 296 (readily recognizing a "significant" governmental interest in maintaining Washington's parks "in an attractive and intact condition," and thereby upholding a broad ban on camping in Lafayette Park and the Mall).

126. Bear in mind, of course, that we are here discussing but one of *three* distinct prongs of time, place, and manner analysis. This discussion merely asserts that satisfaction of *one* such prong, not the outcome of these cases as a whole, turns largely on the question of narrow tailoring.

intrusive means of achieving the government's end; rather, "the requirement of narrow tailoring is satisfied 'so long as the . . . regulation promotes a substantial government interest that would be achieved less effectively absent the regulation.'"¹²⁷

This relaxed conception of narrow tailoring is vividly reflected in the cases. Regulations that *fail* this test invariably feature broad restraints on expressive activity¹²⁸—imposing, for example, sweeping prohibitions on parades,¹²⁹ demonstrations,¹³⁰ labor picketing,¹³¹ abortion picketing,¹³² residential

127. *Ward*, 491 U.S. at 798–99 (quoting *United States v. Albertini*, 472 U.S. 675, 689 (1985)).

128. *See, e.g., Bery v. City of New York*, 97 F.3d 689, 697–99 (2d Cir. 1996) (enjoining enforcement of an ordinance that prohibited visual artists from exhibiting or selling their work in public places without a general vendors license, and holding that the ordinance was not narrowly tailored, but served instead as "a de facto bar preventing visual artists from exhibiting and selling their art in public areas of New York," because it placed an exceedingly low ceiling on the number of available permits, creating a waiting list so long that even the City conceded that plaintiffs' prospects of securing a license were non-existent), *cert. denied*, 117 S. Ct. 2408 (1997).

129. *See, e.g., United Food & Commercial Workers Union v. City of Valdosta*, 861 F. Supp. 1570, 1580–83 (M.D. Ga. 1994) (striking down as facially overbroad legislative restrictions on demonstrations, picketing, leafletting, and parades and striking down an outright ban on parades in residential zones); *Sixteenth of Sept. Planning Comm., Inc. v. City of Denver*, 474 F. Supp. 1333 (D. Colo. 1979) (striking down as impermissibly broad a time, place, and manner restriction on parades in downtown Denver; the regulation banned parades anywhere within the seven-square-block central business district on all workdays from 7:00 a.m. to 6:00 p.m.).

130. *See, e.g., Hague v. CIO*, 307 U.S. 496, 514, 518 (1939) (striking down ordinances that, *inter alia*, imposed a flat ban on public distribution of printed materials, and required a permit, issued at the uncontrolled discretion of the public safety director, for all public meetings and demonstrations); *Valdosta*, 861 F. Supp. at 1580–81 (striking down a ban on public assemblies in all public and quasi-public places other than parks—a prohibition that swept within its ambit all demonstrations on streets, roads, highways, sidewalks, driveways, and alleys).

131. *See, e.g., Thornhill v. Alabama*, 310 U.S. 88, 104 (1940) (striking down a sweeping ban on labor picketing); *Nash v. Chandler*, 848 F.2d 567, 574 (5th Cir. 1988) (striking down on overbreadth grounds a "mass picketing" statute imposing a numerical cap of two picketers within 50 feet of any entrance to a targeted establishment); *Howard Gault Co. v. Texas Rural Legal Aid, Inc.*, 848 F.2d 544, 566–67 (5th Cir. 1988) (striking down the same statute challenged in *Nash*).

132. *See, e.g., Edwards v. City of Santa Barbara*, 150 F.3d 1213, 1215 (9th Cir. 1998) (upholding an ordinance that banned picketing within an eight-foot fixed buffer zone outside medical centers and places of worship, but striking down for lack of narrow tailoring an ordinance that created an eight-foot "floating" buffer zone surrounding any patient or worshipper within 100 feet of a medical center or place of worship), *cert. denied*, 119 S. Ct. 1142 (1999); *Sabelko v. City of Phoenix*, 120 F.3d 161, 162, 165 (9th Cir. 1997) (striking down for lack of narrow tailoring an ordinance that imposed an eight-foot "floating" buffer zone around persons entering or exiting abortion clinics); *Olmer v. City of Lincoln*, 23 F. Supp. 2d 1091, 1100–03 (D. Neb. 1998) (striking down for lack of narrow tailoring an ordinance aimed at anti-abortion

picketing,¹³³ door-to-door leafletting,¹³⁴ or public handbilling.¹³⁵

protesters, which banned focused picketing outside places of worship during scheduled services).

133. See, e.g., *Frisby v. Schultz*, 487 U.S. 474, 486–88 (1988) (addressing an ordinance that imposed an outright ban on picketing “before or about” any residence, the Court held that residential streets are no less traditional public fora than their downtown counterparts, and therefore must be judged under the same stringent standards that govern restrictions on public forum speech, but saved the ordinance from its apparently fatal overbreadth by imposing a narrowing construction that prohibits only “focused” picketing conducted solely in front of a single, targeted residence). The Court’s narrowing construction features illustrations of permissible picketing that would seem generally immune from time, place, and manner prohibition: “[g]eneral marching through residential neighborhoods,” “walking a route in front of an entire block of houses,” door-to-door proselytizing, and door-to-door leafletting. *Id.*; see also *Kirkeby v. Furness*, 52 F.3d 772, 776 (8th Cir. 1995) (holding that anti-abortion protesters were entitled to preliminary injunction barring enforcement of a Fargo, North Dakota ordinance that banned picketing within 200 feet of a residential dwelling and authorized year-long, neighborhood-wide “no-picketing zones”); *Vittitow v. City of Upper Arlington*, 43 F.3d 1100, 1107 (6th Cir. 1995) (striking down a city’s outright ban on residential picketing, refusing to issue a saving construction of the ordinance based on counsel’s representations as to how it would be enforced, and reversing the district court’s effort to save the ordinance by issuing a narrowing injunction), *cert. denied*, 515 U.S. 1121 (1995); *Pursely v. City of Fayetteville*, 820 F.2d 951 (8th Cir. 1987) (striking down ordinance that imposed an outright ban on all residential picketing).

In contrast, the court in *Douglas v. Brownell*, 88 F.3d 1511 (8th Cir. 1996), upheld, as satisfying the narrow tailoring requirement, a residential picketing ordinance that banned demonstrations not only in front of the targeted residence but in front of the homes on either side of it. See *id.* at 1519–20. When confronted with plaintiffs’ assertion that this ordinance banned more speech than that authorized by *Frisby*, the Eighth Circuit responded that *Frisby* established neither a bright-line nor a de minimus standard, and that, in any event, *Frisby* involved an *injunctive* restriction on speech which is subject (as the Supreme Court announced in *Madsen v. Women’s Health Center, Inc.*, 512 U.S. 753, 764–65 (1994)) to more stringent scrutiny than the ordinance at issue here. See *Douglas*, 88 F.3d at 1519–20.

134. See, e.g., *Martin v. City of Struthers*, 319 U.S. 141, 149 (1943) (striking down outright a ban on all door-to-door leafletting).

135. See, e.g., *Jamison v. Texas*, 318 U.S. 413, 417 (1943) (striking down outright a ban on all leafletting on city streets); *Hague*, 307 U.S. at 514, 518 (striking down ordinances that, *inter alia*, imposed a flat ban on public distribution of printed materials, and required a permit issued at the uncontrolled discretion of the public safety director for all public meetings and demonstrations); *Krantz v. City of Fort Smith*, 160 F.3d 1214, 1222 (8th Cir. 1998) (striking down for lack of narrow tailoring an ordinance that banned placing handbills on unattended vehicles parked on public property), *cert. denied*, 119 S. Ct. 2397 (1999); *Gerritsen v. City of Los Angeles*, 994 F.2d 570, 580 (9th Cir. 1993) (striking down as invalid time, place, and manner restrictions on public forum speech a city’s outright ban on handbill distribution in specified areas of public park and its permit scheme for handbill distribution in all other areas of the park); *Henderson v. Lujan*, 964 F.2d 1179, 1186 (D.C. Cir. 1992) (striking down for lack of narrow tailoring a National Park Service regulation banning all leafletting on the sidewalks surrounding the Vietnam Veterans Memorial, where the sidewalks, even at their closest, were more than 100 feet from the Memorial’s wall); *Valdosta*, 861 F. Supp. at 1581–83 (striking down legislative restrictions on demonstrations, picketing, leafletting, and parades and an outright ban on picketing and handbilling in streets, alleys, roads, highways, or driveways).

Absent this type of broad-based ban on a traditional¹³⁶ form of expressive activity, courts routinely uphold time, place, and manner restrictions as satisfying the requirement of narrow tailoring.¹³⁷

3. Assessing the Sufficiency of “Alternative Channels” of Communication

To be valid under the First Amendment, a time, place, and manner restriction must “leave open ample alternative channels for communicati[ng]” the speaker’s message.¹³⁸ Though a speech

136. Where the regulation targets an unconventional mode of expressive activity, courts will readily uphold even a sweeping prohibition. *See, e.g.*, *Roulette v. City of Seattle*, 97 F.3d 300, 306 (9th Cir. 1996) (rejecting a First Amendment challenge brought by homeless advocates, street musicians, and other political organizations, the court upheld a prohibition against sitting or lying on sidewalks between 7:00 a.m. and 9:00 p.m.); *ACORN v. City of Phoenix*, 798 F.2d 1260, 1273 (9th Cir. 1986) (upholding an ordinance that banned soliciting funds from the occupants of motor vehicles stopped at intersections).

137. *See, e.g.*, *Ward v. Rock Against Racism*, 491 U.S. 781, 796-802 (1989) (upholding, as satisfying, *inter alia*, the narrow tailoring requirement, New York City’s use guidelines for its bandshell in Central Park; the guidelines were designed to limit the noise level of bandshell concerts by requiring the performers to use a sound system and sound technician furnished by the city; the technician, while deferring to the performers as to sound mix, retained sole control over sound volume); *Heffron v. International Soc’y for Krishna Consciousness, Inc.*, 452 U.S. 640, 654-55 (1981) (upholding as satisfying, *inter alia*, the narrow tailoring requirement a state fair rule that barred selling or distributing any materials on the fairgrounds except from fixed booths rented to all comers on a first-come, first-served basis based on an unsuccessful First Amendment challenge by Hare Krishnas who sought to circulate freely throughout the fairgrounds without having to rent a booth); *Nationalist Movement v. City of Cumming*, 92 F.3d 1135, 1140 (11th Cir. 1996) (upholding as narrowly tailored an ordinance that banned Saturday morning parades), *cert. denied*, 498 U.S. 1053 (1997); *Stokes v. City of Madison*, 930 F.2d 1163, 1165-66, 1170-71 (7th Cir. 1991) (upholding the arrest of demonstrators protesting U.S. policy toward El Salvador when they attempted to use sound amplification equipment to address a rally without first having obtained the requisite permit for use of such equipment, the court found the sound amplification ordinance was narrowly tailored); *Medlin v. Palmer*, 874 F.2d 1085, 1090-92 (5th Cir. 1989) (upholding as narrowly tailored a noise ordinance prohibiting the use of any hand-held amplifier within 150 feet of any abortion clinic or other medical facility); *United States v. Musser*, 873 F.2d 1513, 1517-18 (D.C. Cir. 1989) (upholding as narrowly tailored a federal regulation prohibiting unattended signs in Lafayette Park), *cert. denied*, 493 U.S. 983 (1989); *White House Vigil for the ERA Comm. v. Clark*, 746 F.2d 1518, 1520, 1555 (D.C. Cir. 1984) (upholding as narrowly tailored certain regulations that governed demonstrations on the White House sidewalk such as limiting the size, construction, and placement of signs there; restricting, but not prohibiting, demonstrations within the “center zone” of the sidewalk; and banning the placement, except momentarily, of parcels upon the sidewalk).

138. *Ward*, 491 U.S. at 791 (quoting *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984)). In applying this requirement, it must be remembered that “one is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it

restriction may run afoul of this requirement if it precludes “forms of expression that are much less expensive than feasible alternatives,”¹³⁹ the basic test for gauging the sufficiency of alternative channels is whether the speaker is afforded “a forum that is accessible and where the intended audience is expected to pass.”¹⁴⁰ In performing this analysis, a court should take account of (1) the speaker’s intended audience and (2) the extent to which her chosen location contributes to her message.¹⁴¹ A speech restriction does *not* leave open ample alternative channels if the speaker is left unable to reach her intended audi-

may be exercised in some other place.” *Schneider v. New Jersey*, 308 U.S. 147, 163 (1939).

139. *City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 812 n.30 (1984); *accord Bay Area Peace Navy v. United States*, 914 F.2d 1224, 1229 n.3 (9th Cir. 1990); *City of Watseka v. Illinois Public Action Council*, 796 F.2d 1547, 1558 (7th Cir. 1986), *aff’d mem.*, 479 U.S. 1048 (1987). *See, e.g., Martin*, 319 U.S. at 146 (“Door-to-door distribution of circulars is essential to the poorly financed causes of little people.”).

However, the Supreme Court has stressed that its “special solicitude” for inexpensive forms of communication “has practical boundaries.” *Taxpayers for Vincent*, 466 U.S. at 812–13 n.30 (“That more people may be more easily and cheaply reached by sound trucks . . . is not enough ‘to insulate that method of communication from regulatory restrictions’ when easy means of publicity are open.”) (citing *Kovacs v. Cooper*, 336 U.S. 77, 88–89 (1949)); *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 549–50 (1981) (Stevens, J., dissenting in part) (declaring a ban on graffiti constitutionally permissible even though some creators of graffiti may have no equally effective alternative means of public expression).

140. *Students Against Apartheid Coalition v. O’Neil*, 660 F. Supp. 333, 339 (W.D. Va. 1987); *accord Bay Area Peace Navy*, 914 F.2d at 1229.

141. *See Million Youth March, Inc. v. Safir*, 18 F. Supp. 2d 334, 347–48 (S.D.N.Y. 1998) (holding that New York City violated the First Amendment in denying a permit request by the Nation of Islam to hold a massive rally in Harlem, urging that the rally be held instead on Randall’s Island—stressing that the Randall’s Island alternative was constitutionally inadequate because it thwarted plaintiff’s access to its target audience, the residents of Harlem, and because holding the rally in Harlem was part and parcel of plaintiff’s message, a message that focused on ways to improve the lives of African-Americans); *accord Nationalist Movement v. City of Boston*, 12 F. Supp. 2d 182, 191–93 (D. Mass. 1998) (holding that city officials violated the First Amendment in denying a parade permit to plaintiff organization, a self-styled “pro-democracy, pro-majority” group viewed by its critics as racist, anti-Semitic, and anti-gay, because the city flunked the alternative channels requirement when it required the plaintiff to hold its parade in downtown Boston rather than the plaintiff’s selected site in South Boston, stressing that the downtown alternative was constitutionally inadequate because it thwarted plaintiff’s access to its target audience in South Boston and because plaintiff’s selected site, the route of the traditional St. Patrick’s Day Parade, was part and parcel of its pro-majority message: “To change the [parade’s] location, however, was to change the character of the message . . . [T]he specific place where a message is communicated may be important to the message and, consequently, of constitutional significance itself.”).

ence.¹⁴² Thus, a restriction may be invalid if it deprives speakers of “a uniquely valuable or important mode of communication,”¹⁴³ or if it “threaten[s]” their “ability to communicate effectively.”¹⁴⁴

Speech restrictions that failed to provide sufficient alternative channels are exemplified in *Dr. Martin Luther King, Jr. Movement, Students Against Apartheid*, and *Bay Area Peace Navy*.¹⁴⁵

In *Dr. Martin Luther King, Jr. Movement*, a civil rights organization sought to march through a white neighborhood, its previous foray there having been curtailed when bystanders pelted the procession with rocks, bricks, and explosive devices.¹⁴⁶ City officials denied the plaintiffs a permit for a second march through the same neighborhood, proposing instead an alternate

142. See *Bay Area Peace Navy*, 914 F.2d at 1229; accord *Taxpayers for Vincent*, 466 U.S. at 812. “While the First Amendment does not guarantee the right to employ every conceivable method of communication at all times and in all places, a restriction on expressive activity may be invalid if the remaining modes of communication are inadequate.” *Id.* at 812 (citations omitted).

143. *Taxpayers for Vincent*, 466 U.S. at 812.

144. *Id.*

145. In *Bery v. City of New York*, 97 F.3d 689 (2d Cir. 1996), *cert. denied*, 520 U.S. 1251 (1997), the court enjoined the enforcement of an ordinance that prohibited visual artists from exhibiting or selling their work in public places without a general vendors license. See *id.* at 697–98. The court held that the ordinance was not narrowly tailored, but served instead as “a de facto bar preventing visual artists from exhibiting and selling their art in public areas of New York,” because it placed an exceedingly low ceiling on the number of available permits, creating a waiting list so long that even the City conceded that plaintiffs’ prospects of securing a license were non-existent. See *id.* Addressing the availability of alternative channels, the court held that the City’s proposal that plaintiffs sell their artwork from homes, restaurants, museums, or galleries was a constitutionally inadequate substitute for sidewalk sales:

Displaying art on the street has a different expressive purpose than gallery or museum shows; it reaches people who might not choose to go into a gallery or museum or who might feel excluded or alienated from these forums. The public display and sale of artwork is a form of communication between the artist and the public not possible in the enclosed, separated spaces of galleries and museums.

Furthermore, to tell [the plaintiffs] that they are free to sell their work in galleries is no remedy for them. . . . [They] are interested in attracting and communicating with the man or woman on the street who may never have been to a gallery and indeed who might never have thought before of possessing a piece of art until induced to do so on seeing the [the plaintiffs’] works. The sidewalks of the City must be available for [the plaintiffs] to reach their public audience. The City has thus failed to meet the requirement of demonstrating alternative channels for [the plaintiffs’] expression.

Id. at 698.

146. See *Dr. Martin Luther King, Jr. Movement, Inc. v. City of Chicago*, 419 F. Supp. 667, 672 (N.D. Ill. 1976).

route through an all-black neighborhood.¹⁴⁷ Since the whole point of the plaintiffs' march was to publicize and protest a pattern of violence against blacks attempting to reside in or travel through the specified neighborhood, the court held that the city's proposal for an alternate route—plaintiffs *away from* that neighborhood and *away from* their intended audience—was constitutionally inadequate as an alternative channel of communication.¹⁴⁸

In *Students Against Apartheid*, student protesters successfully challenged the University of Virginia's lawn-use regulations, under which they had been barred from erecting symbolic shanties to protest South African apartheid and to urge the University's governing body to adopt a divestment policy toward South Africa.¹⁴⁹ The students' intended audience was the University's governing body,¹⁵⁰ whose on-campus meetings were confined to the Rotunda.¹⁵¹ But the University would permit the erection of shanties only in those areas "beyond earshot or clear sight of the Rotunda."¹⁵² By making their shanties—and thus their message—invisible to the governors ensconced in the Rotunda, this restriction thwarted the students' ability to reach their intended audience. Accordingly, the court struck it down as failing to afford alternative channels of communication.¹⁵³

In *Bay Area Peace Navy*, the Ninth Circuit held that a seventy-five-yard security zone established around the viewing stand and vessels in a naval parade violated the First Amendment rights of demonstrators who, by sailing in small boats past the onlooking dignitaries, hoped to present an anti-war message with banners and signs.¹⁵⁴ The court concluded that the government's suggested alternatives (passing out pamphlets

147. See *Dr. Martin Luther King, Jr. Movement, Inc.*, 419 F. Supp. at 672, 674.

148. See *id.* at 673-74.

149. See *Students Against Apartheid Coalition v. O'Neil*, 660 F. Supp. 333, 335-37 (W.D. Va. 1987).

150. See *id.* at 339.

151. See *id.* at 337, 339-40.

152. *Id.* at 339.

153. See *id.* at 339-40.

154. See *Bay Area Peace Navy v. United States*, 914 F.2d 1224, 1225-26, 1231 (9th Cir. 1990).

or demonstrating on land) could not substitute for a water-borne procession past the viewing stand—because the Peace Navy’s intended audience (the invited dignitaries who occupied that stand) was not accessible from land-based positions.¹⁵⁵

In contrast to the foregoing decisions, the speech restrictions in *Taxpayers for Vincent*, *ACORN*, and *Fee* were upheld as affording sufficient alternative channels of communication.¹⁵⁶ In *Taxpayers for Vincent*, a political candidate unsuccessfully challenged an ordinance that banned the posting of signs on public property and thus effectively proscribed his practice of attaching campaign signs to utility pole crosswires.¹⁵⁷ Holding that the property covered by the ordinance (which included lampposts, curbstones, fire hydrants, and tree trunks)¹⁵⁸ was not a public forum,¹⁵⁹ the Court ruled that the ordinance satisfied the reasonableness test as a content-neutral restriction on visual clutter.¹⁶⁰ In reaching this result, the Court concluded that alternative channels of communication were readily available to the plaintiff; he remained free to speak and distribute literature in precisely the same public locations where posting signs was prohibited,¹⁶¹ and nothing in the record indicated that sign-posting was uniquely superior to these alternative modes of expression.¹⁶²

In *ACORN*, the Ninth Circuit upheld an ordinance that banned soliciting funds from the occupants of motor vehicles stopped at intersections.¹⁶³ In arriving at this result, the court concluded that the ordinance left open ample alternative avenues for communication: the plaintiffs were free not only to use the

155. See *Bay Area Peace Navy*, 914 F.2d at 1229. The court likewise rejected the government’s suggestion that the Peace Navy could feasibly demonstrate beyond the 75-yard security zone by “purchas[ing] larger boats capable of handling larger banners.” *Id.* at 1229 n.3.

156. See *City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 817 (1984); *ACORN v. City of Phoenix*, 798 F.2d 1260, 1273 (9th Cir. 1986); *United States v. Fee*, 787 F. Supp. 963, 969-70 (D. Colo. 1992).

157. See *Taxpayers for Vincent*, 466 U.S. at 792-93.

158. See *id.* at 792 n.1.

159. See *id.* at 814-15.

160. See *id.* at 816-17.

161. See *id.* at 812.

162. See *Taxpayers for Vincent*, 466 U.S. at 812.

163. *ACORN v. City of Phoenix*, 798 F.2d 1260, 1273 (9th Cir. 1986).

“myriad and diverse” fundraising methods employed by other organizations—including sidewalk solicitation, door-to-door canvassing, and direct mail—but were also free under the ordinance to approach halted vehicles with *leaflets*, so long as they did not ask for money.¹⁶⁴

In *Fee*, nine environmental protesters were convicted of willfully defying a special order of the National Forest Service that closed a sector of the San Juan National Forest to permit logging activity.¹⁶⁵ The defendants had entered the closed sector of the forest to protest the cutting of ancient trees there.¹⁶⁶ Rejecting the protesters’ First Amendment defense, the court upheld the special order—which banned all expressive activity within the closed sector during a ninety-day period of active logging—as a reasonable time, place, and manner restriction.¹⁶⁷ The order had been precipitated by prior protests in which demonstrators occupied a tree for twelve days, locked themselves to a cattle guard, blocked motor vehicles, rolled logs into the road, and surrounded both loggers and trees to prevent cutting.¹⁶⁸ In upholding the order, the court concluded that it left open sufficient alternative channels by which the protesters could communicate their message.¹⁶⁹ Though the protesters wanted to demonstrate “where the trees were endangered,”¹⁷⁰ they *had* been permitted to take up position inside the forest, at the very point where the road entered the logging area.¹⁷¹ This, the court held, was constitutionally sufficient; it afforded these speakers the requisite platform by which to convey their outrage at the felling of ancient trees.¹⁷²

The guiding principle that reconciles these cases is that a speech restriction will be struck down as failing to afford sufficient alternative channels of communication only if it largely

164. See *ACORN*, 798 F.2d at 1271.

165. See *United States v. Fee*, 787 F. Supp. 963, 964-65 (D. Colo. 1992).

166. See *id.* at 965.

167. See *id.* at 968-70.

168. See *id.* at 964, 969.

169. See *id.* at 969-70.

170. See *Fee*, 787 F. Supp. at 969.

171. See *id.*

172. See *id.* at 969-70.

impairs a speaker's capacity to reach her intended audience.

F. Sharing the Unique Forum: The Problem of Counter-Demonstration

As the foregoing cases suggest, protesters may come to identify one particular *place* as uniquely suited to conveying their message. The attraction of such a place sometimes produces a distinct First Amendment problem: protesters with opposing views on the same subject clamoring to occupy the same forum at the same time. That problem—in a word, the problem of *counter-demonstration*—is the subject of this section.

In the context of any public controversy, it is often the case that one forum is particularly symbolic of, or singularly relevant to, the debate. Demonstrators protesting government policy, for example, have stationed themselves in the park opposite the White House,¹⁷³ along the route of a presidential motorcade,¹⁷⁴ in the shadow of the Republican National Convention,¹⁷⁵ outside a foreign embassy,¹⁷⁶ in the audience at a governor's inauguration speech,¹⁷⁷ and in front of a mayor's home.¹⁷⁸

In *Cox v. Louisiana*,¹⁷⁹ civil rights activists marched on the courthouse where their brethren were jailed.¹⁸⁰ Holocaust survivors have stood in vigil before the home of a Nazi death

173. See *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 289 (1984).

174. See *Glasson v. City of Louisville*, 518 F.2d 899, 901 (6th Cir.), *cert. denied*, 423 U.S. 930 (1975).

175. See *Texas v. Johnson*, 491 U.S. 397, 397 (1989).

176. See *Boos v. Barry*, 485 U.S. 312, 333-34 (1988).

177. See *ACT-UP v. Walp*, 755 F. Supp. 1281, 1284 (M.D. Pa. 1991).

178. See *Gregory v. City of Chicago*, 394 U.S. 111, 111 (1969); *New Alliance Party v. Dinkins*, 743 F. Supp. 1055, 1057 (S.D.N.Y. 1990).

179. 379 U.S. 536 (1965).

180. See *id.* at 539-42. At oral argument before the U.S. Supreme Court, the prosecution unwittingly supplied an illustration of the "unique forum" concept when citing testimony adduced at trial:

The trial judge went to great lengths in asking [one of the defendant protesters] on the witness stand, "Why the courthouse? Why did you come down here? Why not on the old State Capitol grounds or some other part of town, some public park? Why here?" And [the defendant] says, "Here's where they were arrested and we came to protest it; we came here."

MAY IT PLEASE THE COURT: THE MOST SIGNIFICANT ORAL ARGUMENTS MADE BEFORE THE SUPREME COURT SINCE 1955 112 (Peter Irons & Stephanie Guitton eds., 1993) (remarks of Ralph Roy, counsel for the State of Louisiana, at oral argument in *Cox v. Louisiana*).

camp guard;¹⁸¹ Vietnam War protesters have picketed Army recruiting stations,¹⁸² environmentalists have occupied ancient trees slated for cutting;¹⁸³ and, as we have seen so often, protesters on both sides of the abortion debate have confronted each other at clinics¹⁸⁴ and doctors' homes.¹⁸⁵

In all of these cases, protesters identified a forum that was itself resonant with meaning—a forum whose unique connection to the controversy amplified their message, lent it gravity, or imbued it with poignancy. The existence of a unique forum sometimes results in conflicting demands by rival groups for access to that forum—and, ultimately, a desire to *share* that forum, to communicate a message in simultaneous opposition to one's rival.¹⁸⁶

This counter-demonstration scenario is incidentally addressed in a number of decisions—featuring heckling,¹⁸⁷ hostile

181. See *Seven Hills v. Aryan Nations*, 667 N.E.2d 942, 945 (Ohio 1996).

182. See *Gooding v. Wilson*, 405 U.S. 518, 519 n.1 (1972); *Bachellar v. Maryland*, 397 U.S. 564, 565 (1970).

183. See *United States v. Fee*, 787 F. Supp. 963, 965 (D. Colo. 1992).

184. See *Schenck v. Pro-Choice Network of W. N.Y.*, 519 U.S. 357, 362 (1997); *Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753, 757–58 (1994).

185. See *Frisby v. Schultz*, 487 U.S. 474, 476 (1988).

186. See generally Kevin Francis O'Neill & Raymond Vasvari, *Counter-Demonstration as Protected Speech: Finding the Right to Confrontation in Existing First Amendment Law*, 23 HASTINGS CONST. L.Q. 77 (1995) (critiquing extant cases and offering a proposed analysis).

187. For example, in *In re Kay*, 464 P.2d 142 (Cal. 1970), the California Supreme Court addressed the constitutional right to heckle by invoking the First Amendment to impose a narrowing construction upon California's "disturbing a lawful meeting" statute, thereby overturning the convictions of farmworkers who registered their disapproval of a congressman's labor policy by engaging in rhythmical clapping and shouting for five to ten minutes during his campaign speech in a city park. See *id.* at 145–47, 150.

Audience activities, such as heckling, interrupting, harsh questioning, and booing, even though they may be impolite and discourteous, can nonetheless advance the goals of the First Amendment. . .

. . . An unfavorable reception, such as that given Congressman Tunney in the instant case, represents one important method by which an officeholder's constituents can register disapproval of his conduct and seek redress of grievances. The First Amendment contemplates a Debate of important public issues; its protection can hardly be narrowed to the meeting at which the audience must passively listen to a single point of view. The First Amendment does not merely insure a marketplace of ideas in which there is but one seller.

Id. at 147 (citations omitted).

In *Iowa v. Hardin*, 498 N.W.2d 677 (Iowa 1993), the Iowa Supreme Court upheld the disorderly conduct conviction of a heckler who intentionally disrupted a speech by President George Bush during a Republican fundraising rally. See *id.* at 678. The court distinguished *In re Kay*, observing that the defendant's disruptive behavior occurred in an auditorium filled with persons

audiences,¹⁸⁸ conflicting demonstrations¹⁸⁹ and parades,¹⁹⁰ the

who had paid for the opportunity to hear the President's speech, that the disruption effectively halted the program, and that the defendant was removed and arrested only after twice being asked to cease his heckling. *See Hardin*, 498 N.W.2d at 678, 681.

In *City of Spokane v. McDonough*, 485 P.2d 449 (Wash. 1971), the Washington Supreme Court held that a disorderly conduct ordinance could not be enforced to punish an attendee at an outdoor rally who shouted "warmonger" at Vice Presidential candidate Spiro T. Agnew and, flashing the peace sign at him, yelled: "What the hell do you think this means?" *Id.* at 454. For a collection of cases on this issue, see Eve H. Lewin Wagner, Note, *Heckling: A Protected Right or Disorderly Conduct?*, 60 S. CAL. L. REV. 215 (1986).

188. For example, in *Gregory v. City of Chicago*, 394 U.S. 111 (1969), the Court overturned the disorderly conduct convictions of civil rights protesters whose march to and picketing before a mayor's residence produced a hostile reaction by onlookers. *See id.* at 113. "These facts disclosed by the record point unerringly to one conclusion, namely, that when groups with diametrically opposed, deep-seated views are permitted to air their emotional grievances, side by side, on city streets, tranquility and order cannot be maintained even by the joint efforts of the finest and best officers and of those who desire to be the most law-abiding protesters of their grievances." *Id.* at 117 (Black, J., concurring).

189. For example, in *Shamloo v. Mississippi State Board of Trustees of Institutions of Higher Learning*, 620 F.2d 516, 523 (5th Cir. 1980), Iranian students brought a challenge to university regulations requiring that on-campus demonstrations be scheduled in advance with university officials. *See id.* at 519. The court upheld the regulations but struck down a provision that vested officials with the power to disapprove all but "wholesome" activities. *See id.* at 523. In doing so, the court observed that it had previously upheld advance registration requirements, which the court described as "a reasonable method to avoid the problem of simultaneous and competing demonstrations." *Id.*

In *Bayless v. Martine*, 430 F.2d 873 (5th Cir. 1970), the court upheld a university regulation requiring 48-hour advance reservation for on-campus meetings. *See id.* at 878. The requirement of reserving the Student Expression Area 48 hours in advance was a reasonable method by which the problem of simultaneous and competing demonstrations could be avoided. *See id.* While a university could be required under appropriate circumstances to permit both the Students for a Democratic Society and the Young Americans for Freedom to demonstrate, no one could reasonably contend that the Constitution required the college to permit such demonstrations to take place at the same time and in the same area. *See id.*

In *Partisan Defense Committee v. Ryan*, 841 F. Supp. 247 (C.D. Ill. 1994), state officials granted the plaintiff a permit to conduct a counter-demonstration on the north steps of the Illinois State Capitol building while the KKK would be holding a rally on the east steps; the plaintiff sought, but was denied, permission to point his sound system in the KKK's direction in order to drown out their speech. *See id.* at 248, 250.

In *A Quaker Action Group v. Morton*, 362 F. Supp. 1161 (D.D.C. 1973), *aff'd*, 516 F.2d 717 (D.C. Cir. 1975), the court upheld Interior Department regulations governing demonstrations on the White House sidewalk and in Lafayette Park permitting simultaneous demonstrations but requiring that the protest groups supply their own marshals.

190. Supreme Court dicta on this question may be found in *Grayned v. Rockford*, 408 U.S. 104 (1972), where the Court stated that "two parades cannot march on the same street simultaneously, and government may allow only one." *Id.* at 115-16. In *Cox v. New Hampshire*, 312 U.S. 569 (1941), the Supreme Court observed, in dicta, that one virtue of licensing schemes is that they serve "to prevent confusion by overlapping parades or processions." *Id.* at 576; *see also* *Knights of the Ku Klux Klan v. Martin Luther King Jr. Worshipers*, 735 F. Supp. 745, 751

administrative segregation of rival protest contingents,¹⁹¹ and a dissenter's infiltration of a forum previously secured by a permittee¹⁹²—but only one case has squarely decided how the

(M.D. Tenn. 1990) (holding that a city did not violate the First Amendment when it denied the KKK a parade permit to march on Martin Luther King Day where, on a first-come, first-served basis, the City had already issued a permit for a parade that very day by a civil rights organization); *We've Carried the Rich for 200 Years, Let's Get Them Off Our Backs—July 4th Coalition v. City of Philadelphia*, 414 F. Supp. 611, 612–14 (E.D. Pa. 1976) (refusing to allow two massive parades to be conducted simultaneously within 12 blocks of each other in downtown Philadelphia on the date of the Bicentennial and upholding the city's denial of parade permit to plaintiffs, "an amalgam of self-styled dissidents," who sought to conduct a massive counter-demonstration in close proximity to the Bicentennial's "officially sponsored" celebrations, the latter featuring a six to eight hour parade with 50,000 participants, a speech by the U.S. President, and an estimated throng of 300,000 spectators). Though this opinion evinces little enthusiasm for any right to counter-demonstrate, it can best be explained by the huge number of people involved and the physical impossibility of juxtaposing two massive events in one place.

191. In *Johnson v. Bax*, 63 F.3d 154 (2d Cir. 1995), the court addressed police enforcement of distinct "pro" and "anti" areas for demonstrators voicing their views about President Clinton during a visit to New York City. *See id.* at 154, 156. The plaintiff, who bore a sign reading "Mr. Clinton: STOP CAMPAIGNING AND LEAD!" that he regarded as offering "constructive criticism," was arrested when he refused to be placed in the "anti" area, asserting that the "anti" area afforded less favorable access to the dignitary, and that being placed there in the midst of "professional Marxists" effectively radicalized and thus altered *his* message of constructive criticism. *Id.* at 156. The court did not reach the constitutionality of these forum regulation measures, ruling that genuine issues of material fact precluded summary judgment against the plaintiff. *See id.* at 160.

In *Olivieri v. Ward*, 801 F.2d 602 (2d Cir. 1986), *cert. denied*, 480 U.S. 917 (1987), the court held that advocates and opponents of gay rights who sought access to the same unique forum, the sidewalk in front of St. Patrick's Cathedral, in order to raise their voices in response to New York City's annual Gay Pride Parade, were entitled to equal recognition of their First Amendment rights and equal time in the desired forum for conducting their demonstrations. *See id.* at 608. In striking down a police order "freezing" the sidewalk in front of the Cathedral and thereby banning any demonstrations or pedestrian traffic there during the Gay Pride Parade, the Second Circuit imposed an injunctive scheme that afforded each of the two rival groups a separate thirty-minute time slot in which to protest before the Cathedral, housed in a protective pen. *See id.*; *see also Fischer v. City of St. Paul*, 894 F. Supp. 1318, 1323, 1328–29 (D. Minn. 1995) (upholding the police segregation of pro-choice and pro-life demonstrators outside a Planned Parenthood clinic during a ten-day Operation Rescue campaign, including a police order fencing off the clinic's front sidewalk and banning all public access to it except by Planned Parenthood invitees seeking entrance to the clinic) (holding that the police restrictions here, which gave anti-abortion protesters three different vantage points from which to protest—on the sidewalk in front of property adjacent to the clinic, in a specially blocked off lane of traffic directly across the street from the clinic, and authorization for one protester to stand at the clinic's driveway entrance to hand out literature—were narrowly tailored to serve significant government interests and left open alternative channels of communication).

192. *Schwitzgebel v. City of Strongsville*, 898 F. Supp. 1208, 1211, 1219 (N.D. Ohio 1995) (rejecting First Amendment claims by two AIDS activists who, while attending a campaign speech by President George Bush in a traditional public forum, were ejected and arrested after

First Amendment governs the right to protest in the same public forum, at the very same time, as speakers with whom one disagrees.

In that case, *City of Seven Hills v. Aryan Nations*,¹⁹³ the Ohio Supreme Court rejected a flat ban on counter-demonstrations.¹⁹⁴ It struck down an injunction that barred the simultaneous presence in one particular forum of demonstrators with opposing views on one particular topic.¹⁹⁵ The forum was the residential street of John Demjanjuk, an alleged Nazi death camp guard.¹⁹⁶ The topic was Demjanjuk's recent readmission to the United States, following his release by Israeli prison authorities.¹⁹⁷ The injunctive ban on counter-demonstrations was issued at the behest of city officials in the town where

silently unfurling signs critical of Bush's policy on AIDS), *aff'd mem.*, 97 F.3d 1452 (6th Cir. 1996), *cert. denied sub. nom.* DeLong v. City of Strongsville, 522 U.S. 827 (1997).

In *Holland v. Wilson*, 737 F. Supp. 82 (M.D. Ala. 1989), the City of Montgomery, Alabama, issued a permit to the Southern Poverty Law Center for the downtown unveiling and dedication of a civil rights monument, an event that was expected to attract a crowd of between 10,000 and 20,000 spectators, the court held the City did not violate the First Amendment when it denied the KKK a permit to protest at the same time and place. *See id.* at 83, 85. Though the court may have relied on questionable grounds in reaching this result—the mutual antagonism of the two groups, the possibility of violence, and the police chief's self-serving testimony that public safety could not be guaranteed—the principal basis for its decision was that the KKK had no right of access to a forum that the Southern Poverty Law Center had already reserved by means of a permit, and that the City had issued the permit on a first-come, first-served basis. *See id.* at 83–85.

Similarly, in *Sanders v. United States*, 518 F. Supp. 728 (D.D.C. 1981), the court rejected civil rights claims by a plaintiff who asserted that his First Amendment freedoms had been violated when, for the purpose of publicizing what he believed were three mysterious deaths in South Carolina, he ventured without a permit onto the Ellipse in Washington, D.C. while an annual event was being held, and, after placing three small signs beneath the South Carolina Christmas tree and standing beside the tree with a larger sign, he was arrested. *See id.* at 729–30. The court noted that

more fundamental . . . is the interest in guaranteeing citizens the right to participate in events or demonstrations of their own choosing without being subjected to interference by other citizens. A physical intrusion into another event for the purpose of interjecting one's own convictions or beliefs is by definition an interference, regardless of how insubstantial or insignificant it might appear. As such, it is an interference with the rights of other citizens to enjoy the event or demonstration in which they have chosen to participate, and in an area reserved for them.

Id. at 730.

193. 667 N.E.2d 942 (Ohio 1996).

194. *See id.* at 949.

195. *See id.*

196. *See id.* at 945.

197. *See id.*

Demjanjuk had taken up residence.¹⁹⁸ They were alarmed when, in the days immediately surrounding his return from Israel, Demjanjuk's street became the scene of separate demonstrations by Holocaust survivors and the Ku Klux Klan.¹⁹⁹ Fearing the potential for violence if such groups were to air their diametrically opposing views at the same time in the same place, the city secured an injunction that banned the simultaneous presence of speakers with conflicting viewpoints.²⁰⁰

This ban directly interfered with the intended expression of the Holocaust survivors—who sought, by means of their very presence, to contradict the message of Holocaust revisionism advanced by the Klan.²⁰¹ But the city, arguing in support of the ban, asserted that the proposed counter-demonstration posed an unacceptable risk of violence.²⁰² The city's theory of the case, reduced to its essence, advanced a "spontaneous combustion' thesis, in which the admixture of opposing groups may be regarded, a priori, as the recipe for an explosion."²⁰³ Thus, the city argued that the incompatible *nature* of these groups made violence the probable result of any counter-demonstration—and that counter-demonstration *invariably* poses an unacceptable risk of violence because it always features the juxtaposition of antagonistic groups.²⁰⁴

The Ohio Supreme Court rejected these arguments.²⁰⁵ Under the First Amendment, it observed, the suppression of speech generally requires an *imminent*, not merely an abstract, threat of violence.²⁰⁶ It held that the injunctive ban on

198. See *Seven Hills*, 667 N.E.2d at 945.

199. See *id.*

200. See *id.* The injunction decreed that protests could be staged seven days a week, but stated that no more than 30 demonstrators could use the forum at any one time. See *id.* Prospective picketers were required to register in advance with the Seven Hills Law Department in order to protest during one of two time slots (either from 10:00 a.m. to noon or from 2:00 p.m. to 4:00 p.m.). See *Seven Hills*, 667 N.E.2d at 945. In addition, groups with differing opinions regarding the Demjanjuk affair were prohibited simultaneous access to the forum. See *id.*

201. See O'Neill & Vasvari, *supra* note 186, at 99.

202. See *id.* at 96.

203. *Id.* at 95.

204. See *id.* at 94–96.

205. See *Seven Hills*, 667 N.E. 2d at 949.

206. See *id.* at 947–48.

counter-demonstrations could be sustained only under the *Brandenburg* test (permitting the suppression of provocative speech only if intended and likely to produce imminent lawless action), and found that the record offered insufficient proof of imminent or even likely violence (because none of the protesters had engaged in violence, threatened violence, been arrested, or violated any police or court order).²⁰⁷

Though it remains unclear whether dissenters may freely infiltrate a forum previously secured by a permittee,²⁰⁸ *Seven Hills* endorses an affirmative right to engage in counter-demonstration and sharply limits the power to enjoin this unique form of expressive activity.

G. "Private" Public Fora: Free Speech in Shopping Malls and the Influence of State Constitutions

Certain privately-owned spaces—in particular, the common areas of shopping malls—bear many of the same qualities that characterize traditional public fora. As one judge has observed:

Shopping malls . . . function as public gathering centers. 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. One commentator has described shopping malls as the "new downtowns," in which members of the public may not only shop, but also stroll, sit, meet friends, and participate in community activities as they once did in downtown business districts."

By opening their shopping malls to the public, the owners of shopping malls have a reduced expectation of privacy. And citizens, because of the public nature of a mall, have a heightened expectation that they are

207. See *Seven Hills*, 667 N.E. 2d at 948 (citing *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969)).

208. See *supra* note 192.

permitted to engage in some forms of speech activities.²⁰⁹

Although attractive to prospective speakers, shopping malls have been a less than hospitable venue for speech-related activities.²¹⁰ Their owners have vigorously resisted the notion that these spaces constitute a public forum, and the resulting conflicts have produced a burgeoning body of precedent.²¹¹ These cases raise a single issue: To what extent is there a constitutional right of access for speech-related activities in privately-owned spaces that resemble traditional public fora?

There is *no* such right under the *federal* Constitution. In a 1972 shopping mall case, the U.S. Supreme Court ruled that the First Amendment serves only to restrain *governmental* restrictions on speech.²¹² But enterprising lawyers sought access under an alternative theory, invoking the free speech clauses of *state* constitutions. These clauses serve as a viable alternative because, in construing their own constitutions, state court judges are free to find greater protection for individual liberty than that found by federal judges in the U.S. Constitution.²¹³ This is true even where the state and federal charters have similar or identical language.²¹⁴

State free speech provisions may be grouped into three categories: (1) those that emulate the exclusively *negative* language of the federal First Amendment (i.e., "Congress shall make *no law* . . .");²¹⁵ (2) those that confer speech rights in

209. *Eastwood Mall, Inc. v. Slanco*, 626 N.E.2d 59 (Ohio 1994) (rejecting a free speech right of access to privately-owned shopping malls under article I, section 11 of the Ohio Constitution); *id.* at 67 (Wright, J., dissenting) (quoting Note, *Private Abridgment of Speech and the State Constitutions*, 90 YALE L.J. 165, 168 (1980)).

210. See *infra* notes 223-32 and accompanying text.

211. See *infra* notes 219-32.

212. See *Lloyd Corp. v. Tanner*, 407 U.S. 551, 567 (1972).

213. See *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 293 (1982); *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 81 (1980).

214. See *Aladdin's Castle*, 455 U.S. at 293; *PruneYard*, 447 U.S. at 81.

215. Twelve states, along with the District of Columbia, feature exclusively negative language of the sort employed in the First Amendment: D.C. CONST. art. I, § 1; HAW. CONST. art. I, § 4; IND. CONST. art. I, § 9; KY. CONST. art. I, § 8; MD. DECLARATION OF RIGHTS, art. 10; MASS. CONST. part I, art. 16; N.C. CONST. art. I, § 14; OR. CONST. art. I, § 8; R.I. CONST. art. I, § 21; S.C. CONST. art. I, § 2; UTAH CONST. art. I, § 15; W. VA. CONST. art. III, § 7.

sweeping *affirmative* language;²¹⁶ and (3) those that *combine* affirmative and negative clauses.²¹⁷

These affirmative expressions, whether or not coupled with a negative clause, provide a striking contrast to the federal charter. Pennsylvania's provision is a good example: "The free communication of thoughts and opinions is one of the invaluable rights of man, and every citizen may freely speak, write, and print on any subject, being responsible for the abuse of that right."²¹⁸ Absent from this language is any suggestion that its sole purpose is to restrain the government. Thus, affirmative phrasing in a state free speech clause raises the possibility that it reaches not merely governmental but also *private* regulation of speech.

This argument has met with mixed results. California,²¹⁹ Colorado,²²⁰ Massachusetts,²²¹ and New Jersey²²² have deemed their speech clauses sufficiently broad to confer a limited right of expressive access to privately-owned shopping malls. Ten

216. There are 18 states with speech clauses phrased in solely affirmative language: ALASKA CONST. art. I, § 5; ARIZ. CONST. art. II, § 6; ARK. CONST. art. II, § 6; CONN. CONST. art. I, § 4; DEL. CONST. art. I, § 5; IDAHO CONST. art. I, § 9; ILL. CONST. art. I, § 4; KAN. CONST. art. I, § 11; MINN. CONST. art. I, § 3; MISS. CONST. art. III, § 13; NEB. CONST. art. I, § 5; N.H. CONST. part I, art. 22; N.D. CONST. art. I, § 4; PA. CONST. art. I, § 7; S.D. CONST. art. VI, § 5; TENN. CONST. art. I, § 19; WASH. CONST. art. I, § 5; WYO. CONST. art. I, § 20.

217. Twenty states feature speech provisions that combine affirmative and negative clauses: ALA. CONST. art. I, § 4; CAL. CONST. art. I, § 2; COLO. CONST. art. II, § 10; FLA. CONST. art. I, § 4; GA. CONST. art. I, § 1, ¶ 5; IOWA CONST. art. I, § 7; LA. CONST. art. I, § 7; ME. CONST. art. I, § 4; MICH. CONST. art. I, § 5; MO. CONST. art. I, § 8; MONT. CONST. art. II, § 7; NEV. CONST. art. I, § 9; N.J. CONST. art. I, part 6; N.M. CONST. art. II, § 17; N.Y. CONST. art. I, § 8; OHIO CONST. art. I, § 11; OKLA. CONST. art. II, § 22; TEX. CONST. art. I, § 8; VT. CONST. ch. I, art. 13; VA. CONST. art. I, § 12; WIS. CONST. art. I, § 3.

218. PA. CONST. art. I, § 7. Virtually identical language may be found in article II, section 6 of the Arkansas Constitution and art. I, section 19 of the Tennessee Constitution.

219. See *Robins v. PruneYard Shopping Ctr.*, 592 P.2d 341, 347 (Cal. 1979).

220. See *Bock v. Westminster Mall Co.*, 819 P.2d 55, 59 (Colo. 1991). *But see* *Rouse v. City of Aurora*, 901 F. Supp. 1533, 1540-41 (D. Colo. 1995) (rejecting a claim under the Colorado Constitution, the district court held that a *strip mall* sidewalk is not a public forum, distinguishing *Bock* on the grounds that a strip mall does not resemble the "downtown business district" to which *Bock* had likened modern indoor shopping malls).

221. See *Batchelder v. Allied Stores Int'l, Inc.*, 445 N.E.2d 590, 595 (Mass. 1983).

222. See *New Jersey Coalition Against War in the Middle East v. J.M.B. Realty Corp.*, 650 A.2d 757, 761 (N.J. 1994); *see also* *State v. Schmid*, 423 A.2d 615, 633 (N.J. 1980) (recognizing comparable speech-related access to the campus of a private university).

other states—Arizona,²²³ Connecticut,²²⁴ Georgia,²²⁵ Iowa,²²⁶ Michigan,²²⁷ New York,²²⁸ Ohio,²²⁹ Pennsylvania,²³⁰ Washington,²³¹ and Wisconsin²³²—have demurred.

At the century's end, our traditional public fora (sidewalks, parks, and public squares) where speech enjoys the greatest protection, are less and less the crossroads of the community, less and less the setting where we encounter our fellow citizens on foot.²³³ Meanwhile, our day-to-day lives are increasingly carried out in new environments for pedestrian traffic²³⁴—spaces that are privately owned and thus afford no *federal* constitutional access for speech activity.²³⁵ As the trend toward privatization of "public" space continues, the battle for speech-related access to that space will continue as well—and, since the First Amendment has no application in this private sphere, the battle will be waged entirely on a state-by-state basis.

223. See *Fiesta Mall Venture v. Meacham Recall Comm.*, 767 P.2d 719, 723 (Ariz. Ct. App. 1988).

224. See *Cologne v. Westfarms Assocs.*, 469 A.2d 1201, 1210 (Conn. 1984).

225. See *Citizens for Ethical Gov't, Inc. v. Gwinnett Place Assocs.*, 392 S.E.2d 8, 9-10 (Ga. 1990).

226. See *State v. Lacey*, 465 N.W.2d 537, 540 (Iowa 1991).

227. See *Woodland v. Michigan Citizens Lobby*, 378 N.W.2d 337, 358 (Mich. 1985).

228. See *SHAD Alliance v. Smith Haven Mall*, 488 N.E.2d 1211, 1213 (N.Y. 1985).

229. See *Eastwood Mall, Inc. v. Slanco*, 626 N.E.2d 59, 61 (Ohio 1994).

230. See *Western Pa. Socialist Workers 1982 Campaign v. Connecticut Gen. Life Ins. Co.*, 515 A.2d 1331, 1339 (Pa. 1986).

231. See *Southcenter Joint Venture v. National Democratic Policy Comm.*, 780 P.2d 1282, 1292 (Wash. 1989).

232. See *Jacobs v. Major*, 407 N.W.2d 832, 848 (Wis. 1987).

233. See generally, VARIATIONS ON A THEME PARK: THE NEW AMERICAN CITY AND THE END OF PUBLIC SPACE (Michael Sorkin ed., 1992) (tracing the increasing privatization of "public" space that is not actually public, including malls, amusement parks, plazas, and other "variations on a theme park" that herald "the end of public space").

234. See Michael Southworth & Peter M. Owens, *The Evolving Metropolis: Studies of Community, Neighborhood, and Street Form at the Urban Edge*, J. OF THE AM. PLAN. ASS'N, June 22, 1993, at 284 (observing the increasing privatization of public space, coupled with trends in urban design that "preclude the possibility of a pedestrian-oriented environment"); Witold Rybczynski, *The New Downtowns: Shopping Malls*, THE ATLANTIC MONTHLY, May 1993, at 98 (surveying the history of shopping malls, tracing their development as "the new downtowns," and illustrating the growing obsolescence of traditional public fora).

235. See *Lloyd Corp. v. Tanner*, 407 U.S. 551, 567 (1972).

H. Government Efforts to “Privatize” Traditional Public Fora

We move now from the foregoing problem (turning private spaces into public fora) to its opposite (turning public fora into private spaces). At issue here is the power of government to *divest* certain spaces, even temporarily, of their status as traditional public fora—either “privatizing” them or transforming them into nonpublic fora. The cases in this area are few and their results are mixed, but the implications for public protest are enormous.

There are two strands of precedent in this area: (1) governmental efforts to relegate a traditional public forum to the status of a nonpublic forum;²³⁶ and (2) governmental issuance of a permit by which a traditional public forum is turned over to a private actor, who then enjoys the power to effect even view-

236. *United States v. Grace*, 461 U.S. 171, 180 (1983) (striking down a statutory prohibition against leafletting or displaying signs on U.S. Supreme Court’s sidewalk and holding that a traditional public forum cannot be transformed by government fiat into a nonpublic forum, the Court concluded that the sidewalk lining its perimeter must be treated as a public forum, and held that the sweeping ban on expressive activity there could not be justified as a reasonable place restriction).

In *Irish Subcommittee v. Rhode Island Heritage Commission*, 646 F. Supp. 347 (D.R.I. 1986), the court struck down, as content-based restrictions on public forum speech, a state commission’s regulations prohibiting the display or distribution of any political paraphernalia, including political buttons, pins, hats, and pamphlets, at the Rhode Island Heritage Day festivities. *See id.* at 352–53. The court rejected the argument that the festival as a whole, which was situated on the statehouse grounds, or its booths, from which the plaintiffs distributed their political paraphernalia, lacked the status of a traditional public forum, and noted that “[t]o allow the government to limit traditional public forum property and thereby create within it a nonpublic forum would destroy the entire concept of a public forum.” *Id.* at 353–54.

In contrast, in *Community for Creative Non-Violence v. Hodel*, 623 F. Supp. 528 (D.D.C. 1985), a public advocacy group was rebuffed by the National Park Service in its request to include a controversial statue depicting a homeless man sleeping on a steam grate in the Christmas Pageant of Peace, a “national celebration event,” held annually on the Ellipse in Washington, D.C. *See id.* at 533. The court narrowly defined the “relevant forum” as the *Pageant* (i.e., the event), *not* the Ellipse (i.e., the land on which the event was staged), and concluded that, since the *Pageant* was a nonpublic forum, the Park Service was free to select only “traditional” Christmas displays for inclusion in the event, and that the plaintiffs’ First Amendment rights would not be violated if they were permitted to erect their statue *on* the Ellipse, but *outside* the Pageant boundary. *Id.* at 534–35. Because the Ellipse is unquestionably a traditional public forum, identifying the *Pageant* as the “relevant forum” enabled the court to conclude that a public forum had been converted, partially by virtue of a permit, into a nonpublic forum. *Id.*

point-based exclusions of citizens seeking access to that forum.²³⁷

As for the first line of precedent—governmental efforts to transform a traditional public forum into a nonpublic forum—the most famous example is *United States v. Grace*,²³⁸ where Congress attempted just such a transformation of the sidewalk bordering the Supreme Court.²³⁹ Treating the sidewalk as if it were bereft of public forum status, Congress imposed an outright ban there on leafletting and displaying signs.²⁴⁰ The Supreme Court struck the statute down.²⁴¹ Holding that a traditional public forum cannot be transformed by government fiat

237. See *Sistrunk v. City of Strongsville*, 99 F.3d 194, 200 (6th Cir. 1996) (rejecting First Amendment claims by a high school student who was stripped of her “Clinton for President” button as a precondition for admission to an outdoor speech, in a traditional public forum, by incumbent candidate George Bush and holding that a municipality can lease its town commons to a private political organization, here the Bush–Quayle ’92 Campaign, for the purpose of holding a campaign rally, and the organization can in turn make attendance at its rally conditioned upon surrendering any visible expression of support for the opposing candidate), *cert. denied*, 520 U.S. 1251 (1997); *Bishop v. Reagan–Bush ’84 Comm.*, No. 86–3287, 1987 WL 35970 (6th Cir. May 22, 1987) (reversing the trial court’s grant of summary judgment for the defendants—comprising the Cincinnati police, Secret Service agents, and local and national members of the Reagan–Bush campaign committee—who had excluded plaintiff protesters from attending a campaign rally in Cincinnati’s Fountain Square unless they surrendered all signs critical of the Reagan Administration); *Schwitzgebel v. City of Strongsville*, 898 F. Supp. 1208, 1215–19 (N.D. Ohio 1995) (rejecting First Amendment claims by two AIDS activists who, while attending a campaign speech by President George Bush in a traditional public forum, were ejected and arrested after silently unfurling signs critical of Bush’s policy on AIDS) (flatly rejecting the contention that, in granting the Bush Campaign a permit to conduct its rally on the Strongsville Commons, a traditional public forum, the Commons were thereby converted into a nonpublic forum during the President’s speech—but holding that government has the power to eject counter-demonstrators from even a traditional public forum if their expression impinges upon that of a speaker already ensconced there by means of a permit), *aff’d mem.*, 97 F.3d 1452 (6th Cir. 1996), *cert. denied*, 118 S. Ct. 88 (1997).

In *Mahoney v. Babbitt*, 105 F.3d 1452 (D.C. Cir. 1997), the National Park Service attempted to privatize sidewalks lining the route of President Clinton’s inaugural parade to thwart anti-abortion protesters who sought to display banners there; however, the court sided with the protesters. See *id.* at 1458. The court flatly refused “[to] permit the government to destroy the public forum character of the sidewalks along Pennsylvania Avenue by the *ipse dixit* act of declaring itself a permittee.” *Id.* The court observed that the government “granted itself a permit for the sidewalks from which it then sought to ban the ‘inconsistent’ First Amendment activity” of the anti-abortion protesters, and concluded that “there is no authority for the proposition that the government may by fiat take a public forum out of the protection of the First Amendment by behaving as if it were a private actor.” *Id.* at 1457.

238. 461 U.S. 171 (1983).

239. See *id.* at 172.

240. See *id.* at 176.

241. See *id.* at 184.

into a nonpublic forum,²⁴² the Court concluded that the sidewalk lining its perimeter must be treated as a public forum,²⁴³ and the sweeping ban on expressive activity there could not be justified as a reasonable place restriction.²⁴⁴

Grace makes clear that the government has no power to “demote” a given forum from public to nonpublic status.²⁴⁵ But a second line of precedent—involving the power of a permittee to “privatize” a traditional public forum—has produced conflicting decisions. Specifically, this second line of precedent involves the governmental issuance of a permit by which a private actor is given temporary control over a traditional public forum—control that includes the power to effect even viewpoint-based exclusions of other citizens. Most of these cases involve efforts by presidential campaigns to stifle dissent at outdoor rallies.²⁴⁶ In these scenarios, the campaign committee (a private actor) secures a permit from a municipality to use a traditional public forum (usually a public square) as the venue for a speech by the candidate.²⁴⁷ The committee then treats the forum as if it were private property, excluding citizens who oppose the candidate and making attendance at the rally conditioned upon surrendering any visible expression of support for the candidate’s rival.²⁴⁸

242. See *Grace*, 461 U.S. at 180.

243. See *id.* This conclusion is consistent with the Court’s subsequent holding in *Frisby v. Schultz*, 487 U.S. 474, 480–81 (1988), that sidewalks do not lose their public forum status when they reach the tree-lined enclaves of suburbia.

244. See *Grace*, 461 U.S. at 182–83.

245. *United States v. Kokinda*, 497 U.S. 720 (1990), does not hold otherwise. In concluding that post office sidewalks do not constitute a traditional public forum, *Kokinda* was not addressing a “demotion” scenario; the case did not involve an effort to relegate a forum from public to nonpublic status. See *id.* at 727. Instead, *Kokinda* stressed that post office sidewalks had never attained traditional public forum status in the first place because they did not function in the same way as “public” sidewalks in serving as a traditional bastion of public discourse. See *id.* Thus, *Kokinda* does not contradict the holding in *Grace*.

246. See, e.g., *Sistrunk v. City of Strongsville*, 99 F.3d 194, 195 (6th Cir. 1996), *cert. denied*, 520 U.S. 1251 (1997); *Bishop v. Reagan–Bush ’84 Committee*, No. 86–3287, 1987 WL 35970 (6th Cir. May 22, 1987); *Schwitzgebel v. City of Strongsville*, 898 F. Supp. 1208 (N.D. Ohio 1995), *aff’d mem.*, 97 F.3d 1452 (6th Cir. 1996), *cert. denied*, 118 S. Ct. 88 (1997).

247. See, e.g., *Sistrunk*, 99 F.3d at 196; *Bishop*, 1987 WL 35970, at *1; *Schwitzgebel*, 898 F. Supp. at 1212.

248. See *Sistrunk*, 99 F.3d at 196; *Bishop*, 1987 WL 35970, at *1; *Schwitzgebel*, 898 F. Supp. at 1212–13.

Whether a public forum may be “privatized” in this way has divided the courts. Emblematic of the split are two cases that stem from the *same* campaign rally—with one court endorsing and the other rejecting a “privatization” thesis. *Sistrunk* and *Schwitzgebel* both involve an October 28, 1992 campaign speech by George Bush.²⁴⁹ The outdoor rally was staged in a traditional public forum, the Strongsville Commons, that Bush campaign officials purported to control by virtue of a one-dollar permit issued by the city.²⁵⁰ In both cases, the plaintiffs sought to engage in silent dissent, only to be censored in ways that would never be permissible in a traditional public forum.²⁵¹ The *Sistrunk* plaintiff, a high school student, was stripped of her “Clinton for President” button as the price for access to the Commons.²⁵² In *Schwitzgebel*, two men were ejected and arrested after silently unfurling signs critical of Bush’s policy on AIDS.²⁵³ Though both courts agreed that dissenters may be excluded from such a rally,²⁵⁴ they split on the “privatization” thesis, with *Sistrunk* endorsing²⁵⁵ and *Schwitzgebel* rejecting²⁵⁶ it.

Sistrunk held that the First Amendment does not prevent a municipality from granting a permittee “exclusive use” of a traditional public forum.²⁵⁷ Unfortunately, the opinion is less than clear about its theoretical underpinnings; left unanswered is whether the public *nature* of the forum is *altered* by the permit, or whether the “exclusive use” enjoyed by the permittee is simply a necessary concomitant of its expressive “autonomy.”²⁵⁸ In any event, the upshot of *Sistrunk* is that a permittee is free to *use* a traditional public forum *as if* it were private property—engaging in viewpoint-based censorship that

249. See *Sistrunk*, 99 F.3d at 196; *Schwitzgebel*, 898 F. Supp. at 1212.

250. See *Sistrunk*, 99 F.3d at 196; *Schwitzgebel*, 898 F. Supp. at 1212.

251. See *Sistrunk*, 99 F.3d at 196; *Schwitzgebel*, 898 F. Supp. at 1212–13.

252. See *Sistrunk*, 99 F.3d at 196.

253. See *Schwitzgebel*, 898 F. Supp. at 1212–13.

254. See *Sistrunk*, 99 F.3d at 198–200; *Schwitzgebel*, 898 F. Supp. at 1216–19; see *infra* note 262 (critiquing the *Schwitzgebel* analysis).

255. See *Sistrunk*, 99 F.3d at 198.

256. See *Schwitzgebel*, 898 F. Supp. at 1215–16.

257. See *Sistrunk*, 99 F.3d at 198.

258. See *id.* at 200.

would be legally impermissible even in a *nonpublic* forum.²⁵⁹

Schwitzgebel, by contrast, expressly rejected the notion that a permit in any way alters the First Amendment status of a traditional public forum.²⁶⁰ Concluding that the city's issuance of a permit to the Bush Campaign did not, even temporarily, relegate the Commons from public to nonpublic status, the court observed:

To allow the government to transform a traditionally public forum into a non-public forum is to allow the government to suspend, if only temporarily, the existence of an historically protected arena used to safeguard the communication of thoughts between free citizens. 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.²⁶¹

Thus, held the court, a permittee's ejection of dissenting voices from a traditional public forum must be analyzed under the same First Amendment standards that normally apply to restrictions on public forum speech.²⁶²

259. In a nonpublic forum, speech restrictions are analyzed under a reasonableness test, unless they are viewpoint-based. *See Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 46 (1983).

260. *See Schwitzgebel*, 898 F. Supp. at 1215-16.

261. *Id.* at 1216.

262. *See id.* at 1216-17. Given the profoundly speech-*protective* language quoted above, it is ironic that the *Schwitzgebel* court arrived at a speech-*restrictive* conclusion—finding no First Amendment violation in ejecting, arresting, and jailing two citizens who peacefully and silently expressed their disagreement with the policies of a presidential candidate at an outdoor campaign speech in a traditional public forum. *See id.* at 1213, 1219. To achieve this result, the *Schwitzgebel* court performed a tortured time, place, and manner analysis—identifying a significant governmental interest in preventing the “cacophony” of conflicting messages (a curious choice of words, since the plaintiffs were holding their banner in *silence*), and concluding (improbably) that ejecting rival viewpoints from a traditional public forum does *not* offend the content-neutrality requirement. *See id.* at 1217, 1219. Thus, even though they disagree on the power of government to divest a space of its public forum status, *Sistrunk* and *Schwitzgebel* arrive at the same *result*: when a speaker, by means of a permit, is ensconced in a traditional public forum, that forum is magically transformed into a “no dissent” zone.

In the wake of *Sistrunk* and *Schwitzgebel*, it remains unclear how to analyze viewpoint-based exclusions by public forum permittees. Does the issuance of a permit transform such a space from public to nonpublic forum? There is no consensus on the answer to that question—and, without the answer, there is no way to determine the appropriate level of judicial scrutiny. Though a recent case suggests that permit issuance does nothing to diminish the First Amendment status of a traditional public forum,²⁶³ the law on this question remains far from settled.

III. THE FOUR REGULATORY CONTEXTS AND THEIR CORRESPONDING PLAYERS: LEGISLATORS, ADMINISTRATORS, JUDGES, AND POLICE

The remaining sections in this Article correspond to the four regulatory contexts in which speech may be restricted. Legislators, administrators, judges, and police each play a distinct role in the First Amendment landscape. And for each there exists a distinct body of precedent. This Article will address in turn the precedent governing legislative power to regulate speech,²⁶⁴ administrative control over permits and fees,²⁶⁵

263. In *Mahoney v. Babbitt*, 105 F.3d 1452 (D.C. Cir. 1997), the National Park Service attempted to privatize sidewalks lining the route of President Clinton's inaugural parade, with a view toward thwarting anti-abortion protesters who sought to display banners there. *See id.* at 1457. "The government granted itself a permit for the sidewalks from which it then sought to ban the 'inconsistent' First Amendment-protected activity" of the anti-abortion protesters. *Id.* In siding with the protesters, the court flatly refused to "permit the government to destroy the public forum character of the sidewalks along Pennsylvania Avenue by the *ipse dixit* act of declaring itself a permittee." *Id.* at 1458. "[T]here is no authority for the proposition that the government may by fiat take a public forum out of the protection of the First Amendment by behaving as if it were a private actor." *Id.* at 1457. *Mahoney* appears distinguishable from *Sistrunk* and *Schwitzgebel* in one important respect: the latter cases involve *private* permittees, while *Mahoney* involves the *government itself* occupying a public forum and excluding citizens based on the viewpoint of their intended expression. In this sense, *Mahoney* is the easier case; while the censorship in *Sistrunk* and *Schwitzgebel* was carried out by private actors with government acquiescence, the censorship in *Mahoney* was committed directly and affirmatively by the state. Lurking here—but so far avoided by the courts (*see, e.g., Sistrunk*, 99 F.3d at 197)—is the question of *state action*: Is the First Amendment even implicated when a *private* permittee ejects other speakers from a forum?

264. Section IV—*infra* notes 268–408 and accompanying text.

265. Section V—*infra* notes 409–474 and accompanying text.

speech—restrictive injunctions imposed by the judiciary,²⁶⁶ and the role of police as a regulatory presence on the street.²⁶⁷

IV. LEGISLATIVE RESTRICTIONS ON PUBLIC FORUM SPEECH

When a legislative body restricts public forum speech, it acts in one of three ways: restricting *access* to the forum,²⁶⁸ restricting *use* of the forum,²⁶⁹ or restricting the speaker's *message*.²⁷⁰ In this section, the Article addresses in turn each of those three modes of regulation.

A. Restricting *Access* to the Forum: Permits and Fees

Restrictions on public forum *access* are usually imposed by means of a licensing scheme that requires a prospective speaker to secure a permit and pay a fee.²⁷¹ The Supreme Court has long acknowledged that requiring permits and fees as a precondition to speaking, parading, or assembling in a traditional public forum is a prior restraint on speech.²⁷² Though any prior restraint bears a "heavy presumption" against its validity,²⁷³ the Court has recognized that the government, in order to regulate competing uses of public fora, may require permits and fees of those wishing to hold a march, parade, or rally.²⁷⁴

The constitutionality of any such licensing scheme will

266. Section VI—*infra* notes 475–513 and accompanying text.

267. Section VII—*infra* notes 514–570 and accompanying text.

268. *See* Section IV1.

269. *See* Section IV2.

270. *See* Section IV3.

271. *See generally* Eric Neisser, *Charging for Free Speech: User Fees and Insurance in the Marketplace of Ideas*, 74 GEO. L.J. 257 (1985); David Goldberger, *A Reconsideration of Cox v. New Hampshire: Can Demonstrators Be Required to Pay the Costs of Using America's Public Forums?*, 62 TEX. L. REV. 403 (1983).

272. *See, e.g.*, *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 130 (1992); *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 150–51 (1969); *Niemotko v. Maryland*, 340 U.S. 268, 271 (1951).

273. *See* *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963).

274. *Forsyth*, 505 U.S. at 130 (citing *Cox v. New Hampshire*, 312 U.S. 569, 574-76 (1941) which upheld a licensing scheme that required prospective paraders to secure a permit and pay a fee of up to \$300).

hinge on two basic inquiries. The first goes to the degree of *discretion* that the scheme vests in the licensing official.²⁷⁵ The second goes to the barrier of *cost* that the fee creates for prospective speakers.²⁷⁶ This section will address the “cost barrier” cases; the “unfettered discretion” cases appear below, in the section on Administrative Discretion and Procedure.²⁷⁷

Municipal licensing schemes typically require a prospective speaker not only to obtain a permit before using a public forum but also to pay some sort of fee in connection with that permit.²⁷⁸ License fees have been imposed on a broad range of expressive activities,²⁷⁹ including marches,²⁸⁰ parades,²⁸¹ assemblies in

275. The Supreme Court has consistently struck down licensing schemes that vested unfettered discretion in the licensing authority. *See City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 759–60 (1988). This includes schemes that allowed the licensor to vary the fee based on the controversial nature of the speaker's message or its potential for inspiring a hostile response. *See Forsyth*, 505 U.S. at 134. The Court will treat as “a species of unbridled discretion” any failure by a licensing scheme to place limits on the time frame within which the decisionmaker must issue the license. *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 223–24 (1990) (citing *Freedman v. Maryland*, 380 U.S. 51, 56–57 (1965)).

276. *See, e.g., Murdock v. Pennsylvania*, 319 U.S. 105, 113–15 (1943) (rejecting the application of a peddler's license fee to sidewalk and house-to-house sales of religious literature by Jehovah's Witnesses); *Cox v. New Hampshire*, 312 U.S. 569, 576–78 (1941) (upholding a parade permit scheme that authorized the imposition of fees as high as \$300); *Northeast Ohio Coalition for the Homeless v. City of Cleveland*, 105 F.3d 1107, 1110–11 (6th Cir. 1997) (rejecting a First Amendment challenge, brought by indigent vendors of homeless and Nation of Islam “street” newspapers, to city's imposition of a flat, fifty-dollar-per-vendor license fee, charged as a precondition to the sidewalk sale of plaintiffs' newspapers), *cert. denied*, 118 S. Ct. 335 (1997).

277. Section V—*infra* notes 409–474 and accompanying text.

278. *See Neisser, supra* note 271, at 258–60 & nn.1–3; *Goldberger, supra* note 271, at 404 & nn.6–9. Even when the government imposes a permit requirement with no accompanying fee, the courts do not necessarily uphold the scheme. *Compare United States v. Kistner*, 68 F.3d 218, 219–20, 222–23 (8th Cir. 1995) (upholding a permit requirement imposed by the National Park Service as a prerequisite to distribution of printed matter within a national park when the defendant, who was passing out religious pamphlets at the base of the Arch in St. Louis, refused to obtain the requisite permit, even though such permits were routinely processed in 35 minutes, without any fee, and were available every day on the Arch grounds), *with Community for Creative Non-Violence v. Turner*, 893 F.2d 1387, 1389, 1392 (D.C. Cir. 1990) (striking down, for lack of narrow tailoring, a transit authority regulation requiring an advance permit, obtainable without a fee, for any person seeking to engage in any “free speech activity” in the above-ground plazas of Washington's subway system).

279. Though the focus in this Article is on *public forum* expression, speech-related permit fees have also been imposed on legislative lobbying and the operation of adult theaters and bookstores. *See, e.g., Bayside Enters., Inc. v. Carson*, 470 F. Supp. 1140, 1149 (M.D. Fla. 1979) (upholding a \$400 fee, imposed after a previously imposed fee had been invalidated, on the

ground that the city had met its burden of proving that the fee was reasonable and was designed to further valid, nonspeech-related interests of the city); *Bayside Enters., Inc. v. Carson*, 450 F. Supp. 696, 705 (M.D. Fla. 1978) (striking down an ordinance requiring that adult bookstores pay a \$1200 license fee on the ground that the city had failed to demonstrate that the fee was necessary to cover the reasonable costs of the licensing system and was used for no other purpose); *Chemline, Inc. v. City of Grand Prairie*, 364 F.2d 721, 727–28 (5th Cir. 1966) (upholding a license fee of \$25 for the issuance of a motion picture display license and a \$10 fee for each annual renewal where the fee was imposed to defray the expense of investigation and the issuance of the license); *Moffett v. Killian*, 360 F. Supp. 228, 231 (D. Conn. 1973) (striking down a \$35 registration fee for lobbying activity imposed at the beginning and end of each legislative session); *Marks v. City of Newport*, 344 F. Supp. 675, 678–79 (E.D. Ky. 1972) (striking down a provision in a licensing scheme for bookstores and theaters that required licensees to post a \$10,000 bond conditioned on not possessing or displaying any obscene material).

280. For example, in *Eastern Connecticut Citizens Action Group v. Powers*, 723 F.2d 1050 (2d Cir. 1983), the court struck down the state transportation department's \$750,000 liability insurance requirement and its \$200 administrative fee for a proposed march along abandoned railroad bed in which plaintiffs sought to express their belief that a proposed interstate highway should be replaced by rail transportation. *See id.* at 1056. The court struck down the administrative fee because the amount could not be justified as confined to defraying the state's administrative expenses. *See id.* at 1056–57. The court struck down the liability insurance requirement because an earlier march by the same group had produced no injuries or claims against the state, and the group had made numerous diligent efforts to minimize both the risk of harm to marchers and the threat of damage to adjoining property. *Id.*

In *Collin v. Smith*, 578 F.2d 1197 (7th Cir.), *cert. denied*, 439 U.S. 916 (1978), the Seventh Circuit declared unconstitutional an array of ordinances enacted by the Village of Skokie with a view toward prohibiting Nazi marches—including a provision that required \$300,000 in liability insurance as a precondition to marching. *See id.* at 1206–08, 1211.

281. For example, in *Cox v. New Hampshire*, 312 U.S. 569 (1941), the Court upheld a parade permit scheme that authorized the imposition of fees as high as \$300. *See id.* at 576–77.

In *Stonewall Union v. City of Columbus*, 931 F.2d 1130 (6th Cir. 1991), *cert. denied*, 502 U.S. 899 (1991), the court rejected a challenge by a gay rights organization to an ordinance governing parades; the plaintiffs argued unsuccessfully that the ordinance violated the Constitution by imposing “user fees” far in excess of a nominal sum as a precondition to the exercise of First Amendment freedoms. *See id.* at 1137. The ordinance required organizers of any prospective parade to apply in advance for a permit, pay a filing fee of \$85, and then prepay the cost of “traffic control,” a cost that resulted here, according to conflicting testimony, in an assessment of either \$672.50 or \$1090.70. *See id.* at 1131–32 & n.1. The court held that the fees authorized by the ordinance were neither excessive nor unreasonable and that the ordinance was not constitutionally invalid for failing to provide an indigency exception, since the public sidewalks remained a free and entirely acceptable alternative forum for “indigent paraders.” *See id.* at 1134–35. The court further held that the provision requiring prepayment of “traffic control” costs did not confer unfettered discretion upon the licensing official because it contained a range of objective criteria for computing the fee, including time, date, route length, number of participants, and the number of vehicles. *See id.*

Additionally, in *United Food & Commercial Workers Union v. City of Valdosta*, 861 F. Supp. 1570, 1584 (M.D. Ga. 1994), the court struck down as facially overbroad a range of legislative restrictions on demonstrations, picketing, leafletting, and parades, but upheld a requirement that a parade permit fee be based on the cost to the city in providing necessary traffic and crowd control. *See id.* at 1584. The court distinguished *Central Florida Nuclear Freeze Campaign v.*

public parks,²⁸² the sidewalk sale of newspapers²⁸³ and religious literature,²⁸⁴ charitable solicitations,²⁸⁵ the operation of sound

Walsh, 774 F.2d 1515 (11th Cir. 1985), and, without mentioning it, *Forsyth*, on the grounds that this permit scheme did not allow traffic and crowd-control costs to be fixed on a case-by-case basis; instead, they were pre-set "from time to time" by the mayor and city council. *United Food*, 861 F. Supp. at 1584. Thus, the court upheld the provision because "there is no indication that any individual involved in the permit process is allowed to alter the pre-set fee in response to a particular speaker's views." *Id.*

In *Gay & Lesbian Services Network, Inc. v. Bishop*, 841 F. Supp. 295 (W.D. Mo. 1993), the court found that assessing parade sponsors the cost of traffic control was a permissible component of a parade permit fee, so long as no fee for crowd control was included; to the extent that crowd control costs vary depending upon hostility toward the speaker, such fees run afoul of *Forsyth*. See *id.* at 297. By severing the offending crowd-control fee, the court here saved a Kansas City Police Department policy governing parade permits that it earlier struck down on *Forsyth* grounds. See *Gay & Lesbian Servs. Network, Inc. v. Bishop*, 832 F. Supp. 270 (W.D. Mo. 1993).

Finally, in *Houston Peace Coalition v. Houston City Council*, 310 F. Supp. 457 (S.D. Tex. 1970), the court struck down a liability insurance requirement for parades because it bestowed unfettered discretion upon the city attorney to grant or withhold parade permits consistently declined for plaintiffs' anti-war parade, voicing a policy to discourage politically-motivated parades and to limit parades to noncontroversial themes. See *id.* at 461-63.

282. See, e.g., *Invisible Empire Knights of the Ku Klux Klan v. City of W. Haven*, 600 F. Supp. 1427, 1435 (D. Conn. 1985) (granting injunctive relief to the KKK in its facial challenge to an ordinance restricting expressive activity in public parks and striking down the challenged permit scheme, *inter alia*, for failure to include an indigency exception); *Collin v. O'Malley*, 452 F. Supp. 577, 580 (N.D. Ill. 1978) (denying motion for stay pending appeal of unpublished orders and opinions enjoining Chicago from enforcing against Nazi demonstrators first \$100,000/\$300,000 public liability and \$50,000 property damage insurance for public assembly in park and then \$10,000/\$50,000 public liability and \$10,000 property damage insurance).

283. See, e.g., *Northeast Ohio Coalition for the Homeless v. City of Cleveland*, 105 F.3d 1107, 1108, 1111 (6th Cir. 1997) (rejecting a First Amendment challenge brought by indigent vendors of homeless and Nation of Islam "street" newspapers to a city's imposition of a flat, \$50-per-vendor peddler's license fee, charged as a precondition to the sidewalk sale of plaintiffs' newspapers), *cert. denied*, 522 U.S. 931 (1997); *Hull v. Petrillo*, 439 F.2d 1184, 1185-86 (2d Cir. 1971) (rejecting enforcement of a peddler's licensing ordinance against sidewalk sales of the Black Panther Party's newspaper where the scheme imposed a flat, annual, \$15-per-vendor fee as a precondition to sidewalk newspaper sales); *Gall v. Lawler*, 322 F. Supp. 1223, 1224, 1226 (E.D. Wis. 1971) (striking down a "transient merchant" license fee of \$100 per day assessed against those who engaged in sidewalk sales of an "underground" newspaper).

284. See, e.g., *Follett v. Town of McCormick*, 321 U.S. 573, 577 (1944) (rejecting the imposition of a flat \$1-per-day or \$15-per-year peddler's license fee as a precondition to sidewalk and house-to-house sales of religious literature by Jehovah's Witnesses); *Murdock v. Pennsylvania*, 319 U.S. 105, 117 (1943) (rejecting the imposition of a flat peddler's license fee, with fixed rates of \$1.50 per day, \$7 per week, \$12 per two weeks, and \$20 per three weeks, as a precondition to sidewalk and house-to-house sales of religious literature by Jehovah's Witnesses); *Busey v. District of Columbia*, 138 F.2d 592, 593-94, 596 (D.C. Cir. 1943) (striking down a \$5 peddler's license fee applied to the sidewalk sale of religious literature by Jehovah's Witnesses because the government had not met its burden of establishing that the fee did not

trucks,²⁸⁶ and the display of political signs.²⁸⁷

Such a fee is constitutionally permissible if it is directly linked to, and serves to defray, the administrative expenses incurred by the government in regulating the speaker's expres-

exceed expenses of licensing and regulation).

285. *See, e.g.,* Dayton Area Visually Impaired Persons, Inc. v. Fisher, 70 F.3d 1474, 1478, 1490 (6th Cir. 1995) (affirming the denial of preliminary injunctive relief to nonprofit organizations and professional contribution solicitors who challenged provisions of the Ohio Charitable Solicitation Act that imposed a \$25,000 bonding requirement on professional solicitors and required non-exempt charities to pay a sliding-scale registration fee of \$50 to \$200 based on the amount of contributions they received), *cert. denied*, 517 U.S. 1135 (1996); National Awareness Foundation v. Abrams, 50 F.3d 1159, 1163-64, 1166-67 (2d Cir. 1995) (upholding a New York statute that required professional fundraisers to register with the state and pay an annual fee of \$80, where the parties stipulated that the registration fees received by the state exceed its administrative costs, but that the fees are less than the combined costs of administration and enforcement); Center for Auto Safety, Inc. v. Athey, 37 F.3d 139, 140-41, 144-46 (4th Cir. 1994) (upholding provision in Maryland's charitable solicitations law that required charities annually to pay a sliding scale registration fee of \$50 to \$200 based on the nationwide level of contributions received in the previous year), *cert. denied*, 514 U.S. 1036 (1995); Fernandes v. Limmer, 663 F.2d 619, 632-33 (5th Cir. 1981) (invalidating a \$6-per-day permit fee for solicitation at an airport where the government "did not demonstrate a link between the fee and the costs of the licensing process"); Holy Spirit Ass'n for Unification of World Christianity v. Hodge, 582 F. Supp. 592, 604 (N.D. Tex. 1984) (striking down a \$10 permit fee for each person in a charitable organization who solicits funds because of the city's failure to demonstrate a link between the fee and the costs of licensing process); Streich v. Pennsylvania Comm'n on Charitable Orgs., 579 F. Supp. 172, 177 n.3, 180 (M.D. Pa. 1984) (upholding a provision in Pennsylvania's charitable solicitations law that required charities annually to pay a sliding-scale registration fee of \$10 to \$100 based on the level of contributions received in the previous year); International Soc'y for Krishna Consciousness, Inc. v. Griffin, 437 F. Supp. 666, 674 (W.D. Pa. 1977) (striking down a \$10-per-day permit fee for distributing literature and soliciting funds).

286. NAACP v. City of Chester, 253 F. Supp. 707, 714-15 (E.D. Pa. 1966) (striking down a \$25-per-day fee for permit to operate a sound truck after the city offered no evidence linking the fee and the cost of enforcing the ordinance); Pennsylvania v. Winfree, 182 A.2d 698, 703 (Pa. 1962) (sustaining a \$25-per-day permit fee for the use of the sound truck because of the city's showing that the amount of the fee was reasonable given the costs of regulating such activity); United States Labor Party v. Codd, 527 F.2d 118, 119-20 (2d Cir. 1975) (upholding a \$5 fee for the issuance of a daily permit to use a bullhorn and sustaining the fee because the sum it collected was much less than the administrative costs associated with enforcing the licensing scheme).

287. *See, e.g.,* Baldwin v. Redwood City, 540 F.2d 1360, 1371 & n.31 (9th Cir. 1976) (striking down a \$1-per-sign nonrefundable inspection fee imposed on the temporary display of political campaign signs; observing that the ordinance effectively required "a \$500 fee for inspecting 500 identical political posters," the court concluded that "[t]he absence of apportionment suggests that the fee is not in fact reimbursement for the cost of inspection but an unconstitutional tax upon the exercise of First Amendment rights"), *cert. denied sub nom., Leipzig v. Baldwin*, 431 U.S. 913 (1977).

sive activity.²⁸⁸ More controversial are fees that appear to defray nothing more than the cost of their own collection,²⁸⁹ or that force speakers to pay police,²⁹⁰ insurance,²⁹¹ or cleanup²⁹² costs

288. Compare *Codd*, 527 F.2d at 119–20 (upholding a \$5–per–day permit fee for the use of sound amplification equipment because the sum collected by this fee was much less than the administrative cost associated with enforcing the licensing scheme), and *Chemline, Inc. v. City of Grand Prairie*, 364 F.2d 721, 727–28 (5th Cir. 1966) (upholding a \$25 fee for the issuance of a motion picture display license because the fee was imposed to “defray the expense of investigat[ing] and issu[ing] the license”), with *Eastern Conn. Citizens Action Group v. Powers*, 723 F.2d 1050, 1056 (2d Cir. 1983) (striking down the imposition of a \$200 permit fee against prospective marchers because the size of the fee could not be justified as confined to defraying the state’s administrative expenses), and *Fernandes*, 663 F.2d at 632–33 (invalidating a \$6–per–day permit fee for solicitation at an airport where the government “did not demonstrate a link between the fee and the costs of the licensing process”), cert. dismissed, 458 U.S. 1124 (1982). But see *Coalition for the Homeless*, 105 F.3d at 1107 (upholding the imposition of a flat, \$50–per–vendor peddler’s license fee against the indigent vendors of homeless and Nation of Islam “street” newspapers, even though the city could identify administrative expenses totaling only \$43 per permit), cert. denied, 522 U.S. 931 (1997).

289. See, e.g., *Coalition for the Homeless*, 885 F. Supp. 1029, 1033–34 (N.D. Ohio 1995) (striking down a peddler’s licensing scheme in part because the \$50–per–vendor fee imposed by the ordinance served almost exclusively to defray nothing more than the cost of its own collection), rev’d, 105 F.3d 1107 (6th Cir.), cert. denied, 522 U.S. 931 (1997).

290. See, e.g., *Stonewall Union v. City of Columbus*, 931 F.2d 1130, 1131–32 & n.1, 1139 (6th Cir. 1991) (rejecting a First Amendment challenge by a gay rights organization to a parade permit scheme that required, *inter alia*, the prepayment of police “traffic control” costs which resulted, according to conflicting testimony, in an assessment of either \$672.50 or \$1,090.70), cert. denied, 502 U.S. 899 (1991); *United Food & Commercial Workers Union v. City of Valdosta*, 861 F. Supp. 1570, 1580–84 (M.D. Ga. 1994).

In *United Food*, the court struck down, as an impermissible time, place, and manner restriction, a range of legislative restrictions on demonstrations, picketing, leafletting, and parades, but upheld a requirement that a parade permit fee be based on the cost to the city in providing necessary traffic and crowd control. See *id.* at 1584. The court thus distinguished *Central Florida Nuclear Freeze Campaign v. Walsh*, 774 F.2d 1515 (11th Cir. 1985), and, without mentioning it, *Forsyth County v. Nationalist Movement*, 505 U.S. 123 (1992), on the grounds that the *United Food* permit scheme did not allow traffic and crowd–control costs to be fixed on a case–by–case basis; instead, they were pre–set “from time to time” by the mayor and city council; thus, the *United Food* court upheld the provision because “there is no indication that any individual involved in the permit process is allowed to alter the pre–set fee in response to a particular speaker’s views.” *United Food*, 861 F. Supp. at 1584; see also *Gay & Lesbian Servs. Network, Inc. v. Bishop*, 841 F. Supp. 295 (W.D. Mo. 1993) (assessing parade sponsors the cost of traffic control was a permissible component of parade permit fee, so long as no fee for crowd control was included; to the extent that crowd control costs vary depending upon hostility toward the speaker, such fees run afoul of *Forsyth*) (by severing the offending crowd–control fee, the court saves a Kansas City Police Department policy governing parade permits that it earlier struck down, 832 F. Supp. 270 (W.D. Mo. 1993), on *Forsyth* grounds).

291. See, e.g., *Eastern Conn. Citizens Action Group*, 723 F.2d at 1057 (invalidating a state transportation department’s \$750,000 liability insurance requirement and \$200 administrative fee for a political march along an abandoned railroad bed); *Collin v. Smith*, 578 F.2d 1197 (7th

associated with the forum's use. Likewise unsettled is just how *heavy* these pecuniary burdens may be. The Supreme Court has offered no real guidance on any of these questions since the 1940s, when it decided a cluster of cases involving license fees for parading and leafletting.²⁹³ In the intervening years, the Court has almost entirely neglected the subject of public forum user fees²⁹⁴—leaving the lower courts to fend for themselves. The result is a less than coherent body of precedent.

Cir.) (declaring unconstitutional an array of ordinances enacted by the Village of Skokie with a view toward prohibiting Nazi marches, including a provision that required \$300,000 in liability insurance as a precondition to marching), *cert. denied*, 439 U.S. 916 (1978); *Collin v. O'Malley*, 452 F. Supp. 577, 578–80 (N.D. Ill. 1978) (denying a motion for a stay pending the appeal of unpublished orders and opinions enjoining Chicago from enforcing against Nazi demonstrators a \$100,000/\$300,000 public liability and \$50,000 property damage insurance for public assembly in park and then \$10,000/\$50,000 public liability and \$10,000 property damage insurance requirement); *Houston Peace Coalition v. Houston City Council*, 310 F. Supp. 457, 461–63 (S.D. Tex. 1970) (striking down a liability insurance requirement for parades because it bestowed unfettered discretion upon the city attorney to grant or withhold parade permits).

292. See, e.g., *Goldberger*, *supra* note 271, at 404 & n.8.

293. See, e.g., *Follett v. Town of McCormick*, 321 U.S. 573, 577 (1944) (rejecting the application of a flat peddler's license fee as a precondition to sidewalk and house-to-house sales of religious literature by Jehovah's Witnesses); *Murdock v. Pennsylvania*, 319 U.S. 105, 116–17 (1943) (same); *Jones v. Opelika*, 319 U.S. 103, 104 (1943) (same); *Cox v. New Hampshire*, 312 U.S. 569, 576–77 (1941) (upholding a parade permit scheme that authorized the imposition of fees as high as \$300).

294. The Court has offered only the most fleeting elaboration on the meaning of its user fee precedents. In *Forsyth*, 505 U.S. at 123, the Court struck down an ordinance permitting a government administrator to vary the fee for assembling or parading to reflect the estimated cost of maintaining public order. See *id.* at 137. The Court held that the ordinance unconstitutionally required the administrator to examine the *content* of the prospective speaker's message and to charge a higher fee for controversial viewpoints. See *id.* The Court observed that *Murdock* “does not mean that an invalid fee can be saved if it is nominal, or that only nominal charges are constitutionally permissible. . . . The tax at issue in *Murdock* was invalid because it was unrelated to any legitimate state interest, not because it was of a particular size.” *Id.* In *Jimmy Swaggert Ministries v. Board of Equalization*, 493 U.S. 378 (1990), the Court held that the Religion Clauses of the First Amendment do not prevent a state from imposing a generally applicable sales and use tax on the distribution of religious materials by a religious organization. See *id.* at 386–92. The Court observed that the constitutional flaw in the *Murdock* and *Follett* ordinances was that, by imposing a flat license tax “as a *precondition*” to the exercise of First Amendment freedoms, “they operated as prior restraints.” *Id.* at 387 (emphasis added). In *Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenue*, 460 U.S. 575 (1983), the Court upheld a newspaper's First Amendment challenge to a state use tax on ink and paper products used in the production of periodical publications. See *id.* at 593. The *Murdock* and *Follett* fees were invalid because they were “unrelated to the receipts or income of the speaker or to the expenses of administering a valid regulatory scheme,” and because they were imposed “as a *condition* of the right to speak.” *Id.* at 587 n.9 (emphasis added).

Any examination of permit fees must start with the seminal decisions of the 1940s. Among these, the principal authority is *Cox v. New Hampshire*,²⁹⁵ which approved charging fees to demonstrators in order to recoup government expenses caused by speech activity.²⁹⁶ *Cox* rejected a First Amendment challenge by Jehovah's Witnesses to a licensing scheme that required demonstrators to obtain a permit and pay a fee of up to \$300 before marching on public streets or sidewalks.²⁹⁷ The Court upheld the fee requirement, which authorized sliding scale adjustments depending on the size of the procession, because it allowed the government to recoup only those expenses directly attributable to the applicant's speech activities.²⁹⁸ Two years earlier, in *Schneider v. New Jersey*,²⁹⁹ the Court had rejected the notion that a speech activity might be banned if it generated excessive cleanup costs for the government.³⁰⁰ Following in *Schneider's* wake, *Cox* suggested that the government, while powerless to *ban* speech activities due to their costs, might nevertheless *shift* those costs back to the speakers who generated them.³⁰¹

But in the years immediately following *Cox*, the Court emphatically restricted the power of government to foist user fees on public forum speakers. In *Murdock v. Pennsylvania*,³⁰²

295. 312 U.S. 569 (1941).

296. See Goldberger, *supra* note 271, at 404-05.

297. See *Cox*, 312 U.S. at 571 & n.1.

298. See *id.* at 577. The court suggested that, to be valid, such a fee must be levied to recoup, and should not exceed, "the expense incident to the administration of the Act and to the maintenance of public order in the matter licensed." *Id.* (quoting *State v. Cox*, 16 A.2d 508, 513 (N.H. 1940)).

299. 308 U.S. 147 (1939).

300. See *id.* at 162. In *Schneider*, the government attempted to justify broad restrictions on leafletting on the grounds that they were necessary to prevent littering. See *id.* at 154-55. The Court rejected this argument, holding that cleanup costs could not justify a ban on the distribution of leaflets. See *id.* at 162. The Court stressed that

the purpose to keep the streets clean and of good appearance is insufficient to justify an ordinance which prohibits a person rightfully on a public street from handing literature to one willing to receive it. Any burden imposed upon the city authorities in cleaning and caring for the streets as an indirect consequence of such distribution results from the constitutional protection of the freedom of speech and press.

Id.

301. See *Cox*, 312 U.S. at 577.

302. 319 U.S. 105 (1943).

and in *Follett v. Town of McCormick*,³⁰³ the Court struck down the assessment of a flat peddler's license fee imposed as a pre-condition to sidewalk and house-to-house sales of religious literature by Jehovah's Witnesses. Identifying the constitutional flaw in this type of regulatory scheme and distinguishing it from the permit fee upheld in *Cox*, the *Murdock* Court observed:

[T]he issuance of the permit [here] is dependent on the payment of a license tax. And the license tax is fixed in amount and unrelated to the scope of the [applicants' expressive activities] or to their realized revenues. It is not a nominal fee imposed as a regulatory measure to defray the expenses of policing the activities in question. It is in no way apportioned. It is a flat license tax levied and collected as a condition to the pursuit of activities whose enjoyment is guaranteed by the First Amendment. Accordingly, it restrains in advance those constitutional liberties of press and religion and inevitably tends to suppress their exercise. That is almost uniformly recognized as the inherent vice and evil of this flat license tax.³⁰⁴

Unfortunately, the Court has rarely bothered to elaborate on this language in the intervening decades.³⁰⁵ The most that may be gleaned from this passage and the Court's subsequent pronouncements are three characteristics that distinguish a flat license tax from the permit fee approved in *Cox*: A license tax of the sort struck down in *Murdock* and *Follett* is (1) unapportioned and unrelated either to the government's regulatory expenses or to the scope of the licensee's expressive activity;³⁰⁶ and it is exacted (2) in advance of, and (3) as a condi-

303. 321 U.S. 573 (1944).

304. *Murdock*, 319 U.S. at 113-14 (footnote omitted).

305. See *supra* note 294.

306. What makes the *Murdock* and *Follett* fees unconstitutional, and what distinguishes them from the fee upheld in *Cox*, is that they were "unrelated to the receipts or income of the speaker or to the expenses of administering a valid regulatory scheme." *Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575, 587 n.9 (1983). Thus, it wasn't the *size* of the *Murdock/Follett* fees that made them unconstitutional but their lack of any *linkage* either to the government's regulatory expenses or to the scope of the speakers' expressive activities. See *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 137 (1992) (observing that *Murdock* "does not mean that an invalid fee can be saved if it is nominal, or that only nominal charges are

tion precedent to, permitting the applicant to speak.³⁰⁷

Even in striking down the challenged fees in *Murdock* and *Follett*, the Supreme Court was careful to stress the continued vitality of *Cox*, observing that First Amendment freedoms are by no means immune “from all financial burdens of government,”³⁰⁸ and that municipalities retain the power to collect reasonable fees “imposed as a regulatory measure to defray the expenses of policing [expressive] activit[y]”³⁰⁹ and “protecting those on the streets and at home against the abuses of solicitors.”³¹⁰

Never squarely addressed by these cases is the question of fee *affordability*. What if a fee is set so high as to be financially oppressive to ordinary citizens? What if a demonstrator claims that he cannot afford to pay a given fee? Can the *size* of a fee, by itself, offend the First Amendment? On these questions, *Cox* and its progeny afford no express guidance.³¹¹ At most, they offer hints. *Murdock*³¹² and *Follett* both evince a genuine concern that First Amendment freedoms not be conditioned on a citizen’s ability to pay. *Murdock* cautioned that itinerant preachers might be especially vulnerable to the “cumulative effect” of fee requirements as they traveled from town to town,³¹³ and that the financial resources of a religious organi

constitutionally permissible. . . . The tax at issue in *Murdock* was invalid because it was *unrelated* to any legitimate state interest, not because it was of a particular size” (emphasis added)).

307. See *Jimmy Swaggert Ministries v. Board of Equalization*, 493 U.S. 378, 387 (1990) (observing that the constitutional flaw in the *Murdock* and *Follett* ordinances was that, by imposing a flat license tax “as a *precondition*” to the exercise of First Amendment freedoms, “they operated as prior restraints”); see also *Minneapolis Star*, 460 U.S. at 587 n.9. (holding invalid the *Murdock* and *Follett* fees because, *inter alia*, they were imposed “as a *condition* of the right to speak” (emphasis added)).

308. *Follett*, 321 U.S. at 578.

309. *Murdock*, 319 U.S. at 114.

310. *Id.* at 116–17.

311. See Goldberger, *supra* note 271, at 407–08.

312. See *Murdock*, 319 U.S. at 111 (stating that “[f]reedom of speech, freedom of the press, [and] freedom of religion are available to all, not merely to those who can pay their own way”); *Follett*, 321 U.S. at 576 (stating that “[f]reedom of religion is not merely reserved for those with a long purse”).

313. See *Murdock*, 319 U.S. at 115. In *Murdock*, the Court stated that

[i]tinerant evangelists moving throughout a state or from state to state would feel immediately the cumulative effect of [fee] ordinances as they become fashionable. . . . This method of disseminating religious beliefs can be crushed and closed out by the sheer weight of the toll or tribute which is

zation might be seriously depleted by imposing charges for its expressive activities.³¹⁴ Though *Murdock* spoke in passing of “nominal” fees as constitutionally acceptable,³¹⁵ the Supreme Court has since asserted that the flaw in the *Murdock* fee was not its *size* (i.e., its failure to be “nominal”) but its lack of any *linkage* to the government’s regulatory expenses.³¹⁶ Nevertheless, *Schneider* makes clear that the government cannot *ban* speech just because it poses administrative expenses³¹⁷—and, since there is no effective difference between banning speech and making it financially unaffordable, *Schneider* suggests that the government cannot fix public forum user fees at exorbitant levels.³¹⁸

Taken together, *Cox*, *Schneider*, *Murdock*, and *Follett* stand for a basic principle: “[T]he state may recoup the actual costs of governmental services that are generated by the use of public property for speech activities, so long as the charge is not so great as to appear to the judiciary to be oppressive or completely preclusive of speech.”³¹⁹ This principle accurately describes the approach that lower courts have taken in the decades since *Cox*.³²⁰ They have been largely *consistent* in requiring a *linkage*

exacted town by town, village by village.

Murdock, 319 U.S. at 115.

314. *See id.* at 112–14.

315. *See Murdock*, 319 U.S. at 113–14 (describing the challenged assessment, the *Murdock* Court observed: “It is not a nominal fee imposed as a regulatory measure to defray the expenses of policing the activities in question.”).

316. *See Forsyth County v. Nationalist Movement*, 505 U.S. 123, 137 (1992); *see also supra* note 306.

317. *See Schneider*, 308 U.S. at 162; *see also supra* note 300 and accompanying text. Nor can the government unduly restrict the *number* of available permits. *See Bery v. City of New York*, 97 F.3d 689 (2d Cir. 1996), *cert. denied*, 520 U.S. 125 (1997).

In *Bery*, the court enjoined enforcement of an ordinance that prohibited visual artists from exhibiting or selling their work in public places without a general vendors license. *See id.* at 697–98. The court held that the ordinance was not narrowly tailored, but served instead as “a de facto bar preventing visual artists from exhibiting and selling their art in public areas of New York,” because it placed an exceedingly low ceiling on the number of available permits, thereby creating a waiting list so long that even the city conceded that plaintiffs’ prospects of securing a license were non-existent. *Id.* Moreover, the city had at its disposal, but had refrained from using, regulatory provisions governing the time, place, and manner of vending that would serve to ease the problem of sidewalk congestion. *See id.*

318. *See Goldberger*, *supra* note 271, at 410.

319. *Id.* at 409–10.

320. *See id.* at 410 & n.42.

between any fee and the regulatory expenses it purportedly defrays,³²¹ but (due to the lack of Supreme Court guidance) they have been *inconsistent* on the question of fee *affordability*.³²² The lower courts are split on whether a licensing scheme must contain an indigency exception,³²³ and a fee has been upheld even where it was undisputed that the applicants could not afford to pay it.³²⁴ Given the confusion that its silence has produced, the Supreme Court should not wait *another* five decades before addressing the cost barriers erected by public forum permit fees.

B. Restricting Use of the Forum: Examples of Permissible and Impermissible Time, Place, and Manner Regulation

Under the First Amendment, restricting *what* a speaker may say is qualitatively different than restricting *how, when,*

321. See *supra* note 288 and accompanying text.

322. See Goldberger, *supra* note 271, at 411 & n.43. For example, a federal district court struck down a license fee remarkably similar to the one invalidated in *Murdock*: a flat fee, imposed under a peddler's licensing scheme and exacted as a precondition to the sidewalk sale of "street" newspapers by the homeless and the Nation of Islam. *Northeast Ohio Coalition for the Homeless v. City of Cleveland*, 885 F. Supp. 1029, 1030-31, 1034 (N.D. Ohio 1995), *rev'd*, 105 F.3d 1107 (6th Cir. 1997). On appeal, the Sixth Circuit held that the very same fee was valid. See *Northeast Ohio Coalition for the Homeless v. City of Cleveland*, 105 F.3d 1107 (6th Cir. 1997), *cert. denied*, 522 U.S. 931 (1997). Likewise, the Pennsylvania Supreme Court upheld a \$25-per-day sound truck permit fee and placed the burden of proving unreasonableness on the party challenging the fee. See *Commonwealth v. Winfree*, 182 A.2d 698 (Pa. 1962). But a different court held that an identical fee was invalid and placed the burden of proving reasonableness on the city. See *NAACP v. City of Chester*, 253 F. Supp. 707 (E.D. Pa. 1966).

323. Compare *Stonewall Union v. City of Columbus*, 931 F.2d 1130, 1136-37 (6th Cir.) (holding that a parade permit ordinance was not constitutionally invalid for failing to provide an indigency exception, since the public sidewalks remained a free and entirely acceptable alternative forum for "indigent paraders"), *cert. denied*, 502 U.S. 899 (1991), with *Central Fla. Nuclear Freeze Campaign v. Walsh*, 774 F.2d 1515, 1523-24 (11th Cir. 1985) (striking down a permit fee ordinance governing demonstrations in city streets and parks, in part because the scheme lacked an indigency exception), and *Invisible Empire Knights of the Ku Klux Klan v. City of W. Haven*, 600 F. Supp. 1427, 1435 (D. Conn. 1985) (granting injunctive relief to the KKK in its facial challenge to an ordinance restricting expressive activity in public parks and striking down the permit scheme, *inter alia*, for failure to include an indigency exception).

324. *Coalition for the Homeless*, 105 F.3d at 1110-1111 (upholding a \$50-per-vendor license fee against indigent vendors of homeless and Nation of Islam "street" newspapers, even in the face of the district court's finding, 885 F. Supp. at 1034, that it was an undisputed fact that the plaintiffs could not afford to pay the fee), *cert. denied*, 522 U.S. 931 (1997).

or *where* she may say it.³²⁵ Legislation targeting the *use* of a forum—governing the time, place, or manner of expressive activity—is subject to less exacting scrutiny than controls on expressive *content*.³²⁶ Unlike the strict scrutiny reserved for content-based restrictions,³²⁷ an intermediate test is used for time, place, and manner regulations.³²⁸ Under this test, the regulation must be “justified without reference to the content of the regulated speech,” must be “narrowly tailored to serve a significant governmental interest,” and must “leave open ample alternative channels for communicati[ng]” the message.³²⁹

As we have already shown,³³⁰ these three requirements are not as stringent as their language might suggest. The standard for content neutrality will be satisfied even where the regulation burdens some speakers or messages more than others.³³¹ The test for narrow tailoring is even more relaxed; the government need only show that its regulation promotes a substantial state interest “that would be achieved less effectively absent the regulation.”³³² The “ample alternative channels” requirement, though sometimes vigorously applied,³³³ usually turns on whether the speaker is effectively thwarted in reaching her audience.³³⁴

Given the comparatively relaxed application of these stan-

325. See *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 828–29 (1995).

326. See *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 761 (1995).

327. See *Pinette*, 515 U.S. at 761 (the government may regulate expressive content in a public forum “only if such a restriction is necessary, and narrowly drawn, to serve a compelling state interest”).

328. See *id.*

329. *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (quoting *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984)).

330. See *supra* section IIE.

331. See *Ward*, 491 U.S. at 791 (stating that “[a] regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others”) (citing *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 47–48 (1986)).

332. *Ward*, 491 U.S. at 799 (quoting *United States v. Albertini*, 472 U.S. 675, 689 (1985)).

333. See, e.g., *Bery v. City of New York*, 97 F.3d 689, 698 (2d Cir. 1996); *Bay Area Peace Navy v. United States*, 914 F.2d 1224, 1229 (9th Cir. 1990); *Students Against Apartheid Coalition v. O’Neil*, 660 F. Supp. 333, 339–40 (W.D. Va. 1987); *Dr. Martin Luther King, Jr. Movement, Inc. v. City of Chicago*, 419 F. Supp. 667, 673–74 (N.D. Ill. 1976).

334. See *Bay Area Peace Navy*, 914 F.2d at 1229.

dards, it is not surprising that courts have upheld a broad range of legislative restrictions on the time, place, and manner of public forum speech: restricting the time³³⁵ and location³³⁶ of parades; the site³³⁷ and number of participants³³⁸ in demonstrations; the use of public sidewalks;³³⁹ the decibel level of speeches,³⁴⁰ sound trucks,³⁴¹ and band shells;³⁴² and the size,³⁴³

335. See, e.g., *Nationalist Movement v. City of Cumming*, 92 F.3d 1135, 1140 (11th Cir. 1996) (upholding an ordinance banning Saturday morning parades as a reasonable time, place, and manner regulation), *cert. denied*, 519 U.S. 1058 (1997); *Abernathy v. Conroy*, 429 F.2d 1170, 1175 (4th Cir. 1970) (upholding an ordinance that limited parades to the hours between 8:00 a.m. and 8:00 p.m.).

336. See, e.g., *Hamer v. Musselwhite*, 376 F.2d 479, 481 (5th Cir. 1967) (upholding an ordinance banning parades on the four streets surrounding the city's courthouse square).

337. See, e.g., *Hale v. Department of Energy*, 806 F.2d 910, 916-18 (9th Cir. 1986) (rejecting a First Amendment challenge by nuclear weapons protesters to Energy Department regulations governing demonstrations at the Nevada Nuclear Weapons Test Site, and upholding as reasonable time, place, and manner restrictions precipitated by past abuses and trespasses by demonstrators regulations limiting demonstrations to a designated parking and demonstration area, and requiring a 30-day advance application for a permit, including the submission of any leaflets or handbills to be distributed).

338. See, e.g., *Blasecki v. City of Durham*, 456 F.2d 87, 94 (4th Cir.) (upholding an ordinance that prohibited more than 50 people from assembling in a small downtown park), *cert. denied*, 409 U.S. 912 (1972); *Davis v. Francois*, 395 F.2d 730, 735 (5th Cir. 1968) (striking down an ordinance that absolutely limited the number of picketers to two, regardless of the time, place, or circumstances).

339. See, e.g., *Roulette v. City of Seattle*, 97 F.3d 300, 302-05 (9th Cir. 1996) (rejecting a First Amendment challenge brought by homeless advocates, street musicians, and other political organizations, the Ninth Circuit here upheld a prohibition against sitting or lying on sidewalks between 7:00 a.m. and 9:00 p.m.); *White House Vigil for the ERA Comm. v. Clark*, 746 F.2d 1518, 1542 (D.C. Cir. 1984) (upholding as reasonable time, place, and manner restrictions on demonstrations taking place on the White House sidewalk regulations that, *inter alia*, restricted, but did not prohibit, demonstrations within the "center zone" of the sidewalk); *Friedrich v. City of Chicago*, 619 F. Supp. 1129, 1142-45 (N.D. Ill. 1985) (denying a First Amendment and Equal Protection challenge by breakdancers and other street performers to a Chicago ordinance regulating sidewalk entertainment in which the court held, *inter alia*, that a provision banning street performances during a narrow span of hours on Friday and Saturday nights in a narrow sector of city's entertainment district did not violate the First Amendment rights of street performers, since the ban applied only during periods when the area was most crowded and when performers, especially breakdancers, had drawn crowds large enough to force pedestrians into the street).

340. See, e.g., *Stokes v. City of Madison*, 930 F.2d 1163, 1166 (7th Cir. 1991); *Medlin v. Palmer*, 874 F.2d 1085 (5th Cir. 1989). In *Stokes*, demonstrators protesting U.S. policy toward El Salvador were arrested when they attempted to use sound amplification equipment to address a rally without first having obtained the requisite permit for the use of such equipment; the court upheld the sound amplification ordinance as a reasonable time, place, and manner restriction. See *Stokes*, 930 F.2d at 1166-67. The ordinance, which governed speeches and demonstrations for the State Street Mall/Capitol Concourse in Madison, Wisconsin, imposed a two-tier regulatory structure on the use of sound amplification: depending upon the time of day when the rally

number,³⁴⁴ construction,³⁴⁵ and placement³⁴⁶ of signs.

Time, place, and manner regulations have been invalidated only where: (1) they targeted particular messages for suppression (and thereby violated the content neutrality requirement),³⁴⁷ (2) they imposed sweeping restrictions on valued forms of expressive activity (and thereby violated the narrow tailoring requirement),³⁴⁸ or (3) they seriously impaired a speaker's capacity to reach her intended audience (and thereby violated the alterna-

was to be held, the applicant was required to secure either a \$20.00 street use permit or an electrical permit costing \$5.00 plus 15 cents per hour. *See Stokes*, 930 F.2d at 1166-67. In *Medlin*, the court upheld as a legitimate time, place, and manner regulation a noise ordinance prohibiting the use of any hand-held amplifier within 150 feet of any abortion clinic or other medical facility. *See Medlin*, 874 F.2d at 1091-92.

341. *See, e.g., Kovacs v. Cooper*, 336 U.S. 77, 88-89 (1949) (upholding an ordinance prohibiting the use on city streets of sound trucks emitting "loud and raucous" noises).

342. *See, e.g., Ward v. Rock Against Racism*, 491 U.S. 781, 802 (1989) (rejecting a First Amendment challenge by a rock concert promoter to New York City's use guidelines for its band shell in Central Park; the guidelines, upheld as a reasonable time, place, and manner restriction, were designed to limit the noise level of band shell concerts by requiring the performers to use a sound system and a sound technician furnished by the city; the technician, while deferring to the performers as to sound mix, retained sole control over sound volume).

343. *See, e.g., White House Vigil*, 746 F.2d at 1541 (upholding, as reasonable time, place, and manner restrictions on demonstrations taking place on the White House sidewalk, regulations that limited, *inter alia*, the size of signs on the sidewalk).

344. *See, e.g., Thomas v. United States*, 696 F. Supp. 702, 705 (D.D.C. 1988) (rejecting a vagueness challenge by anti-nuclear protesters to federal regulations governing protests in Lafayette Park, and observing that the challenged provisions, restricting, *inter alia*, the number of signs to be employed by protesters, were valid time, place, and manner restrictions).

345. *See, e.g., White House Vigil*, 746 F.2d at 1532-34 (upholding, *inter alia*, restrictions on the construction of signs to be employed by protesters using the White House sidewalk).

346. *See, e.g., City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 817 (1984) (denying a political candidate's challenge to an ordinance that banned the posting of signs on public property and thus effectively proscribed the candidates practice of attaching campaign signs to utility pole crosswires); *United States v. Musser*, 873 F.2d 1513, 1518-19 (D.C. Cir.) (rejecting a First Amendment challenge to a federal regulation prohibiting unattended signs in Lafayette Park), *cert. denied*, 493 U.S. 983 (1989).

347. *See, e.g., Boos v. Barry*, 485 U.S. 312, 321, 334 (1988) (striking down a District of Columbia statute that criminalized the display of any sign criticizing a foreign government within 500 feet of its embassy, and holding that the statute's display clause was content-based because its sole justification was "to protect the dignity of foreign diplomatic personnel by shielding them from speech that is critical of their governments").

348. *See, e.g., Henderson v. Lujan*, 964 F.2d 1179, 1186 (D.C. Cir. 1992) (striking down for lack of narrow tailoring a National Park Service regulation banning all leafletting on the sidewalks surrounding the Vietnam Veterans Memorial, where the sidewalks, even at their closest, were more than 100 feet from the Memorial's wall).

tive channels requirement).³⁴⁹

C. Restricting the Speaker's Message: The Many Guises of Content-Based Regulation

Where legislation is employed to restrict the content of public forum speech, the government acts in one of two ways: (1) *directly* restricting expressive content by targeting particular topics or viewpoints; or (2) restricting content *indirectly* by punishing a speaker for the *reaction* produced by a controversial message. In either context, a court will subject the restriction to heightened scrutiny. The reason for *distinguishing* between direct and indirect restrictions on speech is that each context has given birth to *distinct* bodies of precedent.

1. Regulating Content Directly: Restricting Political Expression, Flag Desecration, and Other Topics or Perspectives

Direct regulation of expressive content is presumptively unconstitutional.³⁵⁰ Examples of *direct* regulation include:

- (1) statutes prohibiting the expression of certain political views: criticizing a foreign government near

349. See, e.g., *Students Against Apartheid Coalition v. O'Neil*, 660 F. Supp. 333, 339–40 (W.D. Va. 1987) (granting injunctive relief to student protesters who challenged a university's lawn-use regulations, under which they had been barred from erecting symbolic shanties to protest South African apartheid and to urge the university's governing body to adopt a divestment policy toward South Africa and holding that the alternative channels of communication offered by the university—erecting the shanties “beyond earshot or clear sight of the Rotunda”—were constitutionally inadequate because they thwarted students' ability to reach their intended audience: the university's governing body, which met on campus only four times a year and gathered only in the Rotunda).

350. See, e.g., *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 828 (1995); *accord* *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 641 (1994). “It is axiomatic,” the Supreme Court has stressed, “that the government may not regulate speech based on its substantive content or the message it conveys.” *Rosenberger*, 515 U.S. at 828; *accord* *Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 96 (1972). “If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.” *Texas v. Johnson*, 491 U.S. 397, 414 (1989). To survive judicial review, a content-based restriction on public forum speech must satisfy strict scrutiny; it will be struck down unless shown to be “necessary, and narrowly drawn, to serve a compelling state interest.” *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 761 (1995).

its embassy,³⁵¹ soliciting votes near a polling place,³⁵² expressing opposition to organized government,³⁵³ advocating illegal conduct to achieve political reform,³⁵⁴ calling for the government's overthrow,³⁵⁵

351. *See, e.g., Boos*, 485 U.S. at 318–19 (striking down a District of Columbia statute that criminalized the display of any sign criticizing a foreign government within 500 feet of its embassy and holding that the provision is a content-based restriction on political speech in a traditional public forum).

352. *See, e.g., Burson v. Freeman*, 504 U.S. 191, 211 (1992). In a rare example of a content-based restriction on public forum speech *surviving* strict scrutiny, the Court upheld a Tennessee statute prohibiting the solicitation of votes and the display or distribution of campaign materials within 100 feet of a polling place entrance, concluding that this restriction was narrowly tailored to serve the compelling state interest in preventing voter intimidation and election fraud. *See id.* Justice Scalia, in his concurrence, asserted that strict scrutiny was not the appropriate standard here; the statute should have been sustained as a viewpoint-neutral regulation of a non-public forum: "Because restrictions on speech around polling places on election day are as venerable a part of the American tradition as the secret ballot, [the challenged statute] does not restrict speech in a traditional public forum, and the 'exacting scrutiny' that the plurality purports to apply is inappropriate." *Id.* at 214 (Scalia, J., concurring) (citations omitted).

353. *See, e.g., Stromberg v. California*, 283 U.S. 359, 369–70 (1931) (overturning the conviction of a Youth Communist League member by striking down statute that criminalized the display of any "red flag, banner, or badge [employed] as a sign, symbol, or emblem of opposition to organized government").

354. *See, e.g., Brandenburg v. Ohio*, 395 U.S. 444, 449 (1969); *De Jonge v. Oregon*, 299 U.S. 353 (1937) (invoking the First Amendment to reverse a criminal syndicalism conviction of a defendant who had merely assisted in the conduct of a public meeting held under the auspices of the Communist Party); *Fiske v. Kansas*, 274 U.S. 380, 387 (1927) (reversing a criminal syndicalism conviction for insufficiency of evidence where the defendant, found merely in possession of the preamble to the constitution of the Industrial Workers of the World, was prosecuted for membership in and allegedly organizing activities for the organization that advocated "class struggle"); *Whitney v. California*, 274 U.S. 357, 372 (1927) (sustaining the criminal syndicalism conviction of a woman who merely attended the convention of, and sought to help organize, a new political party, the California branch of the Communist Labor Party).

In *Brandenburg*, the Court struck down Ohio's Criminal Syndicalism Act and set aside a Ku Klux Klansman's conviction thereunder because the Act punished the mere advocacy of using violence to achieve political change. *See Brandenburg*, 395 U.S. at 449. The Court held that the First Amendment forbids criminalizing subversive advocacy "except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action." *Id.* at 447. The Supreme Court also overruled a case that had upheld a criminal syndicalism statute featuring language very similar to Ohio's Criminal Syndicalism Act. *See id.* at 449 (overruling *Whitney v. California*, 274 U.S. 357 (1927)).

355. *See, e.g., Scales v. United States*, 367 U.S. 203, 229–30 (1961) (limiting further the Smith Act by precluding prosecution for mere membership in the Communist Party, requiring instead some "active," "knowing" participation in illegal ends); *Yates v. United States*, 354 U.S. 298, 318–19 (1957) (undercutting sharply the *Dennis* decision and effectively halting further prosecutions under the Smith Act by stressing that, consistent with the First Amendment, a subversive advocacy conviction cannot be based on speech that urges followers merely to *believe* something; it must urge them to do something, to take some specific, concrete action); *Dennis*

or urging obstruction of the government's war effort;³⁵⁶

- (2) statutes governing treatment of the American flag: affirmatively *requiring* its display,³⁵⁷ or punishing its misuse,³⁵⁸ alteration,³⁵⁹ or desecration;³⁶⁰ and

v. United States, 341 U.S. 494, 516 (1951) (sustaining convictions of the national leaders of the Communist Party by upholding the constitutionality of the Smith Act, which criminalized conspiring to advocate the government's overthrow); *Gitlow v. New York*, 268 U.S. 652, 672 (1925) (sustaining the defendant's criminal anarchy conviction for printing and circulating a leaflet, entitled "The Left Wing Manifesto," that called for "revolutionary mass action").

356. See, e.g., *Abrams v. United States*, 250 U.S. 616, 624 (1919) (upholding the Espionage Act convictions of several defendants who, in opposition to U.S. military intervention against the Bolshevik Revolution in Russia, printed and distributed on the streets of New York City certain leaflets urging that production of ordnance and ammunition for the war effort be curtailed); *Debs v. United States*, 249 U.S. 211, 216–17 (1919) (upholding an Espionage Act conviction and 10-year jail sentence based on the anti-war sentiments expressed by a defendant in a public speech; though the defendant's remarks did not directly oppose U.S. involvement in World War I, he expressed a general abhorrence of war and praised individuals who had resisted or obstructed the draft); *Frohwerk v. United States*, 249 U.S. 204, 210 (1919) (sustaining Espionage Act conviction for preparing and publishing anti-war articles in Missouri's German-language newspaper); *Schenck v. United States*, 249 U.S. 47, 52–53 (1919) (upholding an Espionage Act conviction of the Socialist Party General Secretary who, in opposition to U.S. intervention in World War I, mailed to draft-aged men leaflets that urged resistance to the draft, denounced conscription, and impugned the motives of those backing the war effort).

357. See, e.g., *Cobb v. Beame*, 402 F. Supp. 19, 26 (S.D.N.Y. 1975) (enjoining the enforcement of an ordinance that required the display of an American flag at all assemblies and parades in an action brought by U.S. Labor Party officials after they were arrested at party rallies for failure to have an American flag on display).

358. See, e.g., *Spence v. Washington*, 418 U.S. 405, 408, 414 (1974) (involving a successful as-applied challenge to a flag misuse statute under which the defendant college student was prosecuted for displaying from his apartment window an American flag, hung upside down, with a peace symbol attached, in order to protest U.S. intervention in Cambodia and the killing of students at Kent State); *Smith v. Goguen*, 415 U.S. 566, 568, 582 (1974) (striking down as void for vagueness a flag misuse statute that criminalized publicly treating the American flag contemptuously, since the statute offered no basis for determining what sort of conduct fell within its prohibition, and thereby left police, courts, and juries free to enforce it under their own preferences for treatment of the flag).

359. See, e.g., *Long Island Vietnam Moratorium Comm. v. Cahn*, 437 F.2d 344, 345–46, 350 (2d Cir. 1970) (striking down a New York flag-alteration statute used by local prosecutors to discourage the dissemination of a defendants' buttons and decals, which superimposed a peace sign on the American flag), *aff'd mem.*, 418 U.S. 906 (1974).

360. See, e.g., *United States v. Eichman*, 496 U.S. 310, 312, 319 (1990) (invoking strict scrutiny to strike down the Flag Protection Act, a federal statute that criminalized the desecration of American flags); *Texas v. Johnson*, 491 U.S. 397, 420 (1989) (holding that, in striking down a Texas flag desecration statute, the defendant's act of burning an American flag during a protest rally against President Reagan was expressive conduct within the First Amendment's protection, and that neither of the state's asserted interests—preventing breaches of the peace and preserving

(3) statutes targeting particular types or topics of speech: fighting words,³⁶¹ hate speech,³⁶² anonymous

the flag as a symbol of national unity—could justify criminalizing the defendant's conduct); *Street v. New York*, 394 U.S. 576, 579 (1969) (overturning a conviction under New York's flag desecration statute because, due to the statute's language, the defendant's conviction may have been based solely or partly on the words he uttered—where he publicly burned an American flag when he learned that civil rights leader James Meredith had been shot, declaring: "We don't need no damn flag . . . [i]f they let that happen to Meredith, we don't need an American flag."); *Monroe v. State Court of Fulton County*, 739 F.2d 568, 570, 576 (11th Cir. 1984) (anticipating *Texas v. Johnson*, this court held that Georgia's flag desecration statute was unconstitutional as applied to a flag-burner who was protesting U.S. intervention in Iranian affairs); *United States v. Crosson*, 462 F.2d 96, 98, 104 (9th Cir.) (rejecting a First Amendment challenge to a federal flag desecration statute, and upholding defendant's conviction thereunder, where defendant had burned a flag to protest U.S. military intervention in Vietnam), *cert. denied*, 409 U.S. 1064 (1972); *Joyce v. United States*, 454 F.2d 971, 977–79, 990 (D.C. Cir. 1971) (affirming defendant's conviction, under a federal flag desecration statute, for tearing up an American flag while standing along the route of Nixon's first inaugural parade), *cert. denied*, 405 U.S. 969 (1972); *see also Ohio v. Lessin*, 620 N.E.2d 72, 73–74, 79 (1993) (holding that an inciting-to-violence conviction could not rest on angry crowd reaction to a flag-burner's provocative expression, thereby overturning the conviction of a Revolutionary Communist Workers' Party member who had burned an American flag on Cleveland's Public Square to protest the decision by President George Bush to send troops to Persian Gulf); *cf. United States v. O'Brien*, 391 U.S. 367, 369–70, 386 (1968) (rejecting a First Amendment defense to a conviction for burning draft card; holding that the Constitution does not bar the government from regulating conduct, even conduct with expressive qualities, if the governmental interest is unrelated to the suppression of ideas).

361. *See, e.g., Chaplinsky v. New Hampshire*, 315 U.S. 568, 571–72 (1942) (recognizing, as a category of unprotected speech, those "fighting words" that "by their very utterance inflict injury or tend to incite an immediate breach of the peace," and upholding the defendant's conviction under a statute that, saved by the narrowing construction of state courts, punished no more than "fighting words," where the defendant called the city marshal "a God damned racketeer" and "a damned Fascist"); *cf. Gooding v. Wilson*, 405 U.S. 518, 518–19, 528 (1972) (striking down, on vagueness and overbreadth grounds, a Georgia statute criminalizing the use of "opprobrious words or abusive language, tending to cause a breach of the peace," where Georgia courts had not issued a narrowing construction of the statute limiting its scope to "fighting words").

362. *See, e.g., R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992); *Collin v. Smith*, 578 F.2d 1197 (7th Cir.), *cert. denied*, 439 U.S. 916 (1978).

In *R.A.V.*, the Court struck down an ordinance that, in criminalizing "bias-motivated disorderly conduct," singled out for punishment the public display of symbols or graffiti "arous[ing] anger, alarm, or resentment in others on the basis of race, color, creed, religion, or gender." *R.A.V.*, 505 U.S. at 380, 396. The Court held that the ordinance was fatally flawed because, in singling out for criminal punishment a particularized list of hateful sentiments and leaving all others unregulated, it effectuates a form of content-based—and arguably viewpoint-based—discrimination. *See id.* at 391–94.

In *Collin*, the Seventh Circuit declared an array of ordinances prohibiting Nazi marches unconstitutional. *See Collin*, 578 F.2d at 1210. Additionally, as an impermissible content-based restriction on speech and, separately, on overbreadth grounds, the court struck down a prohibition against disseminating materials that would promote hatred toward persons on the basis of

speech,³⁶³ political speech,³⁶⁴ labor speech,³⁶⁵ or threats upon the President's life.³⁶⁶

2. Regulating Content Directly: The Special Test for Restrictions on Illegal Advocacy

Within this realm of direct content-based regulation, certain categories of speech do not enjoy full First Amendment protection.³⁶⁷ Critical to the study of public protest is the particular

their heritage. See *Collin*, 578 F.2d at 1202-07.

363. See, e.g., *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 337-40, 357 (1995) (striking down Ohio's prohibition against the distribution of anonymous campaign literature); *Talley v. California*, 362 U.S. 60, 60-61, 65 (1960) (striking down an absolute ban on the distribution of anonymous leaflets).

364. See, e.g., *Aiona v. Pai*, 516 F.2d 892, 893 (9th Cir. 1975) (striking down a statute that banned the sidewalk use of *political* signs but did not ban signs bearing other messages).

365. See, e.g., *Carey v. Brown*, 447 U.S. 455, 460-61 (1980) (striking down, as a content-based restriction on public forum speech, a statute that banned the picketing of residences or dwellings but exempted from its prohibition the picketing of any place of employment involved in a labor dispute, where the lawsuit stemmed from the plaintiffs' arrest under the statute for protesting the racial integration policies of Chicago's mayor by picketing on the sidewalk before his home). In *Carey*, the Court stated that

[o]n its face, the Act accords preferential treatment to the expression of views on one particular subject; information about labor disputes may be freely disseminated, but discussion of all other issues is restricted. The permissibility of residential picketing under the [Act] is thus dependent solely on the nature of the message being conveyed.

Id. at 460-61; see also *Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 92-94, 102 (1972) (striking down, as a content-based restriction on public forum speech, an ordinance that prohibited all picketing within 150 feet of a school, except for picketing of any school involved in a labor dispute); *People Acting Through Community Effort v. Doorley*, 468 F.2d 1143, 1143-44, 1146 (1st Cir. 1972) (striking down an ordinance that banned residential picketing but permitted labor picketing); *Davis v. Village of Newburgh Heights*, 642 F. Supp. 413, 413-414, 415 (N.D. Ohio 1986) (holding that an ordinance regulating picketing, which applied only to *labor* picketing, violated the Equal Protection Clause).

366. See, e.g., *Watts v. United States*, 394 U.S. 705, 706 (1969) (holding that an anti-war activist could not be punished for saying, "If they ever make me carry a rifle the first man I want to get in my sights is L.B.J.>").

367. The Supreme Court employs a two-tiered "categorical" approach to direct restrictions on expressive content, and will strike down such restrictions as presumptively unconstitutional unless the regulated utterance belongs to a category of speech defined in advance as being unworthy of full protection. See *R.A.V.*, 505 U.S. at 383. These "low level" categories of speech are denied full First Amendment protection because they are "no essential part of any exposition of ideas," and are of only "slight social value as a step to truth." *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-72 (1942). There are seven categories of "low level" speech. Some are utterly unprotected by the First Amendment, while others are less than fully protected. The *unprotected* categories are: (1) Advocacy of Imminent Lawless Action; (2) Obscenity; (3) Child Pornography; and (4) Fighting Words. The *less than fully protected* categories are: (1) Defama-

ized test that applies to a category of speech known as subversive advocacy—i.e., the advocacy of illegal conduct.

Throughout much of the 20th century, this category was so broadly conceived that dissident *political* speech fell within its ambit. It was used to criminalize anti-war speech during World War I,³⁶⁸ protests against U.S. military intervention in the Bolshevik Revolution,³⁶⁹ abstract calls for revolutionary mass action,³⁷⁰ and mere membership in the Communist Party.³⁷¹ Gradually—through the influence of Justices Louis Brandeis³⁷² and Oliver Wendell Holmes, Jr.³⁷³—the scope of this category was narrowed, such that it came to embrace only *imminent*,

tory Statements; (2) Commercial Speech; and (3) the Lewd/Profane/Indecent. Speech that falls within an *unprotected* category is generally vulnerable to content-based regulation. But content-based restrictions are *not* necessarily valid when applied to the *less than fully protected* categories; such restrictions are gauged under the particular form of intermediate scrutiny developed for each category.

368. See *Debs v. United States*, 249 U.S. 211, 216–17 (1919) (upholding an Espionage Act conviction and ten-year jail sentence based on the anti-war sentiments expressed by the defendant, a national leader of the Socialist Party, during a public speech); *Frohwerk v. United States*, 249 U.S. 204, 210 (1919) (sustaining an Espionage Act conviction and a ten-year jail sentence for preparing and publishing anti-war articles in Missouri's German-language newspaper); *Schenck v. United States*, 249 U.S. at 52–53 (upholding an Espionage Act conviction of the Socialist Party General Secretary who, in opposition to World War I, mailed to draft-age men certain leaflets urging resistance to the draft, denouncing conscription, and impugning the motives of those backing the war effort).

369. See *Abrams v. United States*, 250 U.S. 616, 616–18, 624 (1919) (sustaining the Sedition Act convictions of five defendants who distributed leaflets on the streets of New York City opposing U.S. military intervention in Russia to help overthrow the Bolshevik Revolution; the leaflets denounced the intervention, advocated solidarity with the Russian workers, and urged curtailment of the production of ordnance and ammunition to be used in the incursion).

370. See *Gitlow v. New York*, 268 U.S. 652, 655 (1925) (sustaining the conviction of the defendant, a founder of the American Communist Party, under New York's criminal anarchy law, for writing and disseminating a pamphlet, "The Left Wing Manifesto," that advocated revolution in the abstract, stressing the need for "revolutionary mass action," but fell short of urging any specific, immediate illegal action).

371. See *Whitney v. California*, 274 U.S. 357, 372 (1927), *overruled by* *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (sustaining the California Criminal Syndicalism Act conviction of a woman who merely attended the convention of, and sought to help organize, a new California branch of the Communist Labor Party).

372. See, e.g., *Whitney*, 274 U.S. at 377 (Brandeis, J., concurring) (stressing that advocacy of illegal conduct cannot be criminalized unless the harm it poses is both imminent and serious).

373. See, e.g., *Abrams*, 250 U.S. at 630–31 (Holmes, J., dissenting) (stating that advocacy of illegal conduct may be legitimately suppressed only where it "imminently threaten[s]" the public, and only where it creates an "emergency that makes it immediately dangerous to leave the correction of evil counsels to time").

and not merely theoretical, calls for illegal action.³⁷⁴

The prevailing test is contained in *Brandenburg v. Ohio*,³⁷⁵ which permits punishment only for incitement that is both *intended* and *likely* to produce "imminent lawless action."³⁷⁶ Under this standard, the Supreme Court has held that a campus anti-war protester who joined other demonstrators in blocking a street could not be punished for declaring, after police dispersed the crowd, "We'll take the fucking street later,"³⁷⁷ and that the First Amendment likewise protected the statements of a civil rights activist who, in a speech urging adherence to an NAACP boycott, asserted: "If we catch any of you going in any of them racist stores, we're gonna break your damn neck."³⁷⁸ In the latter case, the Court held that the boycottter's speech, however charged with emotion, did not transcend the bounds of *Brandenburg* because it did not call for *imminent* lawless action.³⁷⁹ Mere *advocacy* of illegal conduct down the road is not enough.³⁸⁰

3. Regulating Content Indirectly: The "Hostile Audience" Cases

The government regulates content *indirectly* by punishing an unpopular speaker for the *reaction* to his message. This *indirect* regulation of expressive content is usually accomplished

374. See *Noto v. United States*, 367 U.S. 290, 297-98 (1961) (reversing a conviction for membership in the Communist Party where the evidence did not establish that the Party had engaged in illegal advocacy, and stating that "the mere abstract teaching . . . of the moral propriety or even moral necessity for a resort to force and violence, is not the same as preparing a group for violent action and steeling it to such action").

375. 395 U.S. 444 (1969). In *Brandenburg*, the Court struck down Ohio's Criminal Syndicalism Act, and set aside a Ku Klux Klansman's conviction thereunder, because the Act punished the mere advocacy of using violence to achieve political change. See *id.* at 449. The Klansman was convicted principally on the basis of a speech in which he asserted: "We're not a revengent organization, but if our President, our Congress, our Supreme Court, continues to suppress the white, Caucasian race, it's possible that there might have to be some revengeance taken." See *id.* at 446.

376. *Id.* at 447. This test supersedes the "clear and present danger" test first adopted in *Schenck*.

377. *Hess v. Indiana*, 414 U.S. 105, 106-07 (1973).

378. *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 902 (1982).

379. See *id.* at 928.

380. See *id.* at 929.

by enforcing general prohibitions against undesirable conduct³⁸¹—statutes proscribing breach of the peace,³⁸² disorderly

381. Though indirect regulation of expressive content is usually effected by means of disorderly conduct or breach of the peace statutes, a new variation features the use of *public accommodations* laws. For example, in *Hurley v. Irish-American Gay, Lesbian & Bisexual Group*, 515 U.S. 557 (1995), the Court held that Massachusetts could not invoke its *public accommodations* laws to force private organizers of the St. Patrick's Day Parade to include a contingent of Irish gays and lesbians who would impart a message that the organizers did not wish to convey; compelling the inclusion of this group effectively altered the expressive content of the organizers' parade, thereby violating the First Amendment. *See id.* at 573.

Similarly, in *City of Cleveland v. Nation of Islam*, 922 F. Supp. 56 (N.D. Ohio 1995), Minister Louis Farrakhan, gearing up for his Million Man March, sought to lease the Cleveland Convention Center for a "men only" meeting but city officials refused. *See id.* at 56. The court, issuing declaratory and injunctive relief thereby granting Farrakhan the access he sought, held that the city, which had twice granted the Billy Graham Crusade single-gender access to the very same facility, could not withhold comparable access to Farrakhan. *See id.* at 58. Furthermore, the city could not invoke public accommodations laws to force Farrakhan to admit females, since doing so would effectively alter the content and character of his speech, given the Nation of Islam's 60-year religious tradition of holding separate men-only and women-only sermons. *See id.* at 59.

In *New York County Board of Ancient Order of Hibernians v. Dinkins*, 814 F. Supp. 358 (S.D.N.Y. 1993), a private sponsor of a St. Patrick's Day Parade refused to allow a gay and lesbian organization to march in the parade under its own banner. *See id.* at 362. The New York City Human Rights Commission intervened and, concluding that the parade was a public accommodation, ruled that the sponsor had violated the city's human rights ordinance by excluding the gay and lesbian group. *See id.* at 362-63. When the city ordered the sponsor to admit the group as a precondition to securing its parade permit, the sponsor sought and received injunctive relief from the district court judge, who ruled that the city's order was a content-based alteration of the sponsor's message and thus offended the First Amendment. *See id.* at 365.

382. *See Gooding v. Wilson*, 405 U.S. 518 (1972) (striking down on vagueness and overbreadth grounds a Georgia statute criminalizing the use of "opprobrious words or abusive language, tending to cause a breach of the peace," where Georgia courts had not issued a narrowing construction of the statute limiting its scope to "fighting words").

In *Cohen v. California*, 403 U.S. 15 (1971), the Court held that the First Amendment precluded the defendant's breach-of-the-peace conviction for walking through a courthouse corridor wearing a jacket bearing the words "Fuck the Draft." *See id.* at 22-23. The defendant's choice of words could be punished "[n]either upon the theory . . . that its use is inherently likely to cause violent reaction [n]or upon a more general assertion that the States, acting as guardians of public morality, may properly remove this offensive word from the public vocabulary." *Id.* at 22-23. "Surely the State has no right to cleanse public debate to the point where it is grammatically palatable to the most squeamish among us. . . . [O]ne man's vulgarity is another's lyric." *Id.* at 25.

In *Brown v. Louisiana*, 383 U.S. 131 (1966), the Court set aside breach-of-the-peace convictions of civil rights protesters who staged a sit-in at a racially segregated public library, where their convictions rested upon the same Louisiana statute earlier invalidated in *Cox v. Louisiana*, 379 U.S. 536 (1965), since, in the intervening period, the statute had received neither a limiting construction nor a legislative revision. *See id.* at 133. "Participants in an orderly demonstration in a public place are not chargeable with the danger, unprovoked except by the fact of the consti-

conduct,³⁸³ disturbing a lawful meeting,³⁸⁴ or “annoying”

tionally protected demonstration itself, that their critics might react with disorder or violence.” *Brown*, 383 U.S. at 133 n.1.

In *Cox v. Louisiana*, 379 U.S. at 551, the Court set aside a breach-of-the-peace conviction of a civil rights activist who led a peaceful march by 2000 students to the courthouse where, with songs, prayers, and speeches, they protested the arrest and incarceration of fellow activists, who were being held in the adjacent jail. Louisiana’s breach-of-the-peace statute was struck down on overbreadth ground because it “would allow persons to be punished merely for peacefully expressing unpopular views.” *Id.* “[T]he ‘compelling answer . . . is that constitutional rights may not be denied simply because of hostility to their assertion or exercise.’” *Id.* (quoting *Watson v. City of Memphis*, 373 U.S. 526, 535 (1963)).

In *Edwards v. South Carolina*, 372 U.S. 229 (1963), the Court set aside breach-of-the-peace convictions of 187 civil rights protesters who, after marching peacefully on a sidewalk around State House grounds, refused a police order to disperse and, after 15 minutes of singing and speechmaking, were arrested. *See id.* at 237. The state cannot criminalize “the peaceful expression of unpopular views.” *Id.*

In *Terminiello v. City of Chicago*, 337 U.S. 1 (1949), the Court reversed a breach-of-the-peace conviction of a Christian Veterans of America member who made an anti-Semitic and racially inflammatory speech in an auditorium packed with 800 supporters, while outside, a crowd of 1000 “angry and turbulent” protesters, deeply hostile to the speaker, strained against a cordon of police. *Id.* at 16. As construed by the trial court, the breach-of-the-peace ordinance “permitted conviction of petitioner if his speech stirred people to anger, invited public dispute, or brought about a condition of unrest. A conviction resting on any of those grounds may not stand.” *Id.* at 5.

In *Cantwell v. Connecticut*, 310 U.S. 296 (1940), the Court set aside a breach-of-the-peace conviction of the defendant, a Jehovah’s Witness, who, in the course of his side-walk proselytizing, incensed passers-by by playing a phonograph record that expressed virulently anti-Catholic sentiments. *See id.* at 303. The defendant, whose conduct was neither truculent nor abusive, could not be convicted for breach of the peace based on the hostile reaction of his audience. *See id.* at 310–11.

383. For example, in *Hess v. Indiana*, 414 U.S. 105 (1973), the Court held that a campus anti-war protester who joined other demonstrators in blocking a street could not be punished for declaring, after police dispersed the crowd, “We’ll take the fucking street later.” *Id.* at 107. In approving the First Amendment defense to a protester’s disorderly conduct conviction, the Court, invoking *Brandenburg v. Ohio*, held that states may not punish words that amount merely to advocacy of illegal conduct at some indefinite future time. *See id.* at 108–09.

In *Bachellar v. Maryland*, 397 U.S. 564 (1970), the Court set aside the disorderly conduct convictions of anti-war protesters who inspired a hostile reaction among approximately 100 onlookers while demonstrating at an Army recruiting station, where, due to the trial court’s refusal to issue proper jury instructions, the defendants’ convictions may have been based solely on their expression of unpopular views. *See id.* at 565. “[I]t is firmly settled that under our Constitution the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers, or simply because bystanders object to peaceful and orderly demonstrations.” *Id.* at 567 (quoting *Street v. New York*, 394 U.S. 576, 592 (1969) (citations omitted)).

In *Gregory v. City of Chicago*, 394 U.S. 111 (1969), the Court overturned the disorderly conduct convictions of civil rights protesters whose march to and picketing before a mayor’s residence produced a hostile reaction by onlookers. *See id.* at 111–12. The Court held that the First Amendment barred protesters’ convictions where, even though pelted with rocks and eggs,

pedestrians³⁸⁵—as a means of punishing controversial *speech*.

This line of precedent substantially restricts the government's power to punish a speaker for the public disorder produced by a controversial message. A seminal case in this area is *Terminiello v. City of Chicago*,³⁸⁶ where the Supreme Court

they remained peaceful throughout their demonstration and were arrested only after refusing a police dispersal demand prompted solely by the onlookers' unruliness. See *Gregory*, 394 U.S. at 111-12.

In *Original Fayette County Civic & Welfare League, Inc. v. Ellington*, 309 F. Supp. 89 (W.D. Tenn. 1970), the district court sustained an overbreadth challenge by civil rights marchers to Tennessee's disorderly conduct statute, which "limit[ed] the . . . freedom of speech to language that is not rude, boisterous, offensive . . . or blasphemous." *Id.* at 92.

384. In *In re Kay*, 464 P.2d 142 (Cal. 1970), the California Supreme Court addressed the First Amendment right to heckle by invoking the First Amendment to impose a narrowing construction upon California's disturbing-a-lawful-meeting statute, thereby overturning the convictions of farmworkers who registered their disapproval of a congressman's labor policy by "engaging in rhythmical clapping and shouting for five to ten minutes" during his campaign speech in a city park. *Id.* at 145. The court stated that

[judicially-recognized limits on free expression do] not mean, however, that the state can grant to the police a roving commission to enforce Robert's Rules of Order, since other First Amendment interests are likewise at stake.

Audience activities, such as heckling, interrupting, harsh questioning, and booing, even though they may be impolite and discourteous, can nonetheless advance the goals of the First Amendment. . . . An unfavorable reception, such as that given Congressman Tunney in the instant case, represents one important method by which an officeholder's constituents can register disapproval of his conduct and seek redress of grievances. The First Amendment contemplates a debate of important public issues; its protection can hardly be narrowed to the meeting at which the audience must passively listen to a single point of view. The First Amendment does not merely insure a marketplace of ideas in which there is but one seller.

Id. at 147.

In *Iowa v. Hardin*, 498 N.W.2d 677 (Iowa 1993), the Iowa Supreme Court upheld a disorderly conduct conviction of a heckler who intentionally disrupted a speech by President George Bush during a Republican fundraising rally. See *id.* at 681. In distinguishing *In re Kay*, the court observed that the defendant's disruptive behavior occurred in an auditorium filled with persons who had paid for the opportunity to hear the President's speech, that the disruption effectively halted the program, and that the defendant was removed and arrested only after twice being asked to cease his heckling. See *id.*

In *City of Spokane v. McDonough*, 485 P.2d 449 (Wash. 1971) the Washington Supreme Court held that a disorderly conduct ordinance could not be enforced to punish an attendee at an outdoor rally who shouted "warmonger" at Vice Presidential candidate Spiro T. Agnew and, flashing a peace sign at him, yelled: "What the hell do you think this means?" *Id.* at 449. See generally Eve H. Lewin Wagner, Note, *Heckling: A Protected Right or Disorderly Conduct?*, 60 S. CAL. L. REV. 215 (1986) (collecting cases and proposing an analytical standard).

385. See, e.g., *Coates v. City of Cincinnati*, 402 U.S. 611, 611, 615 (1971) (striking down an ordinance that prohibited sidewalk meetings by three or more people conducted "in a manner annoying to persons passing by" and holding that "public intolerance or animosity" cannot be the basis for abridging the rights of free assembly and association).

386. 337 U.S. 1 (1949).

reversed a breach-of-the-peace conviction of a widely vilified speaker whose anti-Semitic and racially inflammatory speech produced a near riot. Calling his antagonists "slimy scum," "snakes," and "bedbugs,"³⁸⁷ the defendant delivered a venomous speech to an auditorium packed with 800 supporters,³⁸⁸ while outside, straining against a cordon of police, "a surging, howling mob" of 1000 people "hurl[ed] epithets at those who would enter and tried to tear their clothes off."³⁸⁹ At trial, the defendant's conviction followed a jury instruction that authorized punishment for speech that "stirs the public to anger, invites dispute, brings about a condition of unrest, or creates a disturbance."³⁹⁰ The Court held that this instruction violated the First Amendment:

[A] function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. . . . That is why freedom of speech, though not absolute, is nevertheless protected against censorship or punishment, unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest.³⁹¹

Two years later, in an apparent retreat from *Terminiello*, the Supreme Court decided *Feiner v. New York*,³⁹² which upheld

387. See *Terminiello*, 337 U.S. at 26.

388. *Id.* at 3.

389. *Id.* at 16.

390. *Id.* at 3.

391. *Id.* 337 U.S. at 4 (citations omitted).

392. 340 U.S. 315 (1951). *Feiner* involved a college student who, standing atop a soapbox and using a loudspeaker, gave a streetcorner speech to a crowd of 80 people in which his derogatory remarks about President Truman, the American Legion, the Mayor of Syracuse, and other local officials inspired a hostile audience reaction. See *id.* at 316-17. The Court held that the students' subsequent arrest and conviction could be sustained based on the trial court's findings that the defendant encouraged his audience to become racially divided into hostile camps, that the gathering crowd was interfering with traffic, and that the defendant repeatedly refused police requests to cease talking. See *id.* at 320-21. In his dissent, Justice Black stated that "[i]t is neither unusual nor unexpected that some people at public street meetings mutter, mill about, push, shove, or disagree, even violently, with the speaker. Indeed, it is rare where controversial topics are discussed that an outdoor crowd does not do some or all of these things." *Id.* at

the disorderly conduct conviction of a college student whose streetcorner harangue produced racial friction among eighty onlookers.³⁹³ But the Court's subsequent decisions—in *Edwards v. South Carolina*,³⁹⁴ *Cox v. Louisiana*,³⁹⁵ and *Gregory v. City of Chicago*³⁹⁶—have reinforced the vitality of *Terminiello*, overturning the convictions of equally unpopular speakers who prompted equally hostile reactions by equally sizable crowds.

Feiner's contrary result is attributable to one crucial fact that sets it apart from the other cases: the speaker encouraged his audience to become racially divided into hostile camps³⁹⁷—in other words, he engaged in a *mischievous, bad faith* effort to produce violent clashes among his listeners. From a First Amendment perspective, such behavior is fundamentally different from the expression of provocative *ideas*—different, even, from the use of exaggeration or vilification in pressing one's

325–26 (Black, J., dissenting.)

393. See *Feiner*, 340 U.S. at 320-21.

394. 372 U.S. 229 (1963). In *Edwards*, the Court set aside the breach-of-the-peace convictions of 187 civil rights protesters who, after marching peacefully on a sidewalk around State House grounds, refused a police order to disperse and, after 15 minutes of singing and speechmaking, were arrested. See *id.* at 233. This demonstration, in which the marchers carried placards reading “Down with segregation,” “I am proud to be a Negro,” and similar messages, produced a tense crowd of 200 to 300 onlookers. *Id.* at 231. The Court held that the state cannot criminalize “the peaceful expression of unpopular views.” *Id.* at 237.

395. 379 U.S. 536 (1965). In *Cox*, the Court set aside the breach-of-the-peace conviction of a civil rights activist who led a peaceful march by 2000 students to a courthouse where, with songs, prayers, and speeches, they protested the arrest and incarceration of fellow activists who were being held in the adjacent jail. See *id.* at 539–40. When the defendant urged his followers to proceed to the racially segregated lunch counters of nearby establishments, this produced some “muttering” and “grumbling” among the 100 to 300 white onlookers positioned across the street. See *id.* at 543. The demonstration ended in chaos when the defendant refused a police dispersal order and the officers responded by firing tear gas into the crowd. See *id.* at 551. The Court struck down, on overbreadth grounds, Louisiana's breach-of-the-peace statute, which, “as authoritatively interpreted by” the state supreme court, “would allow persons to be punished merely for peacefully expressing unpopular views.” *Id.* The Court added that “the ‘compelling answer . . . is that constitutional rights may not be denied simply because of hostility to their assertion or exercise.’” *Id.* (quoting *Watson v. City of Memphis*, 373 U.S. 526, 535 (1963)).

396. 394 U.S. 111 (1969) (overturning the disorderly conduct convictions of 85 civil rights protesters whose march to and picketing before the mayor's residence produced a hostile reaction by 1000 onlookers, and holding that the First Amendment barred the protesters' convictions where, pelted by rocks and eggs, they remained peaceful throughout their demonstration and were arrested only after refusing a police dispersal demand prompted solely by the onlookers' unruliness).

397. See *Feiner*, 340 U.S. at 317.

beliefs. As the Supreme Court observed in *Cantwell v. Connecticut*:³⁹⁸

In the realm of religious faith, and in that of political belief, sharp differences arise. In both fields the tenets of one man may seem the rankest error to his neighbor. To persuade others to his own point of view, the pleader, as we know, at times, resorts to exaggeration, to vilification of men who have been, or are, prominent in church or state, and even to false statement. But the people of this nation have ordained in the light of history, that, in spite of the probability of excesses and abuses, these liberties are, in the long view, essential to enlightened opinion and right conduct on the part of the citizens of a democracy.³⁹⁹

The underlying rationale of the hostile audience cases is to prevent a "heckler's veto" of minority opinions.⁴⁰⁰ The idea is to give minority viewpoints a chance to enter the marketplace of ideas and gain adherents.⁴⁰¹ This principle is traceable to

398. 310 U.S. 296 (1940). In *Cantwell*, the Court set aside a breach-of-the-peace conviction of the defendant, a Jehovah's Witness, who, in the course of his sidewalk proselytizing, incensed passers-by in playing a phonograph record that expressed virulently anti-Catholic sentiments. *See id.* at 303. The Court held that the defendant, whose conduct was neither truculent nor abusive, could not be convicted for breach of the peace based on the hostile reaction of his audience. *See id.* at 310-11.

399. *Id.* at 310.

400. *See, e.g.*, *Glasson v. City of Louisville*, 518 F.2d 899 (6th Cir.), *cert. denied*, 423 U.S. 930 (1975). In *Glasson*, the court sustained a section 1983 action by a solitary anti-Nixon protester who, while waiting along the route of a Presidential motorcade amid a sea of Nixon supporters, unfurled a sign that prompted grumbling and muttered threats among the onlookers. *See id.* at 902. When she refused a police request to put the sign out of view, they took it from her and tore it up, to the cheers of the onlookers. *See id.* The court stated that to permit what happened here to the plaintiff would be to "incorporate into [the First Amendment] a heckler's veto which would empower an audience to cut off the expression of a speaker with whom it disagreed. The state may not rely on community hostility and threats of violence to justify censorship."

401. *See, e.g.*, *Hurwitz v. City of Oakland*, 247 F. Supp. 995 (N.D. Cal. 1965). In *Hurwitz*, the court enjoined city officials from prohibiting a parade intended to protest U.S. military intervention in Vietnam, even though plaintiffs' previous marches had been disrupted by angry spectators, who hurled tear gas bombs, broke through a police cordon, ripped banners, and disabled loudspeakers, and where plaintiffs and their followers had always remained nonviolent. *See id.* at 1001. The court rejected the notion that a citizen may be denied the right to speak based on the likely antagonism that his message would inspire, observing that "under such a doctrine, unpopular political groups might be rendered virtually inarticulate." *Id.*

James Madison's idea that the need for a Bill of Rights is to prevent the tyranny of the majority.⁴⁰² Thus, the First Amendment protects the speaker whose *beliefs* are so controversial that they spark audience unrest, but it does *not* protect the speaker who, in bad faith, *sets out to instigate* audience unrest.

Ultimately, the hostile audience cases permit the following conclusions. *Terminiello* and its progeny make clear that a speaker cannot be punished for an angry reaction to his ideas⁴⁰³—even, per *Cantwell*, if he resorts to exaggeration or vilification in pressing his beliefs.⁴⁰⁴ But, under *Feiner*, such protection does not extend to the speaker who undertakes a mischievous, bad faith effort to instigate violent clashes among his listeners.⁴⁰⁵ Though *Cantwell* suggests that speech rights may necessarily be suspended in the face of an ongoing and uncontrollable crowd reaction,⁴⁰⁶ the police have an affirmative duty (as demonstrated below⁴⁰⁷) to *protect* the unpopular speaker.⁴⁰⁸

V. ADMINISTRATIVE DISCRETION AND PROCEDURE

We turn now from *legislative* restrictions on public forum speech to a distinctly different question: To what extent does the First Amendment restrain the discretion and procedure of *executive* branch officials in exerting administrative control over public demonstrations? We will focus on two discrete topics: limits on the discretion enjoyed by administrators in issuing permits and fees for public demonstrations, and limits on the procedural time frame in which applications to demonstrate must be entertained.

402. See 2 THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 1029 (Bernard Schwartz ed., 1971) (remarks of June 8, 1789, House of Representatives).

403. See *Terminiello*, 337 U.S. at 4.

404. See *Cantwell*, 310 U.S. at 310.

405. See *Feiner*, 340 U.S. at 317.

406. See *Cantwell*, 310 U.S. at 308.

407. See *infra* section VII2.

408. See *Sabel v. Stynchcombe*, 746 F.2d 728, 731 & n.7 (11th Cir. 1984); *Glasson v. City of Louisville*, 518 F.2d 899, 905-06 (6th Cir.); *Wolin v. Port of N.Y. Auth.*, 392 F.2d 83, 94 (2d Cir. 1968); *Downie v. Powers*, 193 F.2d 760, 764 (10th Cir. 1951); *Hurwitt v. City of Oakland*, 247 F. Supp. 995, 1001 (N.D. Cal. 1965).

A. Limits on Administrative Discretion in Issuing Permits and Fees

There are two distinct lines of precedent in this area: decisions invalidating permit schemes that vested “unfettered discretion” in the licensing official, and decisions invalidating permit schemes that allowed the licensor to consider the controversial nature of a speaker’s message or its potential for inspiring a hostile response.

1. Permit Schemes That Vest “Unfettered Discretion” in the Licensing Official

Courts have consistently invalidated permit schemes vesting government officials with “unfettered discretion” to forbid or allow certain speech activities⁴⁰⁹—striking down discretionary

409. For example, in *City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750 (1988), the Court struck down an ordinance that afforded the mayor unbridled discretion in granting or denying permits to place newsracks on public property. *See id.* at 759, 772. The Court observed that unbridled licensing schemes pose two major First Amendment risks: “self-censorship by speakers in order to avoid being denied a license to speak; and the difficulty of effectively detecting, reviewing, and correcting content-based censorship as applied without standards by which to measure the licensor’s action.” *Id.* at 759. The Court stated that “without standards to bound the licensor, speakers denied a license will have no way of proving that the decision was unconstitutionally motivated, and, faced with that prospect, they will be pressured to conform their speech to the licensor’s unreviewable preference.” *Id.* at 760.

In *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546 (1975), a municipal board charged with managing a city auditorium and a city-leased theater refused to permit the staging in either facility of the rock musical “Hair,” asserting that the production would not be “in the best interest of the community.” *Id.* at 548. The Court held that the board’s refusal to permit the performance was a prior restraint that violated the First Amendment because it was effected under a scheme that gave unfettered discretion to the board and afforded applicants no procedure for prompt judicial review. *See id.* at 561.

In *Wolin v. Port of N.Y. Auth.*, 392 F.2d 83 (2d Cir. 1968), the Second Circuit afforded injunctive relief to anti-war protesters who sought access to New York City’s Port Authority Bus Terminal for the purpose of expressing their views on Vietnam by distributing leaflets, carrying placards, and conducting discussions with passers-by. *See id.* at 94. The Court struck down the regulations under which plaintiffs were denied access to the Terminal because they vested unfettered discretion in the licensing official. *See id.* at 93. The court added that “[t]he effect of the present regulations is to empower a single official to refuse access on his mere opinion that a denial will prevent inconvenience and disorder. By such devices, official authority can become ‘an instrument of arbitrary suppression of opinion on public questions.’” *Id.* (quoting *Cox v. New Hampshire*, 312 U.S. 569, 577 (1941)).

In *Staub v. City of Baxley*, 355 U.S. 313 (1958), the Court struck down an ordinance that

limits on parades⁴¹⁰ and demonstrations,⁴¹¹ sidewalk preaching⁴¹²

prohibited soliciting union membership without first obtaining a discretionary permit from the mayor or city council. *Staub*, 355 U.S. at 325. The Court stated that

an ordinance which, like this one, makes the peaceful enjoyment of [constitutional] freedoms . . . contingent upon the uncontrolled will of an official—as by requiring a permit or license which may be granted or withheld in the discretion of such official—is an unconstitutional censorship or prior restraint upon the enjoyment of those freedoms.

Staub, 355 U.S. at 322.

410. For example, in *Shuttlesworth v. City of Birmingham*, 394 U.S. 147 (1969) the Court struck down a parade permit scheme whose administration effectively vested unfettered discretion in licensing officials. *Id.* at 159. The Court stated that

[e]ven when the use of its public streets and sidewalks is involved . . . a municipality may not empower its licensing officials to roam essentially at will, dispensing or withholding permission to speak, assemble, picket, or parade according to their own opinions regarding the potential effect of the activity in question on the welfare, decency, or morals of the community.

Id. at 153.

In *Nationalist Movement v. City of Boston*, 12 F. Supp. 2d 182 (D. Mass. 1998), the district court held that city officials violated the First Amendment in denying a parade permit to the plaintiff organization—a self-styled “pro–democracy, pro–majority” group viewed by its critics as racist, anti–Semitic, and anti–gay. *Id.* at 195. The court struck down the parade permit scheme as affording the city’s transportation commissioner unfettered discretion to grant or deny permits because under this scheme, the commissioner was free to deny a permit whenever, in his opinion, a parade would “disrupt” a street or require police coverage that would “deny reasonable police protection” to the rest of the city. *Id.* at 193–95.

In *Knights of the Ku Klux Klan v. Martin Luther King Jr. Worshippers*, 735 F. Supp. 745 (M.D. Tenn. 1990), the court struck down portions of a parade permit ordinance that vested licensing officials with broad discretion to deny a permit based on the possibility of violence. *See id.* at 749–50.

In *Invisible Empire of the Knights of the Ku Klux Klan v. Mayor of Thurmont*, 700 F. Supp. 281 (D. Md. 1988), the court held that town officials unconstitutionally denied the KKK a parade permit because licensing officials were vested with unfettered discretion, the Klan was required to pay the cost of police protection, and issuance of the permit hinged on a never–before–imposed “nondiscrimination condition” that effectively entitled blacks to march in the Klan’s parade. *Id.* at 291. The permit scheme allowed the Board of Commissioners “to approve or disapprove of parade applications as they see fit.” *Id.* at 285.

In *Hurwitt v. City of Oakland*, 247 F. Supp. 995 (N.D. Cal. 1965), the court enjoined city officials from prohibiting a parade intended to protest U.S. military intervention in Vietnam, even though plaintiffs’ previous marches had been disrupted by angry spectators, including the Hell’s Angels, who hurled tear gas bombs, broke through a police cordon, ripped banners, and disabled loudspeakers, and where the plaintiffs and their followers had always remained nonviolent. *See id.* at 1000. The court stated that the potential that the speaker’s viewpoint may “stir the public to anger, invite dispute, and thus create, or appear . . . to create, unrest or even disturbance” cannot be the basis for withholding a permit. *Id.* at 1001.

411. *See Hague v. CIO*, 307 U.S. 496, 500 (1939) (striking down ordinances that, *inter alia*, imposed a flat ban on public distribution of printed materials, and required a permit, issued at the uncontrolled discretion of the public safety director, for all public meetings and demonstrations); *Shamloo v. Mississippi State Bd. of Trustees*, 620 F.2d 516, 518 (5th Cir. 1980) (upholding challenge to university regulations governing on–campus demonstrations, brought by Iranian students who had been disciplined for failing to obey them, and upholding a requirement that

and leafletting,⁴¹³ rallies in public parks,⁴¹⁴ and the use of sound

on-campus demonstrations be scheduled in advance, but striking down a provision that vested officials with the power to disapprove all but "wholesome" activities); *Million Youth March, Inc. v. Safir*, 18 F. Supp. 2d 334, 341-44, 349 (S.D.N.Y. 1998) (holding that New York City officials violated the First Amendment in denying a permit request by the Nation of Islam to hold a massive rally in Harlem, and enjoining city officials from blocking the rally, thereby striking down a permit scheme that vested city officials with unfettered discretion to grant or deny a license to engage in expressive activity); *Service Employees Int'l Union v. Port Auth. of N.Y.*, 3 F. Supp. 2d 413, 420 (S.D.N.Y. 1998) (striking down permit scheme governing protests at the World Trade Center and Port Authority Bus Terminal; the scheme posed the threat of arbitrary enforcement by vesting licensing officials with the discretion to deny or revoke a permit based on their opinion that conditions "would cause a danger to persons or property or unreasonably interfere with pedestrian or vehicular traffic flow, [or] the formation or progress of any line of persons waiting for service").

412. For example, in *Kunz v. New York*, 340 U.S. 290 (1951), the Court struck down an ordinance vesting discretionary power in the city police commissioner to control in advance the right of citizens to speak on religious matters in the streets of New York. *See id.* at 294-95. In *Furr v. Town of Swansea*, 594 F. Supp. 1543 (D.S.C. 1984), a facial challenge was brought by Anabaptist ministers to an ordinance requiring a permit for sidewalk preaching and public speaking, the court held that a permit scheme offends the First Amendment by vesting the town council with unfettered discretion in granting or denying permits. *See id.* at 1551-52. In regulating sidewalk expression under the ordinance, the town council was free to consider the likely effect of the proposed gathering on surrounding businesses and was free to impose any restrictions that it deemed fit and proper. *See id.* at 1547-48. In practice, the grant of a permit hinged on the approval of downtown merchants and, given the general distaste for plaintiffs' preaching, the only permit that city officials were willing to grant them was for preaching in a vacant lot on the edge of town. *See id.* at 1547 n.7 & 1549.

413. *See, e.g., Schneider v. New Jersey*, 308 U.S. 147, 164-65 (1939) (striking down ordinances that prohibited leafletting without a license and provided no standards for issuance of licenses, stating that "we hold a municipality cannot . . . require all who wish to disseminate ideas to present them first to police authorities for their consideration and approval, with a discretion in the police to say some ideas may, while others may not, be . . . disseminate[d]"); *Lovell v. City of Griffin*, 303 U.S. 444, 452-53 (1938) (striking down an ordinance prohibiting the distribution of circulars, pamphlets, or literature of any kind without permission from the city manager, because the ordinance contained no restrictions or limitations on the city manager's discretion).

414. For example, in *Niemotko v. Maryland*, 340 U.S. 268 (1951), the Court reversed a disorderly conduct conviction of several Jehovah's Witnesses convicted on the grounds that they used a public park for Bible talks without first obtaining a permit from city officials, even though there existed no statute or ordinance imposing a permit requirement. *See id.* at 273.

In *ACORN v. City of Tulsa*, 835 F.2d 735 (10th Cir. 1987), after several plaintiffs were denied access to a public park where they intended to stage speeches and rallies critical of the Reagan Administration, they brought a facial challenge to permit the scheme regulating expressive activity in city's public parks. *See id.* at 737-38. The court invalidated the provision vesting unfettered discretion in the Park Board over issuance of permits, stating that "[i]n essence, the Park Board relies on its own intuitive judgment; however well exercised, it is an insufficient standard to be applied in determining the permissibility of First Amendment activities." *Id.* at 741.

In *Rubin v. City of Santa Monica*, 823 F. Supp. 709 (C.D. Cal. 1993), the court struck down

amplification equipment.⁴¹⁵

Any scheme that vests arbitrary discretion in the licensing official “has the potential for becoming a means of suppressing a particular point of view.”⁴¹⁶ If a regulation leaves room for assessing the speaker’s viewpoint in deciding whether or not to grant a permit, “the danger of censorship and abridgment of our precious First Amendment freedoms is too great’ to be permitted.”⁴¹⁷

These principles are so firmly grounded in precedent that a district judge, confronted over thirty years ago with the sup-

a permit scheme governing demonstrations in public parks because, among other reasons, it vested undue discretion in the licensing official. See *Rubin*, 823 F. Supp. at 713. Under the challenged ordinance, demonstrations of 35 or more people were permissible only if they fell within an undefined exception for “First Amendment Activities,” and the licensor had unbridled discretion to inquire into the content of applicant’s speech in determining whether to grant a permit under the exception. See *Rubin*, F. Supp. at 711. The court identified “two evils” in speech licensing schemes “that will not be tolerated”: (1) vesting “unbridled discretion” in the licensing authority, and (2) “fail[ing] to place limits on the time within which the decisionmaker must issue the license.” *Id.* at 711 n.3 (citing *FW/PBS, Inc. v. Dallas*, 493 U.S. 215, 225–26 (1990)).

In *Invisible Empire Knights of the Ku Klux Klan v. City of West Haven*, 600 F. Supp. 1427 (D. Conn. 1985), the court granted injunctive relief to the KKK in its facial challenge to an ordinance restricting expressive activity in public parks. See *id.* at 1436. The court held that the permit scheme was unconstitutional due to its failure to provide the administrator with any standards for granting or denying permits. See *id.* at 1432–33.

415. See, e.g., *Saia v. New York*, 334 U.S. 558, 562 (1948) (striking down an ordinance prohibiting the use of a loudspeaker in public places without permission of the police chief, whose discretion was unlimited); *Friedrich v. City of Chicago*, 619 F. Supp. 1129, 1147–48 (N.D. Ill. 1985) (holding, *inter alia*, that a provision forbidding street performers from using sound amplification equipment unless they were granted a special permit issued by the city council violated the First Amendment because the ordinance did not specify how to obtain such a permit and set no standards or guidelines concerning issuance of such permits).

416. *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 130 (1992) (quoting *Heffron v. International Soc’y for Krishna Consciousness, Inc.*, 452 U.S. 640, 649 (1981)).

417. *Forsyth*, 505 U.S. at 131 (quoting *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 553 (1975)). Accordingly, “[a] permit scheme is constitutional as a reasonable time, place and manner restriction [only] if it is content neutral, narrowly tailored to serve a significant governmental interest, and leaves open ample alternatives for communication.” *Gay & Lesbian Servs. Network, Inc. v. Bishop*, 832 F. Supp. 270, 275 (W.D. Mo. 1993) (citing *Forsyth*, 505 U.S. at 130) “The burden of proof on these three factors falls squarely on the government.” *Id.* (citing *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 n.5 (1984)). “If it is determined that the permit scheme is not content neutral, then it must be enjoined unless the [state] can show that it is narrowly tailored to achieve a compelling government interest.” *Id.* (citing *Burson v. Freeman*, 504 U.S. 191, 198 (1992)).

pression of Vietnam War protesters, observed even then that:

It is established beyond need for an extended discussion that municipalities cannot validly leave decisionmaking for allowance of peaceful parades or demonstrations to the unbridled discretion or mere opinion of a local official. The lodging of any such broad discretion in a public official would permit such official to say which expressions of view . . . will be permitted [—] a power fraught with possibilities for selective administration that would in effect deprive some groups of the equal protection of the laws.⁴¹⁸

Accordingly, a permit scheme will survive constitutional scrutiny only if it employs content-neutral criteria,⁴¹⁹ and only if it contains "narrowly drawn, reasonable, and definite standards for the officials to follow."⁴²⁰ Without such standards, "post hoc rationalizations by the licensing official and the use of shifting or illegitimate criteria are far too easy, making it difficult for courts to determine in any particular case whether the licensor is permitting favorable, and suppressing unfavorable, expression."⁴²¹

418. *Hurwitt v. City of Oakland*, 247 F. Supp. 995, 1000-01 (N.D. Cal. 1965).

419. *See Gay & Lesbian Servs.*, 832 F. Supp. at 275.

420. *Niemotko v. Maryland*, 340 U.S. 268, 271 (1951); *accord* *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 150-51 (1969) (holding that "a law subjecting the exercise of First Amendment freedoms to the prior restraint of a license, without narrow, objective, and definite standards to guide the licensing authority, is unconstitutional"). A permit scheme fails this test if it "involves appraisal of facts, the exercise of judgment, [or] the formation of an opinion' by the licensing authority." *Forsyth*, 505 U.S. at 131 (quoting *Cantwell v. Connecticut*, 310 U.S. 296, 305 (1940)).

421. *City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 758 (1988). A vivid example of the danger adverted to in *Lakewood* is addressed in *Women Strike for Peace v. Morton*, 472 F.2d 1273 (D.C. Cir. 1972). In *Morton*, an anti-war group fought with the Interior Department for three years in a futile effort to secure a permit to erect on the Ellipse a temporary display (comprised of 11 styrofoam tombstones) commemorating those who died in Vietnam. *See id.* at 1274. The government kept denying the plaintiffs a permit, each time offering a different reason, and all the while allowing more extensive displays to be erected on the Ellipse for the annual Christmas Pageant. *See id.* at 1275-76. Therefore, the court affirmed the grant of injunctive relief, and permitted the plaintiffs to erect their display on a portion of the Ellipse not then occupied by the Christmas Pageant. *See id.* at 1294.

2. Permit Schemes That Allow the Licensing Official to Consider the Controversial Nature of a Speaker's Message or Its Potential for Inspiring a Hostile Response

Closely akin to the “unfettered discretion” cases are those in which the permit scheme allows licensing officials to consider either the controversial nature of a speaker's message or its potential for inspiring a hostile response. These schemes are struck down just as readily, and for the same reason, as the schemes affording unbridled discretion. In both contexts, the First Amendment flaw is the same: public forum access is left to hinge on the *popularity* of a speaker's message.

The permit schemes in this line of precedent are of two (equally fatal) types: (1) those allowing the licensor to forbid or restrict speech activities based on concerns that the speaker's message will inspire a hostile response,⁴²² and (2) those allowing

422. For example, in *Christian Knights of the Ku Klux Klan Invisible Empire, Inc. v. District of Columbia*, 972 F.2d 365 (D.C. Cir. 1992), even though the KKK's previous rallies in Washington, D.C. had been cut short by violent crowds, resulting in brick-throwing, injuries, and multiple arrests, the court here affirmed the grant of an injunction to the Klan, allowing it to march the full eleven block route that it had requested rather than the truncated four block route for which the D.C. police had granted a permit. *See id.* at 369, 376. Since the District's place restriction, resting as it did on concerns about violent reaction to controversial speaker, was content based, it could be sustained only if necessary to advance a compelling interest, and it could not be sustained where the district court found that the threat of violence, although substantial, was not beyond reasonable control. *See id.* at 375. The facts supported the district court's conclusion that reduction from eleven blocks to four blocks could not be justified in light of testimony by the National Park Police that the greatest confrontation was expected to occur at an assembly point of the march, planned force levels at the assembly point were sufficient to overcome attempts to stop the march by violence and to assure safety, and planned force levels were sufficient to assure a reasonable level of safety along the march route itself, notwithstanding testimony by D.C. police that they would not have been able to control violence if the march went the full eleven blocks. *See id.*

In *Beckerman v. City of Tupelo*, 664 F.2d 502 (5th Cir. 1981), a First Amendment challenge to parade and sound equipment ordinances was brought by civil rights activists seeking to conduct a protest march. *See id.* at 509-10. Here, the court struck down a provision authorizing the police chief to deny the parade permit if he determined that issuance would “provoke disorderly conduct.” *Id.* at 506, 509-10. On its face, this section was an unconstitutional prior restraint on free speech since it sanctioned the permit denial on the basis of a heckler's veto. *See id.* The court held that the city may not deny a parade permit simply out of fear that the marchers may produce an adverse reaction by onlookers. *See id.* “The existence of a hostile audience, standing alone, has never been sufficient to sustain a denial of or punishment for the exercise of First Amendment rights.” *Id.* at 510.

In *Collin v. Chicago Park District*, 460 F.2d 746 (7th Cir. 1972), the court held that Nazis were entitled to injunctive relief after city officials denied their application for a permit to hold a demonstration in a public park. *See id.* at 748, 757. "As to the possibility of there being hostile audience members causing violence, the law is quite clear that such considerations are impermissible in determining whether to grant permits. . . . [I]t is impermissible even to consider the threat of a hostile audience when ruling on a permit application or a request for injunction against a demonstration." *Collin*, 460 F.2d at 754-55 (citations omitted).

In *Knights of the Ku Klux Klan v. Martin Luther King Jr. Worshippers*, 735 F. Supp. 745 (M.D. Tenn. 1990), the court struck down portions of a parade permit ordinance that vested licensing officials with broad discretion to deny a permit based on the possibility of violence. *See id.* at 749-50.

In *Dr. Martin Luther King, Jr. Movement, Inc. v. City of Chicago*, 419 F. Supp. 667 (N.D. Ill. 1976), a civil rights organization sought to march through a white neighborhood where its previous foray there was curtailed when bystanders pelted the procession with rocks, bricks, and explosive devices. *See id.* at 672. The court held that city officials violated the First Amendment in denying organizers a permit for a second march through the same neighborhood and proposing instead an alternate route through an all-black neighborhood, even though the first march left 31 police officers injured and produced 52 arrests, plaintiffs conducted themselves peacefully and cannot be denied a permit based on the threat of a hostile audience. *See id.* at 674-75.

The threat of a hostile audience cannot be considered in determining whether a permit shall be granted or in ruling on a request for an injunction against a demonstration. Thus, our laws bespeak what should be; for were it otherwise, enjoyment of constitutional rights by the peaceable and law-abiding would depend on the dictates of those willing to resort to violence.

Id. at 675 (citations omitted).

In *Hurwitt v. City of Oakland*, 247 F. Supp. 995 (N.D. Cal. 1965), the court enjoined city officials from prohibiting a parade intended to protest U.S. military intervention in Vietnam, even though plaintiffs' previous marches had been disrupted by angry spectators, including the Hell's Angels, who hurled tear gas bombs, broke through a police cordon, ripped banners, and disabled loudspeakers, where plaintiffs and their followers had always remained nonviolent. *See id.* at 1001. The potential that the speaker's viewpoint may "stir the public to anger, invite dispute, and thus create, or appear . . . to create, unrest or even disturbance" cannot be the basis for withholding a permit. *Id.* at 1001.

In *Williams v. Wallace*, 240 F. Supp. 100 (M.D. Ala. 1965), the court granted civil rights activists injunctive relief and ordered the State of Alabama to permit, and not to interfere with, plaintiffs' plans to march from Selma to Montgomery. *See id.* at 109. "The [State's] contention that there is some hostility to this march will not justify its denial. Nor will the threat of violence constitute an excuse for its denial." *Id.* at 109 (citations omitted).

In *Village of Skokie v. National Socialist Party of America*, 366 N.E.2d 347 (Ill. App. Ct. 1977), *rev'd in part*, 373 N.E.2d 21 (Ill. 1978), the court declined to enjoin a group of Nazis from marching through an Illinois suburb populated by hundreds of Holocaust survivors. *See id.* at 349. The court did so even though the government put on evidence showing that "if the defendants ever appear in Skokie to demonstrate, there . . . is a virtual certainty that thousands of irate Jewish citizens [will] physically attack [them]." *Id.* at 353. The court held that the possible presence of a hostile and violent audience is an impermissible consideration in granting an injunction or for withholding a permit, and held that the appellate panel correctly refused to enjoin the Nazi march but erred in barring the Nazis from wearing their uniforms. *See id.* at 353-54.

In *Wolin v. Port of New York Authority*, 392 F.2d 83 (2d Cir. 1968), the court afforded injunc-

the licensor to charge a higher police protection fee based on the anticipated level of hostility among onlookers.⁴²³

The first category is famously exemplified by cases in which Ku Klux Klansmen and Nazis were denied permits to march. In *Village of Skokie v. National Socialist Party*,⁴²⁴ the court declined to enjoin a group of Nazis from marching through an Illinois suburb populated by hundreds of Holocaust survivors.⁴²⁵ Even though it was “a virtual certainty” that the appearance of parading Nazis would prompt “thousands of irate Jewish citizens [to] physically attack [them],”⁴²⁶ the court refused to

tive relief to anti-war protesters who sought access to New York City's Port Authority Bus Terminal for the purpose of expressing their views on Vietnam by distributing leaflets, carrying placards, and conducting discussions with passers-by, even though the expression of these views, especially to traveling servicemen, posed the risk of hostile reaction. *Wolin*, 392 F.2d at 85-86. “The potential provocation caused by heated debate is not a valid reason to preclude discussion.” *Id.* at 92.

423. See *Forsyth*, 505 U.S. at 124 (striking down an ordinance permitting government administrator to vary the fee for assembling or parading to reflect the estimated cost of maintaining public order, and holding that the ordinance unconstitutionally required the administrator to examine the *content* of the prospective speaker's message, and to charge a higher fee for controversial viewpoints); *Central Fla. Nuclear Freeze Campaign v. Walsh*, 774 F.2d 1515, 1516 (11th Cir. 1985) (involving a First Amendment challenge brought by a nonprofit anti-nuclear organization where the court struck down, both facially and as applied, an Orlando ordinance that required persons wishing to demonstrate in city streets and parks to prepay amount of costs for additional police protection, to be determined at the police chief's discretion; therefore, by allowing the licensing official to consider the potential for hostile counter-demonstrations in fixing an applicant's permit fee, the instant scheme offends the First Amendment by charging more for controversial speech than for mainstream expression); *Gay & Lesbian Servs.*, 832 F. Supp. at 272, 275 (striking down, under *Forsyth*, a Kansas City Police Department policy governing parade permits authorizing the assessment of a crowd control fee that would vary depending upon the level of hostility likely to be generated by the speaker or message); see also *Invisible Empire of the Knights of the Ku Klux Klan v. Mayor of Thurmont*, 700 F. Supp. 281, 285-86, 290 (D. Md. 1988) (holding that town officials unconstitutionally denied the KKK a parade permit where licensing officials were vested with unfettered discretion, the Klan was required to pay the cost of police protection, and issuance of the permit hinged on a never-before-imposed “nondiscrimination condition” that effectively entitled blacks to march in the Klan's parade); *Invisible Empire of the Knights of the Ku Klux Klan v. City of W. Haven*, 600 F. Supp. 1427, 1433 (D. Conn. 1985) (granting injunctive relief to KKK in its facial challenge to an ordinance restricting expressive activity in public parks, thereby striking down the permit scheme, *inter alia*, for requiring an applicant to post a bond to cover costs of police protection).

424. 366 N.E.2d 347 (Ill. Ct. App. 1977), *rev'd in part*, 373 N.E.2d 21 (Ill. 1978) (holding that the appellate panel correctly refused to enjoin the Nazi march but erred in barring the Nazis from wearing their uniforms).

425. See *Village of Skokie*, 366 N.E.2d at 349.

426. *Id.* at 353.

prevent the march, holding that the possibility of a violent audience reaction is an impermissible consideration in granting an injunction or withholding a permit.⁴²⁷ In *Christian Knights of the Ku Klux Klan Invisible Empire, Inc. v. District of Columbia*,⁴²⁸ the KKK obtained an injunction permitting it to march in Washington, D.C.,⁴²⁹ even though its previous rallies there had been cut short by violent crowds,⁴³⁰ resulting in brick-throwing, injuries, and multiple arrests.⁴³¹ Evincing little enthusiasm for its result,⁴³² the D.C. Circuit nevertheless affirmed the Klan's injunction—holding that permit denials are content-based if grounded on concerns about audience hostility,⁴³³ and therefore cannot be sustained where the threat of violence, even if substantial, is “not beyond reasonable control.”⁴³⁴

427. See *Village of Skokie*, 366 N.E.2d at 353 (citing, *inter alia*, *Collin*, 460 F.2d at 754; *Dr. Martin Luther King, Jr. Movement*, 419 F. Supp. at 675).

428. 972 F.2d 365 (D.C. Cir. 1992).

429. Under the injunction, the Klan was allowed to march the full eleven-block route that it had requested, rather than the truncated four-block route for which the D.C. police had granted a permit. See *id.* at 368, 376.

430. See *id.* at 367.

431. See *id.* at 369.

432. See *Christian Knights*, 972 F.2d at 374. Expressing sympathy with the government's response here—rather than *denying* the Klan a permit, it reduced the *scope* of the Klan's march from eleven to four blocks—the D.C. Circuit drew a distinction between limiting and refusing a permit, asserting that the state is afforded *some* leeway in restricting the parameters of a demonstration when confronted with “the prospect of a violent response.” *Id.* Rejecting more absolutist approaches urged by counsel and amici, including (1) that restrictions may be imposed only where the threatened violence is “truly real and substantial and beyond reasonable control”; (2) that “the fear of a hostile audience is never to be considered in ruling upon permit applications”; and (3) that authorities may impose restrictions “only on the scene in response to a clear and present danger of violence,” the court arrived at a position that is more indulgent of the state:

We cannot agree that a threat of violence “is an impermissible ground even for a time, place, and manner limitation.” When the choice is between an abbreviated march or a bloodbath, government must have some leeway to make adjustments necessary for the protection of participants, innocent onlookers, and others in the vicinity.

Id.

433. See *id.*

434. *Id.* at 375. In rejecting the contention by D.C. police that the Klan's march had to be reduced from eleven blocks to four blocks or the threat of violence would be beyond reasonable control, the district court relied upon testimony by the National Park Police that the greatest confrontation would likely occur at the assembly point of the march, that planned force levels at the assembly point were sufficient to overcome any violent attempts to stop the march, and that planned force levels along the proposed eleven block route were sufficient to assure a reasonable level of safety, notwithstanding testimony by D.C. police that they would not be able to control violence if the march were to cover the full eleven blocks. *Id.*

This first category of precedent stretches back through the anti-war and civil rights eras—where, once again, we find permit denials invalidated on factual records bristling with violence. Even where prior marches were greeted with great hostility—where Vietnam protests were derailed by tear gas bombs⁴³⁵ and civil rights processions were pelted with rocks, bricks, and explosive devices⁴³⁶—the courts consistently held that such speakers could not be denied a permit based on the likely antagonism that their message would inspire.⁴³⁷ “This is so,” explained one court, “because under such a doctrine, unpopular political groups might be rendered virtually inarticulate.”⁴³⁸ The alternative, explained another, would leave the exercise of First Amendment freedoms “depend[ent] on the dictates of those willing to resort to violence.”⁴³⁹

The second category of precedent in this area is prominently exemplified by *Forsyth County v. Nationalist Movement*,⁴⁴⁰ where the Supreme Court struck down a licensing scheme that permitted the administrator to vary the fee for assembling or parading to reflect the estimated cost of maintaining public order.⁴⁴¹ The ordinance had been enacted “[a]s a direct result”⁴⁴² of two violent demonstrations in which civil rights activists, protesting racial discrimination in a rural Georgia county, were confronted by hostile residents. The first march was brought to a premature halt when 400 Klan members, shouting racial slurs, began throwing rocks and beer bottles.⁴⁴³ The second march featured 20,000 marchers, 1000 counter-demonstrators, and 3000 law enforce-

435. See *Hurwitt v. City of Oakland*, 247 F. Supp. 995, 1005 (N.D. Cal. 1965).

436. See *Dr. Martin Luther King, Jr. Movement, Inc. v. City of Chicago*, 419 F. Supp. 667, 672, 678 (N.D. Ill. 1976).

437. See *Dr. Martin Luther King, Jr. Movement*, 419 F. Supp. at 675; *Hurwitt*, 247 F. Supp. at 1001; see also *Williams v. Wallace*, 240 F. Supp. 100 (M.D. Ala. 1965) (granting civil rights activists injunctive relief ordering the state of Alabama to permit, and not to interfere with, plaintiffs’ plans to march from Selma to Montgomery, stating that “[the State’s] contention that there is some hostility to this march will not justify its denial. Nor will the threat of violence constitute an excuse for its denial.”) (citations omitted).

438. *Hurwitt*, 247 F. Supp. at 1001.

439. *Dr. Martin Luther King, Jr. Movement*, 419 F. Supp. at 675.

440. 505 U.S. 123 (1992).

441. See *id.* at 126–27.

442. *Id.* at 126.

443. See *id.* at 125.

ment officers.⁴⁴⁴ It was punctuated (though not halted) by rock-throwing and produced sixty arrests.⁴⁴⁵

Though these facts presented an "emotional" context in which to review the county's response,⁴⁴⁶ its ordinance vested the administrator with the same unfettered discretion that invariably proves fatal in licensing schemes.⁴⁴⁷ Here, that discretion came into play in fixing police protection fees on an applicant-by-applicant basis: "The fee assessed will depend on the administrator's measure of the amount of *hostility* likely to be created by the speech based on its content. Those wishing to express views unpopular with bottle-throwers, for example, may have to pay more for their permit."⁴⁴⁸ In striking down the ordinance, the Court concluded: "Speech cannot be financially burdened, any more than it can be punished or banned, simply because it might offend a hostile mob."⁴⁴⁹

B. Limits on the Time Frame for Issuing a Permit

Courts will treat as "a species of unbridled discretion" any failure by a licensing scheme to place limits on the *time frame* within which the decisionmaker must issue the license.⁴⁵⁰ In

444. See *Forsyth County*, 505 U.S. at 125-26.

445. See *id.*

446. See *id.* at 124.

447. On this point, the Court observed:

Based on the county's implementation and construction of the ordinance, it simply cannot be said that there are any "narrowly drawn, reasonable and definite standard[s]," guiding the hand of the Forsyth County administrator. The decision how much to charge for police protection or administrative time—or even whether to charge at all—is left to the whim of the administrator. There are no articulated standards either in the ordinance or in the county's established practice. The administrator is not required to rely on any objective factors. He need not provide any explanation for his decision, and that decision is unreviewable. Nothing in the law or its application prevents the official from encouraging some views and discouraging others through the arbitrary application of fees. The First Amendment prohibits the vesting of such unbridled discretion in a government official.

Id. at 132-33 (quoting *Niemotko v. Maryland*, 340 U.S. 268, 271 (1951)) (citations and footnotes omitted).

448. *Id.* at 134 (emphasis added).

449. *Forsyth County*, 505 U.S. at 134-35.

450. *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 223-24 (1990). In *FW/PBS*, the Court struck down the licensing scheme in an ordinance regulating sexually-oriented businesses because it lacked "an effective limitation on the time within which the licensor's decision must be made," and because it "fail[ed] to provide an avenue for prompt judicial review" in the event

this section, we will address in turn the principal ways in which a licensing scheme may run afoul of this requirement: by failing to afford prompt processing of permit applications or prompt judicial review of permit denials, and by imposing advance registration requirements that build into the application process a lengthy delay before the licensee may speak.

1. The Need for Prompt Processing and Prompt Judicial Review

Courts consistently invalidate speech licensing schemes that fail to afford either prompt processing of permit applications⁴⁵¹ or prompt judicial review of permit denials.⁴⁵² These procedural safeguards come from *Freedman v.*

of a license denial. *FW/PBS*, 493 U.S. at 229. In performing its analysis, the Court identified “two evils” in speech licensing schemes “that will not be tolerated”—vesting “unbridled discretion” in the licensing authority, and “fail[ing] to place limits on the time within which the decisionmaker must issue the license.” *Id.* at 225–26, & 229.

451. See *FW/PBS*, 493 U.S. at 226–27 (striking down a permit scheme for sexually-oriented businesses because a key prerequisite in securing a permit was an inspection visit by city officials; a visit that, under the ordinance, the city was free to put off indefinitely); *Collin v. Chicago Park Dist.*, 460 F.2d 746, 756–57 (7th Cir. 1972) (holding that Nazis were entitled to injunctive relief after city officials denied their application for a permit to hold a demonstration in a public park by striking down a permit scheme that gave the licensor five days in which to grant or deny a demonstration permit but, in the event of inaction, left the matter in limbo pending a written request from the applicant for a review by the licensor’s supervisor).

452. See *FW/PBS*, 493 U.S. at 229; *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 559–61 (1975) (holding that a municipal board’s refusal to permit a theatrical performance was a prior restraint that violated the First Amendment because it was effected under a scheme that gave unfettered discretion to the board and afforded applicants no procedure for prompt judicial review, where the board, charged with managing a city auditorium and a city-leased theater, refused to permit the staging in either facility of the rock musical “Hair,” asserting that the production would not be “in the best interest of the community”); *Baby Tam & Co. v. City of Las Vegas*, 154 F.3d 1097, 1101 (9th Cir. 1998) (striking down a speech licensing ordinance under which the plaintiff had been denied a license to operate an adult bookstore because the ordinance failed to provide for prompt judicial review of denials); *Central Fla. Nuclear Freeze Campaign v. Walsh*, 774 F.2d 1515, 1526 (11th Cir. 1985) (holding that in a First Amendment challenge brought by a nonprofit anti-nuclear organization, an Orlando ordinance that required persons wishing to demonstrate in city streets and parks to prepay amount of costs for additional police protection, to be determined at police chief’s discretion was unconstitutional (both facially and as applied), and identifying a separate and independent basis for striking down this ordinance: failure to provide for prompt judicial review of permit denials); *United Food & Commercial Workers Union v. City of Valdosta*, 861 F. Supp. 1570, 1583–84 (M.D. Ga. 1994) (striking down a range of legislative restrictions on demonstrations, picketing, leafletting, and parades and holding that the city’s permit requirement for parades violated the First Amendment by failing to provide for judicial review of permit denials).

Maryland,⁴⁵³ where the Supreme Court, in striking down a motion picture censorship system, set forth the following requirements for any speech licensing scheme:

(1) any restraint prior to judicial review can be imposed only for a specified brief period during which the status quo must be maintained; (2) expeditious judicial review of that decision must be available; and (3) the censor must bear the burden of going to court to suppress the speech and must bear the burden of proof once in court.⁴⁵⁴

The "core policy" underlying *Freedman* is that any license for expressive activity "must be issued within a reasonable period of time, because undue delay results in the unconstitutional suppression of protected speech."⁴⁵⁵ Accordingly, "the licensor must make the decision whether to issue the license within a specified and reasonable time period during which the status quo is maintained, and there must be the possibility of prompt judicial review in the event that the license is erroneously denied."⁴⁵⁶

The *Freedman* safeguards have been extended beyond the realm of motion picture licensing⁴⁵⁷ to schemes governing public demonstrations⁴⁵⁸ and parades.⁴⁵⁹ They have been invoked to strike down schemes that allowed indefinite delays in processing permit applications,⁴⁶⁰ or left the applicant in procedural limbo

453. 380 U.S. 51 (1965).

454. *FW/PBS*, 493 U.S. at 227–28 (distilling the *Freedman* procedural safeguards); *see also Freedman*, 380 U.S. at 58–60.

455. *FW/PBS*, 493 U.S. at 228.

456. *Id.*

457. *See id.* at 227–29 (approving an ordinance regulating sexually-oriented businesses); *Southeastern Promotions*, 420 U.S. at 559–61 (approving a theatrical performance in a city auditorium and a city-leased theater).

458. *See, e.g., Central Fla. Nuclear Freeze Campaign v. Walsh*, 774 F.2d 1515, 1526 (11th Cir. 1985); *Collin*, 460 F.2d at 756–57.

459. *See, e.g., LeFlore v. Robinson*, 434 F.2d 933, 947–48 (5th Cir. 1970), *vacated on other grounds*, 446 F.2d 715 (5th Cir. 1971); *United Food & Commercial Workers Union v. City of Valdosta*, 861 F. Supp. 1570, 1583–84 (M.D. Ga. 1994).

460. *See FW/PBS*, 493 U.S. at 226–27 (striking down a permit scheme for sexually-oriented businesses because a key prerequisite in securing a permit was an inspection visit by city officials; a visit that, under the ordinance, the city was free to put off indefinitely).

after a permit denial.⁴⁶¹ Thus, any permit scheme governing public forum expression will be vulnerable to facial challenge if it lacks express provisions either limiting the time frame for processing an application or affording prompt judicial review in the event of a denial.

2. Advance Registration Requirements

Because a speech licensing scheme must contain limits on the time frame for issuing permits,⁴⁶² courts are consistently hostile toward schemes that impose advance registration requirements of any significant duration.⁴⁶³ Such requirements are vulnerable to First Amendment challenge because they build into the application process a mandatory delay before the licensee may speak. The problem with any built-in delay, as Justice Harlan once observed, is that “timing is of the essence in politics. It is almost impossible to predict the political future; and when an event occurs, it is often necessary to have one’s

461. See *Collin*, 460 F.2d at 756–57 (striking down permit scheme that gave licensor five days in which to grant or deny a demonstration permit but, in the event of inaction, left the matter in limbo pending a written request from the applicant for a review by the licensor’s supervisor)(holding that Nazis were entitled to injunctive relief after city officials denied their application for permit to hold demonstration in public park).

462. See *FW/PBS*, 493 U.S. at 223–24.

463. See, e.g., *Douglas v. Brownell*, 88 F.3d 1511, 1523–24 (8th Cir. 1996) (striking down a parade permit ordinance as not narrowly tailored because it imposed a five-day advance registration requirement); *Grossman v. City of Portland*, 33 F.3d 1200, 1206–08 (9th Cir. 1994) (striking down an ordinance that required an advance permit for any demonstration, no matter how small, to be conducted in any public park, and holding that the ordinance was not narrowly tailored because it burdened all expressive gatherings, no matter how few the number of participants, and because it effectively banned spontaneous expression by requiring all prospective speakers to obtain a permit in advance); *NAACP v. City of Richmond*, 743 F.2d 1346, 1349, 1357 (9th Cir. 1984) (striking down an ordinance requiring advance notice of 20 days for securing a parade permit, where the city had invoked this provision in denying a permit to the NAACP, thereby thwarting a proposed march to protest the death of a black man in police custody); *International Bhd. of Teamsters v. City of Rocky Mount*, 672 F.2d 376, 377, 380 (4th Cir. 1982) (striking down, on overbreadth grounds, an ordinance governing picketing on public streets that required the permit to be obtained at least 72 hours in advance); *Rosen v. Port of Portland*, 641 F.2d 1243, 1247–50 (9th Cir. 1981) (sustaining a First Amendment challenge, brought by Jews for Jesus, to advance-notice and identification disclosure requirements for speech activities at an airport; in striking down the airport’s requirement that prospective speakers register one business day in advance, the court distinguished cases upholding advance-notice requirements for parades and White House demonstrations, asserting that the underlying governmental interests in those cases—traffic congestion and presidential security, respectively—had no comparably significant analogue in the airport context).

voice heard promptly, if it is to be considered at all."⁴⁶⁴ In *NAACP v. City of Richmond*,⁴⁶⁵ the death of a black man in police custody prompted immediate plans for a protest march—but city officials thwarted the march by invoking a twenty-day advance registration requirement in their parade permit ordinance.⁴⁶⁶ Rejecting the ordinance as effectively “outlaw[ing] spontaneous expression,”⁴⁶⁷ the Ninth Circuit stressed that:

simple delay may permanently vitiate the expressive content of a demonstration. A spontaneous parade expressing a viewpoint on a topical issue will almost inevitably attract more participants and more press attention, and generate more emotion, than the “same” parade 20 days later. The later parade can never be the same. Where spontaneity is part of the message, dissemination delayed is dissemination denied.⁴⁶⁸

Advance registration requirements have been invalidated in a broad range of contexts, including permit schemes for parading,⁴⁶⁹ demonstrating,⁴⁷⁰ picketing,⁴⁷¹ and leafletting.⁴⁷² Since parades and demonstrations create greater congestion than picketing or leafletting, they necessarily require greater lead time⁴⁷³—but even for parades and demonstrations, the courts

464. *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 163 (1969) (striking down a parade permit scheme in the context of a thwarted civil rights march) (Harlan, J., concurring); *accord Carroll v. President & Comm’rs of Princess Anne*, 393 U.S. 175, 182 (1968) (invalidating a speech-restrictive injunction imposing a ten-day freeze on demonstrations by a white supremacist group and finding that a delay “of even a day or two” may be intolerable when applied to “political speech in which the element of timeliness may be important”).

465. 743 F.2d 1346 (9th Cir. 1984).

466. *See id.* at 1349.

467. *Id.* at 1355.

468. *Id.* at 1356.

469. *See, e.g., Douglas v. Brownell*, 88 F.3d 1511, 1523–24 (8th Cir. 1996) (striking down a five-day advance registration); *City of Richmond*, 743 F.2d at 1357 (striking down a 20-day advance registration).

470. *See, e.g., Grossman v. City of Portland*, 33 F.3d 1200, 1207–08 (9th Cir. 1994) (striking down an ordinance that required an advance permit for any demonstration, no matter how small, to be conducted in any public park).

471. *See, e.g., International Bhd. of Teamsters v. City of Rocky Mount*; 672 F.2d 376, 380 (4th Cir. 1982) (striking down a seventy-two-hour advance registration requirement).

472. *See, e.g., Rosen v. Port of Portland*, 641 F.2d 1243, 1247 (9th Cir. 1981) (striking down airport restrictions that required registration one business day in advance of leafletting).

473. *Rosen*, 641 F.2d at 1247–48.

have consistently rejected advance registration requirements beyond two days.⁴⁷⁴ Thus, if a speech licensing scheme imposes a built-in delay of more than two days, it will be especially vulnerable to constitutional challenge.

VI. JUDICIAL REGULATION: INJUNCTIONS

A. Judicial Power to Regulate Public Forum Access and Expression

Through their injunctive powers, courts have long exercised detailed control over public forum access and expression. With greater precision than any ordinance⁴⁷⁵—and bolstered by their contempt powers over injunction violators⁴⁷⁶—courts have specified the date,⁴⁷⁷ time,⁴⁷⁸ duration,⁴⁷⁹ and location⁴⁸⁰ of public

474. See *City of Richmond*, 743 F.2d at 1357. Compare *Douglas*, 88 F.3d at 1523–24 (8th Cir. 1996) (striking down a parade permit scheme imposing a five-day advance registration requirement), and *International Bhd. of Teamsters*, 672 F.2d at 377, 380 (striking down a permit scheme for picketing imposing a 72-hour advance registration requirement), with *A Quaker Action Group v. Morton*, 516 F.2d 717, 735 (D.C. Cir. 1975) (upholding a 48-hour advance registration requirement for demonstrations near the White House), and *Bayless v. Martine*, 430 F.2d 873, 878 (5th Cir. 1970) (upholding a 48-hour advance registration requirement for on-campus demonstrations), and *Powe v. Miles*, 407 F.2d 73, 84 (2d Cir. 1968) (upholding a 48-hour advance registration requirement for on-campus demonstrations), and *Local 32B-32J, Serv. Employees Int'l Union v. Port Auth. of N.Y.*, 3 F. Supp. 2d 413, 422 (S.D.N.Y. 1998) (upholding a 36-hour waiting period for permits to stage protests at the World Trade Center and Port Authority Bus Terminal), and *Jackson v. Dobbs*, 329 F. Supp. 287, 292 (N.D. Ga. 1970) (upholding an ordinance requiring marchers to obtain a permit by 4:00 p.m. on the day preceding a march), *aff'd*, 442 F.2d 928 (5th Cir. 1971).

475. See *Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753, 765 (1994) (observing that injunctive restrictions on speech, because they can be “tailored” to the individual circumstances of a case, afford opportunities for greater precision than “generally applicable statutes”).

476. See, e.g., *United States v. Terry*, 802 F. Supp. 1094, 1096 (S.D.N.Y. 1992) (involving criminal contempt proceedings against an anti-abortion protester who, in violation of the district court's injunction, presented then-Governor Bill Clinton with a fetus). Cf. *United States v. Lynch*, 952 F. Supp. 167, 168, 170–71 (S.D.N.Y.) (involving a criminal contempt proceeding against an elderly bishop and a young monk who blocked access to an abortion clinic in violation of a permanent injunction, where the court held that the defendants, who sat quietly praying in the clinic driveway, did not manifest the requisite willfulness to be convicted of criminal contempt, acting as they did from a sense of conscience and sincere religious conviction; separately, the court invoked its “prerogative of leniency,” announcing that it would refuse to convict on these facts even if defendants' conduct could be deemed willful), *aff'd mem.*, 104 F.3d 357 (2d Cir.), *cert. denied*, 520 U.S. 1170 (1997).

477. See, e.g., *City of Seven Hills v. Aryan Nations*, 667 N.E.2d 942, 945 (Ohio 1996) (striking down an injunction which permissibly specified the date, time, duration, and location of residential picketing because it imposed a flat ban on the simultaneous presence of protest

forum expression, housing protesters in protective pens,⁴⁸¹ stationing them behind barricades,⁴⁸² capping their number,⁴⁸³ limiting their noise level,⁴⁸⁴ and restricting their proximity to the target of their message.⁴⁸⁵ But the injunctive powers of

groups with opposing viewpoints; the trial court had issued the injunction to prevent Holocaust survivors and the Ku Klux Klan from demonstrating simultaneously on the residential street of accused Nazi prison guard John Demjanjuk, whose recent release by Israeli prison authorities had prompted the expression of sharply opposing views on Demjanjuk's return to the United States).

478. See, e.g., *Seven Hills*, 667 N.E.2d at 945.

479. For example, in *Olivieri v. Ward*, 801 F.2d 602 (2d Cir. 1986), cert. denied, 480 U.S. 917 (1987), the court held that advocates and opponents of gay rights who sought access to the same unique forum, the sidewalk in front of St. Patrick's Cathedral, in order to raise their voices in response to New York City's annual Gay Pride Parade were entitled to equal recognition of their First Amendment rights and equal time in the desired forum for conducting their demonstrations. See *id.* at 608. In striking down a police order "freezing" the sidewalk in front of the Cathedral and thereby banning any demonstrations or pedestrian traffic there during the Gay Pride Parade, the Second Circuit imposed an injunctive scheme that afforded each of the two rival groups a separate 30 minute time slot in which to protest before the Cathedral, housed in a protective pen. See *id.* at 607; see also *New Alliance Party v. Dinkins*, 743 F. Supp. 1055, 1057, 1060 (S.D.N.Y. 1990) (denying permission to demonstrate to a political party promoting a "Black Agenda" in a sector of a public park within sight and sound of the mayor's mansion; issuing a preliminary injunction, the court granted a limited right of access to a park sector, but authorized the erection of barricades to contain protesters, imposed limits on the size (100 participants) and duration (two hours) of any protest, and vested the police with the authority to terminate any demonstration that became threatening to public safety or to the mayor's security); *Seven Hills*, 667 N.E.2d at 945.

480. See, e.g., *Olivieri*, 801 F.2d at 607-08; *Seven Hills*, 667 N.E.2d at 945.

481. See, e.g., *Olivieri*, 801 F.2d at 607-08.

482. See, e.g., *New Alliance Party*, 743 F. Supp. at 1068.

483. See, e.g., *Olivieri*, 801 F.2d at 607-08; *New Alliance Party*, 743 F. Supp. at 1068; *Seven Hills*, 667 N.E.2d at 945.

484. See, e.g., *Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753, 758 (1994). In *Madsen*, the Court analyzed a speech-restrictive injunction that was aimed at anti-abortion protesters who, in willful violation of previous injunctions, had continued to block clinic driveways and doorways and used loudspeakers and bullhorns that were audible in the clinic's surgery and recovery rooms. See generally *id.* The Court upheld the noise restrictions, and the 36-foot buffer zone around the clinic, but struck down the other provisions, including a 300-foot no-approach zone around the clinic and a sweeping ban on "images observable" by patients inside the clinic. See *id.* at 770, 772-74.

485. See, e.g., *Schenck v. Pro-Choice Network of W. N.Y.*, 519 U.S. 357, 377-78, 380 (1997) (striking down, because it burdened more speech than necessary, an injunction that imposed a "floating buffer zone," requiring pro-life protesters to stay 15 feet from those entering or leaving an abortion clinic; but upholding, on the other hand, a "fixed buffer zone" injunction, requiring protesters to remain 15 feet from clinic doorways and driveways, because it was necessary to ensure access to the clinic); *Madsen*, 512 U.S. at 768-70 (upholding a 36-foot injunctive buffer zone around an abortion clinic); *McKusick v. City of Melbourne*, 96 F.3d 478, 485-86 (11th Cir. 1996) (upholding a state court's abortion clinic injunction that imposed a

a trial court are circumscribed by appellate review.

B. Appellate Review of Speech-Restrictive Injunctions

This section will address a number of discrete issues concerning appellate review of speech-restrictive injunctions: the heightened (and newly-minted) standard of review; problems in gauging the content-neutrality of such injunctions; the general prohibition against granting them *ex parte*; and the need for restricting their scope as narrowly as possible.

In *Madsen v. Women's Health Center, Inc.*,⁴⁸⁶ the Supreme Court announced a new and heightened standard of appellate review for speech-restrictive injunctions.⁴⁸⁷ The Court was confronted in *Madsen* with an injunction against anti-abortion protesters who, in willful violation of previous injunctions, had continued to block clinic driveways and doorways, using loud-speakers and bullhorns that were audible in the clinic's surgery and recovery rooms.⁴⁸⁸ Among the provisions contained in the injunction were a thirty-six-foot "buffer zone" surrounding the clinic that anti-abortion demonstrators were forbidden to enter; a 300-foot "no-approach" zone surrounding the clinic in which anti-abortion protesters were barred from pursuing unwanted communications with clinic visitors; a sweeping ban on "images observable" by patients inside the clinic; and noise restrictions on the protesters' use of amplification equipment.⁴⁸⁹

Observing that "[i]njunctions . . . carry greater risks of censorship and discriminatory application than do general ordinances,"⁴⁹⁰ the *Madsen* Court held that speech-restrictive injunctions should therefore be subjected by appellate courts to more

36-foot buffer zone, as consistent with *Madsen*); *New Alliance Party*, 743 F. Supp. at 1055. Cf. *Sabelko v. City of Phoenix*, 120 F.3d 161, 165 (9th Cir. 1997) (striking down a "floating buffer zone" ordinance—similar to the injunction in *Schenck*—that required abortion clinic protesters, upon request, to maintain an eight-foot distance from any person entering or exiting a clinic).

486. 512 U.S. 753 (1994).

487. *See id.* at 765 ("We must ask . . . whether the challenged provisions of the injunction burden no more speech than necessary to serve a significant government interest.").

488. *See id.* at 758–61.

489. *See id.* at 759–61.

490. *Id.* at 764.

“stringent” First Amendment scrutiny than comparable legislation—that, “when evaluating a content-neutral *injunction*, we think that our standard time, place, and manner analysis is not sufficiently rigorous.”⁴⁹¹ Announcing a new standard of review for speech-restrictive injunctions, the Court held that, rather than inquiring whether the order is “narrowly tailored to serve a significant governmental interest,”⁴⁹² “[w]e must ask instead whether the challenged provisions of the injunction *burden no more speech than necessary* to serve a significant government interest.”⁴⁹³

Since the new standard pertains only to content-neutral injunctions,⁴⁹⁴ the *Madsen* Court was next confronted with the task of gauging the order’s content-neutrality. The Court rejected the contention that the injunction, because it was directed solely at *anti*-abortion protesters, was content or viewpoint based.⁴⁹⁵ By its very nature, an injunction is directed at *particular* individuals because of their *particular* conduct; here, it was the *misconduct* of the anti-abortion demonstrators, including their violation of previous court orders, that led to the instant injunction.⁴⁹⁶ That this injunction did not reach *pro-choice* protesters “is justly attributable to the lack of any similar demonstrations”—or misconduct—“by those in favor of abortion.”⁴⁹⁷ Thus, to accept the petitioners’ argument here “would be to classify virtually every injunction as content or viewpoint based.”⁴⁹⁸

Applying its newly-minted standard to the challenged

491. *Madsen*, 512 U.S. at 765 (emphasis added).

492. *Id.* at 764 (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989)).

493. *Id.* at 765 (emphasis added).

494. Strict scrutiny is reserved for speech restrictions that are content-based. See *Boos v. Barry*, 485 U.S. 312, 321–22 (1988).

495. See *Madsen*, 512 U.S. at 762–63.

496. See *id.* at 762; accord *McKusick v. City of Melbourne*, 96 F.3d 478, 485–86 (11th Cir. 1996) (upholding the court’s abortion clinic injunction and imposing a 36-foot buffer zone, similar to the injunction upheld in *Madsen*, because it was neither unduly broad nor viewpoint-based and because it was targeted at particular demonstrators who had acted on particular occasions in a violent or disruptive manner).

497. *Madsen*, 512 U.S. at 762.

498. *Id.*

injunction, the Court upheld the noise restrictions⁴⁹⁹ and the thirty-six-foot “buffer zone,”⁵⁰⁰ but invalidated the “no-approach” zone⁵⁰¹ and the sweeping ban on “images observable” inside the clinic.⁵⁰² The Court has since reaffirmed its new test.⁵⁰³

There remain two fundamental principles governing appellate review of speech-restrictive injunctions: Such injunctions must not be granted *ex parte*, and their restraints must be limited to the narrowest possible scope. These twin teachings were emphatically delivered in *Carroll v. President & Commissioners of Princess Anne*,⁵⁰⁴ where the Supreme Court struck down a ten-day injunction, issued *ex parte*,⁵⁰⁵ that banned further demonstrations by a white supremacist group.⁵⁰⁶ Local officials secured the injunction only hours after petitioners had staged an “aggressively and militantly racist” rally, held on the courthouse steps before a large mixed-race crowd, featuring amplified speeches that were “deliberately derogatory, insulting, and threatening” to blacks.⁵⁰⁷ The crowd grew increasingly tense as the rally progressed; sixty state policemen from surrounding

499. See *Madsen*, 512 U.S. at 772–73.

500. See *id.* at 768–70.

501. See *id.* at 773–74.

502. See *id.* at 773.

503. See *Schenck v. Pro-Choice Network of W. N.Y.*, 519 U.S. 357 (1997). In *Schenck*, the Court reaffirmed the *Madsen* test for gauging the constitutionality of speech-restrictive injunctions. See *id.* at 372–73. Because it burdened more speech than necessary, the Court struck down the injunction that imposed a “floating buffer zone,” instead requiring anti-abortion protesters to stay 15 feet from those entering or leaving an abortion clinic; but upholding, on the other hand, a “fixed buffer zone” injunction, requiring protesters to remain 15 feet from clinic doorways and driveways, because it was necessary to ensure access to the clinic. See *id.* at 361–63. Before the complaint was filed, the clinics were subjected to numerous large-scale blockades in which protesters marched, stood, knelt, sat, or lay in clinic parking lot driveways and doorways, blocking or hindering cars from entering the lots, and blocking patients and clinic employees from entering the facility. See *id.* at 362–63. In addition, other protesters consistently attempted to stop or disrupt clinic operations by milling around clinic doorways and driveway entrances, trespassing onto clinic parking lots, crowding around cars, and, as to women and their escorts trying to enter the facility, surrounding, crowding, jostling, grabbing, pushing, shoving, yelling, and even spitting at them. See *id.* at 363. These actions continued even in the face of a temporary restraining order. See *id.* at 365.

504. 393 U.S. 175 (1968).

505. See *id.* at 177 & n.2.

506. The group was known as the National States Rights Party. See *id.* at 176.

507. *Id.* at 176–77.

counties arrived and were held in readiness.⁵⁰⁸ Petitioners concluded the rally by exhorting the whites in the audience to return the following night and “bring every friend you have” in order to “raise a little bit of hell for the white race.”⁵⁰⁹

The following night’s rally was averted when local officials, without bothering even informally to contact petitioners, obtained a sweeping ten-day injunction that barred them from holding meetings or rallies anywhere in the county “which will tend to disturb and endanger” the local citizenry.⁵¹⁰ In striking down this injunction, the Supreme Court suggested that *ex parte* speech restrictions are presumptively unconstitutional; this is because, by definition, their issuance takes place without the crucial benefit of evidentiary input from both sides of the dispute,⁵¹¹ and the procedural safeguards necessary for sustaining a prior restraint are thus entirely lacking.⁵¹²

The injunction was offensive to the First Amendment not only for its *ex parte* issuance but also for its broad scope. On this point, the Court stressed that speech-restrictive injunctions:

must be couched in the narrowest terms that will accomplish the pinpointed objective permitted by constitutional mandate and the essential needs of public order. In this sensitive field, the State may not employ “means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved.” In other words, the order must be tailored as precisely as possible to the exact needs of the case.⁵¹³

The Court’s language here—“narrowest terms,” “pinpointed objective,” “exact needs,” “precisely as possible”—could hardly be more emphatic. To survive appellate review, a speech-restrictive injunction must be sharply confined to the narrowest possible scope.

508. See *Carroll*, 393 U.S. at 176.

509. *Carroll*, 393 U.S. at 176 n.1.

510. *Id.* at 177.

511. See *id.* at 183.

512. See *id.* at 180–82.

513. *Id.* at 184 (quoting *Shelton v. Tucker*, 364 U.S. 479, 488 (1960)).

VII. A REGULATORY PRESENCE ON THE STREET: THE POWERS AND DUTIES OF POLICE

Often overlooked in First Amendment law is the unique role of police, who serve as a regulatory presence on the street. Their powers and duties in regulating speech are rarely regarded as a distinct analytical matter—but, in fact, these questions have produced discrete lines of precedent. In this section, we examine the First Amendment role of the police from two perspectives: (1) the extent of their *control* over public forum access, use, and expression; and (2) their duty to *protect* unpopular speakers.

A. Police Power to Regulate the Conduct of Public Demonstrations

The cases involving police power to regulate public forum expression fall into two basic categories: (1) those addressing police-imposed time, place, and manner restrictions; and (2) those addressing police power to arrest or disperse demonstrators.

The first category essentially involves police power to impose ground rules on the *use* of a given forum, tailored to accommodate the unique characteristics of the occasion, the demonstration, and the space.⁵¹⁴ Employing conventional time, place, and manner analysis, courts have upheld police segregation of pro-choice and pro-life demonstrators outside an abortion clinic,⁵¹⁵ the confinement of anti-Soviet picketers to a “bullpen”

514. See, e.g., *Grider v. Abramson*, No. 98-5282, 1999 WL 398010 (6th Cir. June 18, 1999) (upholding crowd control methods employed by police during a KKK rally and a simultaneous opposition rally where these methods included keeping the rallies separated, setting up a magnetometer to check for weapons, and maintaining a police-occupied buffer zone between those attending and those speaking at the Klan rally), *aff'g* 994 F. Supp. 840 (W.D. Ky. 1998).

515. See *Fischer v. City of St. Paul*, 894 F. Supp. 1318, 1323, 1328-29 (D. Minn. 1995) (upholding the police segregation of pro-choice and pro-life demonstrators outside a Planned Parenthood clinic during a ten-day Operation Rescue campaign, including a police order fencing off the clinic's front sidewalk and banning all public access to it except by Planned Parenthood invitees seeking entrance to the clinic and holding that the police restrictions here, which gave anti-abortion protesters three different vantage points from which to protest—on the sidewalk in front of property adjacent to the clinic, in a specially blocked off lane of traffic directly across

across the street from a Russian embassy,⁵¹⁶ and a buffer zone restricting sidewalk demonstrations at the United Nations building.⁵¹⁷

Though courts are generally quite deferential in reviewing these forum housekeeping measures, a recent decision by the Second Circuit indicates that message-based segregation of rival protest contingents may warrant heightened scrutiny. In *Johnson v. Bax*,⁵¹⁸ a visit by President Clinton to New York City prompted police to funnel demonstrators into distinct "pro" and "anti" areas, with a view toward reducing the possibility of conflict between supporters and opponents of the President.⁵¹⁹ The plaintiff appeared on the scene bearing a sign—reading "Mr. Clinton: Stop Campaigning and Lead!"—that he regarded as offering "constructive criticism" of the President.⁵²⁰ Police arrested the plaintiff when he refused to be placed in the "anti" area, asserting that the "anti" area afforded less favorable access to the President, and that being placed there, in the midst of "professional Marxists," effectively radicalized *his* message of constructive criticism.⁵²¹ Though the Second Circuit did not reach the constitutionality of this message-based segregation, ruling that genuine issues of material fact precluded summary

the street from the clinic, and authorization for one protester to stand at the clinic's driveway entrance to hand out literature—were narrowly tailored to serve significant government interests and left open alternative channels of communication).

516. See *Concerned Jewish Youth v. McGuire*, 621 F.2d 471, (2d Cir. 1980) (rejecting a First Amendment challenge by a Jewish group to police restrictions on demonstrations at the Russian Mission to the United Nations where the restrictions limited the number of protesters to twelve, confined their closest location to a "bullpen" diagonally across the street from the Mission, and banned the use of sound amplification equipment anywhere on the Mission block), *cert. denied*, 450 U.S. 913 (1981).

517. See *International Soc'y for Krishna Consciousness, Inc. v. City of New York*, 504 F. Supp. 118, (S.D.N.Y. 1980) (upholding police policy regulating time, place, and manner of sidewalk demonstrations in the vicinity of the United Nations building, thereby rejecting the claims for injunctive relief by Krishnas who sought to proselytize and solicit funds on the sidewalk immediately adjacent to the U.N. visitor's gate when the challenged policy merely barred "a continuous presence" on the sidewalk directly contiguous to the U.N. building, but freely allowed picketing, demonstrations, and other expressive activity on the opposite side of the street).

518. 63 F.3d 154 (2d Cir. 1995).

519. See *id.* at 156.

520. *Id.*

521. *Id.*

judgment against the plaintiff,⁵²² the court identified a range of vexing First Amendment issues posed by plaintiff's claims: (1) whether dividing demonstrators into "pro" and "anti" areas may be deemed a *content-neutral* forum regulation; (2) whether the respective vantage points to which the groups were assigned genuinely afforded them *equal* access to the President; (3) whether the First Amendment is offended by the *discretion* enjoyed by police in deciding whether a speaker's message falls into the "pro" or "anti" category; and (4) whether the act of placing a particular speaker in a particular area unconstitutionally *alters* his intended message.⁵²³

Though *Johnson v. Bax* will not likely disturb the general judicial deference to time, place, or manner restrictions imposed by police, it does indicate that the message-based segregation of rival protesters is vulnerable to heightened scrutiny.

We turn next to police power to arrest or disperse public forum demonstrators. Courts are generally deferential to on-the-street judgments by police to arrest or disperse, so long as evidence of illegal⁵²⁴ or unruly⁵²⁵ behavior exists;⁵²⁶ but that

522. See *Johnson*, 63 F.3d at 160.

523. See *id.* at 158-59 & n.2.

524. See, e.g., *Habiger v. City of Fargo*, 80 F.3d 289, 295 (8th Cir.), *cert. denied*, 117 S. Ct. 518 (1996) (holding that police officers had qualified immunity in a suit brought by an abortion protester who was arrested for violating a temporary restraining order governing clinic demonstrations); *United States v. Cinca*, 56 F.3d 1409, 1416 (D.C. Cir. 1995) (holding that U.S. Park Police were properly empowered to revoke the permit of White House demonstrators and then arrest them where the demonstrators, in violation of National Park Service regulations, sat down and held signs in the center portion of the White House sidewalk, forcing other pedestrians into the street).

525. See, e.g., *Redd v. City of Enterprise*, 140 F.3d 1378, 1383 (11th Cir. 1998) (granting qualified immunity to police officers concerning their arrest of sidewalk preachers who were speaking loudly and yelling at passers-by; although the preachers were engaged in constitutionally protected speech in a traditional public forum, the arrest was lawful because their behavior could reasonably be construed as disorderly conduct); *Washington Mobilization Comm. v. Cullinane*, 566 F.2d 107, 122-23 (D.C. Cir. 1977) (authorizing the arrest or dispersal of violent or "obstructive" demonstrators, the court here rejects claims by anti-war protesters for injunctive restrictions on the crowd-control tactics used by Washington, D.C. police); *Spratlin v. Montgomery County*, 772 F. Supp. 1545, 1552 (D. Md. 1990) (holding that the police did not violate the First or Fourth Amendment rights of a protester whom they briefly detained after he had publicly called for the *death* of a county official), *aff'd mem.*, 941 F.2d 1207 (4th Cir. 1991); *Landry v. Daley*, 288 F. Supp. 183, 188-89 (N.D. Ill. 1968) (holding that there was no basis under First Amendment for enjoining state court prosecutions of fair housing protesters who,

deference vanishes upon proof that police expelled or arrested a protester based on the viewpoint he sought to express.⁵²⁷ The latter situation seems most frequently to arise when police

while proceeding without a permit to erect a large tent on a vacant lot, repeatedly defied and physically resisted police orders to dismantle the tent and disperse).

526. Absent illegal or unruly behavior on the part of the demonstrators, courts do not employ the same deference in analyzing police power to arrest or disperse. *See, e.g.*, *Lamb v. City of Decatur*, 947 F. Supp. 1261, 1264–65 (C.D. Ill. 1996) (holding that police officers who pepper-sprayed labor protesters as they conducted a peaceful demonstration were not entitled to qualified immunity; notwithstanding the alleged excitability of the crowd, the widely-recognized protection for First Amendment protection was enough to put police on notice that using force against non-violent demonstrators was prohibited and therefore, qualified immunity is not widely available to police in First Amendment cases); *Nuremberg Actions v. County of Contra Costa*, 697 F. Supp. 1111, 1112 (N.D. Cal. 1988) (holding that plaintiff protesters adequately stated a claim for injunctive relief against police use of “pain holds” in dealing with demonstrations at a naval weapons station).

527. *See, e.g.*, *Johnston v. City of Houston*, 14 F.3d 1056, 1061 (5th Cir. 1994) (refusing to grant summary judgment based on qualified immunity to Houston police officers who arrested the plaintiff during a protest at a Chinese consulate where evidence indicated that the plaintiff may have been arrested for voicing views critical of the Bush Administration); *Cannon v. City & County of Denver*, 998 F.2d 867, 878 (10th Cir. 1993) (denying police officers the ability to assert a qualified immunity defense to a section 1983 action brought by anti-abortion protesters whom they arrested for carrying signs reading “The Killing Place” which could not be justified as an effort to suppress “fighting words” or to halt expression inherently likely to cause a breach of the peace); *ACT-UP v. Walp*, 755 F. Supp. 1281, 1289–90 (M.D. Pa. 1991) (holding that police, in their effort to shield governor from criticism and thwart planned protest by gay rights organization, violated First Amendment by closing state legislature’s public gallery for the first time ever during governor’s annual address and that police committed content-based closure of limited public forum); *Farber v. Rizzo*, 363 F. Supp. 386, 393–95 (E.D. Pa. 1973) (addressing a broad range of police actions regulating protesters who sought to demonstrate against President Nixon, including police violation of a temporary restraining order designed to guarantee the protesters access to a public space adjacent to the hall where the President was speaking and finding that police, with the aim of limiting visible expressions of dissent during the President’s visit, pursued a policy of excluding and arresting sign-bearing demonstrators who sought access to the public space designated in the temporary restraining order, thereby holding that the officers’ willful violation of the temporary restraining order constituted civil contempt); *Sparrow v. Goodman*, 361 F. Supp. 566, 585 (W.D.N.C. 1973) (holding that the police and the Secret Service violated the First Amendment in their selective exclusion and arrest of individuals, based solely on their physical appearance as likely Nixon antagonists, who, holding valid tickets, tried to enter a “Billy Graham Day” event at the Charlotte Coliseum, to be attended by President Nixon), *aff’d sub nom. Rowley v. McMillan*, 502 F.2d 1326 (4th Cir. 1974). *But see* *Kroll v. United States Capitol Police*, 847 F.2d 899, 904 (D.C. Cir. 1988) (upholding the power of the Capitol Police to arrest a protester who held up a sign that, in the officer’s estimation, “conflicted with the spirit of” an Olympic welcoming ceremony conducted outdoors on Capitol Hill, thereby holding that the officer enjoyed qualified immunity in performing this arrest, even though he arrested the plaintiff for demonstrating without a permit but allowed other onlookers, equally bereft of permits, to hold up signs that directed no criticism at the Olympics).

attempt to shield public officials from criticism or dissent.⁵²⁸

When demonstrators engage in *illegal* behavior—when, for example, an abortion clinic protester violates a temporary restraining order,⁵²⁹ or White House picketers refuse to abide by National Park Service regulations⁵³⁰—police power to arrest them is clear. Likewise, police have the power to arrest or disperse demonstrators who engage in obstructive, unruly, or violent behavior. In *Landry v. Daley*,⁵³¹ for example, a federal judge held that there was no First Amendment basis for enjoining state court prosecutions of fair housing protesters who, while proceeding without a permit to erect a large tent on a vacant lot, repeatedly defied and physically resisted police orders to dismantle the tent and disperse.⁵³²

Singularly useful in affording guidance on police power to arrest or disperse is *Washington Mobilization Committee v. Cullinane*,⁵³³ where the D.C. Circuit rejected claims by anti-war protesters for injunctive restrictions on the crowd-control tactics used by Washington police. In a three-week trial, plaintiffs adduced evidence that the police, in an effort to quell Vietnam War protests from 1969 to 1971, used stationary police lines to block the progress of marches; used moving police lines, or “sweeps,” to enforce dispersal orders; and made widespread use of the District’s “failure-to-move-on” statute to conduct

528. See, e.g., *Johnston*, 14 F.3d at 1058 (protester allegedly expressed views critical of the Bush Administration); *ACT-UP*, 755 F. Supp. at 1289 (shielding governor from expected dissent at his State of the Commonwealth address); *Farber*, 363 F. Supp. at 393–95 (systematically excluding and arresting any sign-bearing demonstrator critical of President Nixon); *Sparrow*, 361 F. Supp. at 569–76 (selective exclusion and arrest of likely Nixon antagonists attempting to enter a “Billy Graham Day” event to be attended by President Nixon).

529. See *Habiger*, 80 F.3d at 289.

530. See *United States v. Cinca*, 56 F.3d 1409 (D.C. Cir. 1995).

531. 288 F. Supp. 183 (N.D. Ill. 1968).

532. See *id.* at 185–86. Problematic, and probably wrong under current law, is the court’s conclusion regarding one protester who offered no physical resistance but did exhort a crowd of 175 onlookers that the arrests they were witnessing were wrong. See *id.* at 188–89. The case of *Brandenburg v. Ohio*, 395 U.S. 444, 449 (1969), was not decided until the following year—and might have altered the outcome in light of *Landry*’s finding, 288 F. Supp. at 189, that this defendant’s exhortations to the crowd, while “generating increasing response and tension,” did *not* direct them “to specific action.”

533. 566 F.2d 107 (D.C. Cir. 1977).

mass arrests of nonviolent demonstrators.⁵³⁴ Reversing the grant of injunctive relief below, the D.C. Circuit attempted to place a more benign spin on the plaintiffs' evidence of police behavior. Whether or not the court is persuasive in its interpretation of the record, the opinion offers more detailed guidance than any other on police power to arrest or disperse. "In ordering obstructive demonstrators to 'move on,'" observes the court, "the initial police objective must be merely to clear passage [for vehicular and pedestrian traffic], not to disperse the demonstrators, or to suppress the free communication of their views."⁵³⁵ Under the First Amendment, police may "impose reasonable restraints upon demonstrators to assure that they be peaceful and not obstructive," and, by the same token, "to contain or disperse demonstrations that have become violent or obstructive."⁵³⁶ As for "violent or obstructive" protesters, the police "may validly order [them] to disperse or clear the streets. If any demonstrator or bystander refuses to obey such an order after fair notice and opportunity to comply, his arrest does not violate the Constitution even though he has not previously been violent or obstructive."⁵³⁷

Tempering the expansive police powers recognized in *Cullinane* are *Nuremberg Actions v. County of Contra Costa*⁵³⁸ and *Lamb v. City of Decatur*⁵³⁹—cases that deal with police officers resorting to "pain holds" and pepper spray, respectively. In *Nuremberg*, a federal district judge ruled that protesters had adequately stated a claim for injunctive relief against police use of "pain holds" in regulating demonstrators at a naval weapons station.⁵⁴⁰ In *Lamb*, a district court held that police officers who pepper-sprayed labor protesters as they conducted a peaceful demonstration were not entitled to qualified immunity; the alleged "excitability" of the protesters, even if true, did not justify forcibly dispersing an otherwise orderly demonstration.⁵⁴¹

534. See *Cullinane*, 566 F.2d at 111.

535. *Id.* at 116–17.

536. *Id.* at 119.

537. *Id.* at 120.

538. 697 F. Supp. 1111 (N.D. Cal. 1988).

539. 947 F. Supp. 1261 (C.D. Ill. 1996).

540. See *Nuremberg*, 697 F. Supp. at 1112.

541. See *Lamb*, 947 F. Supp. at 1264.

Nuremberg and *Lamb* indicate that there are limits to the judicial deference normally accorded on-the-street judgments by police, even when those judgments are made under shifting and stressful circumstances. *Lamb* shows that the decision to *disperse* a demonstration must be based on more than mere *unrest* among the protesters.⁵⁴² *Nuremberg* shows that when dispersal is appropriate—as, for example, when expelling protesters from a nonpublic forum⁵⁴³—the use of force should not exceed what is necessary.⁵⁴⁴ In a word, it is police *overreaction* that explains the results in these cases. Absent a sense that police were overreacting in some way, a judge will normally treat their on-the-street judgments with considerable respect.

Police overreaction of a different sort—stemming from a zealous desire to protect public officials from criticism or dissent—has produced a line of cases in which the usual judicial deference is conspicuously absent. These are the cases involving viewpoint-based expulsion or arrest of public protesters. With minor exceptions,⁵⁴⁵ courts consistently hold that this type of police behavior violates the First Amendment.⁵⁴⁶

In *Johnston v. City of Houston*,⁵⁴⁷ the Fifth Circuit denied qualified immunity to Houston police officers because the record indicated that they arrested plaintiff at a public forum protest for voicing views critical of the Bush Administration.⁵⁴⁸ In *ACT-UP v. Walp*,⁵⁴⁹ a district judge ruled that police violated the First Amendment when, in their effort to shield the governor from criticism and thwart a planned protest at his annual ad-

542. See *Lamb*, 947 F. Supp. at 1267.

543. The naval weapons station in *Nuremberg*, like any military installation, is a nonpublic forum for First Amendment purposes. See *Greer v. Spock*, 424 U.S. 828, 838 (1976).

544. See *Nuremberg*, 697 F. Supp. at 1112.

545. See, e.g., *Kroll v. United States Capitol Police*, 847 F.2d 899, 904 (D.C. Cir. 1988) (upholding the power of Capitol Police to arrest a protester who held up a sign that, in the officer's estimation, "conflicted with the spirit of" an Olympic welcoming ceremony conducted outdoors on Capitol Hill, and held that the officer enjoyed qualified immunity in performing this arrest, even though he arrested the plaintiff for demonstrating without a permit but allowed other onlookers, equally bereft of permits, to hold up signs that directed no criticism at the Olympics).

546. See *supra* notes 527–28 and accompanying text.

547. 14 F.3d 1056 (5th Cir. 1994).

548. See *id.* at 1058.

549. 755 F. Supp. 1281 (M.D. Pa. 1991).

dress, they closed the state legislature's public gallery for the first time ever during such a speech.⁵⁵⁰ In *Sparrow v. Goodman*,⁵⁵¹ a district judge held that police and Secret Service agents violated the First Amendment in their selective exclusion and arrest of individuals—based solely on their physical appearance as likely antagonists of President Nixon—who, holding valid tickets, tried to enter a “Billy Graham Day” event at the Charlotte Coliseum, which the President was scheduled to attend.⁵⁵² And, in *Farber v. Rizzo*,⁵⁵³ Philadelphia police officers were held in civil contempt when, with the aim of suppressing visible expressions of dissent during a visit by President Nixon, they violated a temporary restraining order by systematically arresting any sign-bearing demonstrator who sought access to a public forum adjacent to the hall where the President was speaking.⁵⁵⁴ The *Farber* court observed:

We reject completely [the police] contention that [their] actions were justified by the past activities of some plaintiffs at demonstrations and by the uncorroborated reports of unidentified informants. The term “security risk” is not a talisman by which constitutional limitations are erased and police are given a free hand. The actions of plaintiffs at prior demonstrations may not be used to deprive them of the opportunity to exercise their First Amendment rights. The police cannot be given the unfettered right to suppress demonstrations because they consider them risky from prior experience.⁵⁵⁵

550. See *Walp*, 755 F. Supp. at 1289–90.

551. 361 F. Supp. 566 (W.D.N.C. 1973), *aff'd sub nom. Rowley v. McMillan*, 502 F.2d 1326 (4th Cir. 1974).

552. See *id.* at 569–76.

553. 363 F. Supp. 386 (E.D. Pa. 1973).

554. See *id.* at 393–95.

555. *Id.* at 397 n.11 (citations omitted). In *Farber*, the court held that the police violated the First Amendment in arresting a protester who, while ensconced in the public area protected by the temporary restraining order, used a bullhorn to address the other crowd members, since there was no showing that the bullhorn's volume was beyond a reasonable range. See *id.* at 396. The court also held that police did *not* violate the First Amendment in arresting an individual who was screaming abuse at the arresting officers and urging onlookers to interfere with the arrest. See *id.*

We turn now from police regulatory *control* over public demonstrations to their duty to *protect* unpopular speakers.

B. Police Protection of Speakers Who Inspire a Hostile Audience Reaction

The First Amendment does not merely bar police from silencing a speaker whose message is provocative or unpopular;⁵⁵⁶ it imposes an affirmative duty to *protect* a speaker whose message has produced a hostile audience reaction.⁵⁵⁷

556. For example, in *Texas v. Johnson*, 491 U.S. 397, 409 (1989), the Court overturned a flag-burning conviction and stated that “the government may [not] ban the expression of certain disagreeable ideas on the unsupported presumption that their very disagreeableness will provoke violence,” nor may it “assume that every expression of a provocative idea will incite a riot.” *Id.* at 409. Indeed, “if it is the speaker’s *opinion* that gives offense, that consequence is a *reason* for according it constitutional protection.” *Id.* (quoting *FCC v. Pacifica Foundation*, 438 U.S. 726, 745 (1978) (Stevens, J., concurring)) (emphasis added).

In *Street v. New York*, 394 U.S. 576 (1969), the Court overturned a flag-burning conviction, stating that “[i]t is firmly settled that under our Constitution the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers.” *Id.* at 580–81, 592. In *Terminiello v. City of Chicago*, 337 U.S. 1 (1949), the trial court construed a breach-of-the-peace ordinance as “permitt[ing] conviction of petitioner if his speech stirred people to anger, invited public dispute, or brought about a condition of unrest. A conviction resting on any of those grounds may not stand.” *Id.* at 5.

557. For example, in *Sabel v. Stynchcombe*, 746 F.2d 728 (11th Cir. 1984), the court overturned refusal-to-disperse convictions of several Revolutionary Communist Party demonstrators who, in the course of a May Day rally, inspired a hostile reaction by almost 200 onlookers. *Id.* at 729–31. The court recognized that the police have a *duty to protect* unpopular speakers confronted by a hostile crowd. *See id.* at 731. The court also concluded that the “shouting,” “shoving,” and “cursing” that witnesses observed among the 200 onlookers “provided an insufficient basis for governmental restriction of protected speech.” *Id.* at 731 & n.7.

In *Glasson v. City of Louisville*, 518 F.2d 899 (6th Cir. 1975), the court sustained a section 1983 action by a solitary anti-Nixon protester whose sign was destroyed by police at the behest of hostile on-lookers. *See id.* at 901, 906. The court held that the police not only violated the First Amendment by destroying the plaintiff’s sign, but had an affirmative *duty to protect* her from the hostile crowd. *See id.* at 906.

In *Wolin v. Port of New York Authority*, 392 F.2d 83 (2d Cir. 1968), the court afforded injunctive relief to anti-war protesters who sought access to New York City’s Port Authority Bus Terminal for the purpose of expressing their views on Vietnam by distributing leaflets, carrying placards, and conducting discussions with passers-by. *See id.* at 85–86. The court held that protesters were “entitled to *protection* by Terminal police” against disturbances provoked by hostile audience. *Id.* at 94 (emphasis added).

In *Downie v. Powers*, 193 F.2d 760 (10th Cir. 1951), the Tenth Circuit reversed a district court’s dismissal of a civil rights action brought by Jehovah’s Witnesses against a police department for standing by and failing to protect them when a mob burst into the auditorium where they were gathered and, using “sticks, rocks, guns, and other instruments of violence . . . attacked

These principles are vividly illustrated in *Glasson v. City of Louisville*,⁵⁵⁸ where a solitary anti-Nixon protester, waiting along the route of a Presidential motorcade amid a sea of Nixon

[them] and broke up the assembly." *Downie*, 193 F.2d at 762. The court held that it is not enough for police to remain neutral in a hostile audience situation; they have an affirmative *duty to protect* the unpopular speaker. *See id.* at 764. "One charged with the duty of keeping the peace cannot be an innocent bystander where constitutionally protected rights of persons are being invaded. He must stand on the side of law and order or be counted among the mob." *Id.*

In *Hurwitt v. City of Oakland*, 247 F. Supp. 995 (N.D. Cal. 1965), the court enjoined city officials from prohibiting a parade intended to protest U.S. military intervention in Vietnam, even though plaintiffs' previous marches had been disrupted by angry spectators, including the Hell's Angels, who hurled tear gas bombs, broke through a police cordon, ripped banners, and disabled loudspeakers, where the plaintiffs and their followers had always remained non-violent. *Id.* at 998-1001, 1007.

[S]uppression by public officials or police of the right of free speech and assembly cannot be made an easy substitute for the performance of their duty to maintain order by taking such steps as may be necessary and feasible to *protect* peaceable, orderly speakers, marchers, or demonstrators in the exercise of their rights against violent or disorderly retaliation or attack at the hands of those who may disagree and object.

Id. at 1001 (emphasis added).

In *Beckerman v. City of Tupelo*, 664 F.2d 502 (5th Cir. 1981), civil rights activists brought a First Amendment challenge to parade and sound equipment ordinances because they were seeking to conduct a protest march. *See id.* at 506. The court stated that the

state is not powerless to prevent imminent violence or lawlessness resulting from a clash between the marchers and onlookers. If this situation arises, *the police must try first to disperse and control the crowd*, and if that becomes impossible, the marchers may be arrested. Likewise, if the marchers exceed the bounds of persuasion and argument and enter the realm of incitement to imminent lawless action, they can be punished. Such punishment or curtailment of First Amendment rights must be based on a present abuse of rights, not a pre-nascent fear of future misconduct.

Id. at 510 (emphasis added) (citations omitted).

However, to the above cases compare *Feiner v. New York*, 340 U.S. 315 (1951), where the Court upheld a disorderly conduct conviction of a college student who, standing atop a soapbox and using a loudspeaker, gave a streetcorner speech to a crowd of eighty people in which his derogatory remarks about President Truman, the American Legion, the Mayor of Syracuse, and other local officials inspired a hostile audience reaction. *See id.* at 316-17, 321. The court held that the conviction could be sustained based on the trial court's findings that defendant encouraged his audience to become divided into hostile camps, that the gathering crowd was interfering with traffic, and that defendant repeatedly refused police requests to cease talking. *See id.* at 318-21.

It is neither unusual nor unexpected that some people at public street meetings mutter, mill about, push, shove, or disagree, even violently, with the speaker. Indeed, it is rare where controversial topics are discussed that an outdoor crowd does not do some or all of these things . . . [The officers'] *duty was to protect petitioner's right to talk, even to the extent of arresting the man who threatened to interfere.*

Id. at 325-26, 327 (Black, J., dissenting) (emphasis added) (citations omitted). "It is against that kind of threat that speakers need *police protection*. If they do not receive it and instead the police throw their weight on the side of those who would break up the meetings, the police become the new censors of speech." *Id.* at 331 (Douglas, J., dissenting) (emphasis added).

558. 518 F.2d 899, 905 (6th Cir.), *cert. denied*, 423 U.S. 930 (1975).

supporters, unfurled a protest sign that read: “[L]ead us to hate and kill poverty, disease, and ignorance, not each other.”⁵⁵⁹ The woman’s sign prompted “grumbling and mutter[ed] threats” among onlookers across the street, and this hostility escalated until a nearby police officer feared that “the crowd . . . [was] going to go over and get her—maybe hurt her.”⁵⁶⁰

Obeying a general directive “to destroy all signs detrimental to the President,”⁵⁶¹ the police officer

approached appellant and, according to his testimony, asked her, “Would you please take this sign down, Lady; it’s detrimental to the United States of America.” When [the protester] refused, and replied that she had a right to display it, [the police officer] took it from her and tore it up. The hecklers across the street cheered and then immediately quieted down and began to disperse.⁵⁶²

Holding that the officer was liable for violating the protester’s First Amendment rights, the *Glasson* court observed that “hostile public reaction does not cause the forfeiture of the constitutional protection afforded a speaker’s message,”⁵⁶³ and declared:

To permit police officers to prohibit the expression of ideas which they believe to be “detrimental” or “injurious” to the President of the United States or to punish for incitement or breach of the peace the peaceful communication of such messages because other persons are provoked and seek to take violent action against the speaker would subvert the First Amendment, and would incorporate into that constitutional guarantee a “heckler’s veto” which would empower an audience to cut off the expression of a speaker with whom it disagreed. The state may not rely on community hostility and threats of violence to justify

559. *Glasson*, 518 F.2d at 901–02.

560. *Id.* at 902.

561. *Id.*

562. *Id.*

563. *Id.* at 905.

censorship.⁵⁶⁴

The *Glasson* court concluded that a police officer's duty in a hostile audience situation is not merely to *refrain* from enforcing a heckler's veto; the officer has an affirmative duty to *protect* the unpopular speaker:

A police officer has the duty not to ratify and effectuate a heckler's veto, nor may he join a moiling mob intent on suppressing ideas. Instead, he must take reasonable action to protect from violence persons exercising their constitutional rights.⁵⁶⁵

The other federal courts to address this issue have agreed that it is not enough for police to remain neutral in a hostile audience situation; officers have an affirmative protective duty toward the speaker.⁵⁶⁶ As the Tenth Circuit observed: "One charged with the duty of keeping the peace cannot be an innocent bystander where the constitutionally protected rights of persons are being invaded. He must stand on the side of law and order or be counted among the mob."⁵⁶⁷

The Eleventh Circuit has identified a variety of options that police may pursue in carrying out their duty to protect. In *Sabel v. Stynchcombe*, the court overturned the refusal-to-disperse convictions of Revolutionary Communist Party demonstrators who, in the course of a May Day rally, inspired a hostile reaction by almost 200 onlookers.⁵⁶⁸ The court observed:

If police believed, as they stated, that they were less concerned with appellants' intrusions than with protecting them from an increasingly threatening crowd, they enjoyed an even greater range of choice. They could have taken steps to protect appellants while allowing the

564. *Glasson*, 518 F.2d at 905-06 (footnote omitted).

565. *Id.* at 906.

566. See *Sabel v. Stynchcombe*, 746 F.2d 728, 731 & n.7 (11th Cir. 1984); *Beckerman v. City of Tupelo*, 664 F.2d 502, 510 (5th Cir. 1981); *Wolin v. Port of New York Authority*, 392 F.2d 83, 94 (2d Cir. 1968); *Downie v. Powers*, 193 F.2d 760, 764 (10th Cir. 1951); *Hurwitt v. City of Oakland*, 247 F. Supp. 995, 1001 (N.D. Cal. 1965).

567. See *Downie*, 193 F.2d at 764.

568. 746 F.2d 728, 729-31 (11th Cir. 1984).

demonstration to continue, such as surrounding the speakers or arresting those spectators who threatened violence. Or they could have taken [Revolutionary Communist] Party members into protective custody, curtailing the demonstration but not subjecting appellants to prosecution.⁵⁶⁹

The court concluded that the “shouting,” “shoving,” and “cursing” that witnesses observed among the 200 onlookers “provided an insufficient basis for governmental restriction of protected speech.”⁵⁷⁰

These duty-to-protect cases impose on police a responsibility that few officers will relish; but the role assigned them is crucial to ensuring that “freedom of speech” remains more than merely a platitude.

VIII. CONCLUSION

There are four regulatory players in the realm of public protest: legislators,⁵⁷¹ administrators,⁵⁷² judges,⁵⁷³ and police.⁵⁷⁴ This Article identifies discrete lines of precedent that have grown up around each of those players. From the duty-to-protect cases governing police⁵⁷⁵ to the permit cases governing administrators,⁵⁷⁶ these lines of precedent—though frequently overshadowed by the public forum doctrine—represent a significant undercurrent in the law of public protest. Failure to distinguish among the four regulatory players, and failure to account for their respective lines of precedent, are salient causes for the confusion that so often plagues this branch of First Amend-

569. *Sabel*, 746 F.2d at 731 (footnotes omitted).

570. *Id.* at 730-31.

571. See Section IV, *supra* notes 268-408 and accompanying text.

572. See Section V, *supra* notes 409-474 and accompanying text.

573. See Section VI, *supra* notes 475-513 and accompanying text.

574. See Section VII, *supra* notes 514-570 and accompanying text.

575. See, e.g., *Sabel v. Stynchcombe*, 746 F.2d 728, 731 (11th Cir. 1984); *Glasson v. City of Louisville*, 518 F.2d 899, 905-06 (6th Cir.), *cert. denied*, 423 U.S. 930 (1975); *Wolin v. Port of N.Y. Auth.*, 392 F.2d 83, 94 (2d Cir. 1968).

576. See, e.g., *Forsyth County v. Nationalist Movement*, 505 U.S. 123 (1992); *Shuttlesworth v. City of Birmingham*, 394 U.S. 147 (1969); *NAACP v. City of Richmond*, 743 F.2d 1346 (9th Cir. 1984).

ment law.