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Demonstrations, Security Zones, and First Amendment Protection of Special Places

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DEMONSTRATIONS, SECURITY ZONES, AND FIRST AMENDMENT PROTECTION OF SPECIAL PLACES

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I. INTRODUCTION

Recent events reveal a marked increase in government limitations on public protests and demonstrations. Certain areas, such as public space near the White House, have been effectively placed off limits to demonstrators. Protestors are put out of sight, down the road, or otherwise away from the object of their protest. The Secret Service has created "security zones" insulating the President and his entourage from the sights and sounds of opposition marches and demonstrations. And the police are using sophisticated tactics, such as surveillance, infiltration, disinformation, and preemptive arrests to undermine and frustrate the ability of protestors to conduct their marches and send their message to the larger public. While it may seem that 9/11 and the war on terrorism would make these actions even more defensible than they might otherwise be, actually the opposite is true. Most of the demonstrations affected by government suppression tactics are just those "troublesome" popular risings—opposition to war, globalization economics, and loss of privacy and freedom—that serve to check government overreaching but which may find little outlet in mainstream forms of communication. Yet First Amendment doctrine, in particular the time, place, and manner test, has become too flabby and unstable to reliably counter the government's sophisticated dilution and weakening of public demonstrations and the consequent enervation of dissent. To protect rights of protest and to restore integrity to "the right of the people peaceably to assemble, and to petition the Government for a redress of grievances,"[1] this symposium paper calls for a recasting of the time, place and manner test[2] and a recognition of a First Amendment doctrine of "special places."

Part II of this article surveys the recent tactics used by the government to contain protest and demonstrations, focusing particularly on demonstrations in Washington, D.C. Part III identifies the essential liberty interest in protecting protest and demonstrations in the streets, the people's forum. Then Parts IV and V evaluate the effectiveness of the time, place, and manner test and the tensions arising from a facile either/or contrast with content control. Part VI suggests a more nuanced, intermediate scrutiny doctrine of special places, and, finally, Part

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1 U. S. CONST., Amend. 1.

2 *See, e.g.,* Clark v. Community for Creative Nonviolence, 468 U.S. 288 (1984).

VII suggests how this new doctrine would work in the example of Washington, D.C.'s Lafayette Park.

II. THE TACTICS OF SUPPRESSION

Recent tactics of suppressing and frustrating marches, demonstrations, and political dissent have moved beyond the blunt, obvious, and plainly unlawful use of fire hoses, baton beatings, and mass arrests.[3] It is not that the police have entirely abandoned violence and improper use of force to control demonstrators. Just ask the 150 protestors injured when Miami police attacked them with batons, rubber bullets, concussion grenades, and pepper spray as they marched against the Free Trade Area of the Americas meeting in November 2003.[4] Rather, police have added to their repertoire tactics designed to dilute, cabin, and render irrelevant marches and demonstrations opposing government policies concerning war, globalization, and civil liberties. Such tactics are more dangerous to First Amendment values because they are more insidious. They frustrate and diminish public protest but are less likely to generate sympathy for protestors or arouse public ire.[5]

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3 See SARAH BULLARD, FREE AT LAST: A HISTORY OF THE CIVIL RIGHTS MOVEMENT AND THOSE WHO DIED IN THE STRUGGLE 33 (1993) (over one thousand civil rights workers arrested during Mississippi Freedom Summer in 1964); HARVARD SITKOFF, THE STRUGGLE FOR BLACK EQUALITY: 1954-1992 115 (1993) (over one thousand protestors jailed at one time during protests in Albany, Georgia in 1961-62); *id.* at 118, 127-28 (over twenty thousand protestors jailed during protests in Birmingham, Alabama in 1963); HENRY HAMPTON & STEVE FAYER, VOICES OF FREEDOM: AN ORAL HISTORY OF THE CIVIL RIGHTS MOVEMENT FROM THE 1950S THROUGH THE 1980S 222 (1990) (thousands jailed during protests in Selma, Alabama, including over three thousand during one week in 1965); JUAN WILLIAMS, EYES ON THE PRIZE: AMERICA'S CIVIL RIGHTS YEARS, 1954-1965 190-93 (1987) (describing Birmingham firefighters' use of hoses on children and other civil rights protestors, with water powerful enough to rip the bark off trees); *see also* Washington Mobilization Comm. v. Cullinane, 566 F.2d 107, 111 (D.C. Cir. 1977) (rejecting claims by anti-war protestors 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).

4 Forty police agencies provided 2,500 officers, funded in part by money from the $8.5 billion Congressional appropriation for Iraq and Afghanistan, to watch over several thousand demonstrators who demonstrated against globalization and free trade policies during meetings of negotiators on the Free Trade Area of the Americas in Miami in November. Police beat and routed groups of demonstrators including medics tending to wounded protestors. The police say they took no action until demonstrators threw projectiles or failed to disperse when ordered. *See, e.g.*, Les Kjos, *FTAA Dispute Roars On,* UNITED PRESS INTERNATIONAL, Dec. 4, 2003 (hereinafter UPI); Forrest Norman, *Dangerous Medicine For Street Medics Tending To FTAA Protestors, Neutrality Was No Match For Brutality,* MIAMI NEW TIMES, Dec. 4, 2003.

5 For example, the vicious and brutal actions of the police at the 1968 Democratic Convention in Chicago, widely viewed as a police riot, generated sympathy and support for the anti-Vietnam War movement. Of course not all violent action against protestors generates sympathy or solidarity, at

A. *Special Places Put Off Limits—the Case of Lafayette Park*

Lafayette Park is a peaceful city block of greenery located directly across from the White House on Pennsylvania Avenue. The park, together with the sidewalk in front of the White House, has been the site of political protests for over 80 years. And for just about as long the government has sought to limit or end such protests.

During the period from September 11, 2001 to March 2004, United States Park Police regulations prevented all demonstrations of more than 25 persons in the park.[6] In August 2002, a federal judge upheld the 25 person protest ban and denied a request by a Christian activist group that wanted to hold prayer vigils across the street from the White House to commemorate the one-year anniversary of September 11th. The judge ruled that the National Park Service, acting on a series of requests from the Secret Service, was justified in denying all permits for large demonstrations in the park since the terrorist attacks.[7] The ban for August and September was based partly on classified intelligence information "regarding threats to the President and the White House complex," according to the government's court filing.[8] More broadly, however, and likely the reason the ban remained in place for over two years, was the government's contention that the "necessity of limiting large group activity in Lafayette Park is based on the ability of the Secret Service to observe and detect individuals who may either constitute an immediate threat or be preparing for a future threat against the White House."[9]

The restrictions on demonstrations in the park are not merely a post-9/11 phenomenon. From 1967 to 1977, during the Vietnam War, a series of legal challenges called the "Quaker Action" cases were required to invalidate a 100-person limit on White House sidewalk demonstrations and a 500-person limit on Lafayette Park demonstrations.[10] Only a few years later, Lafayette Park resumed its

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least not in all quarters. In the Miami protests referred to above, on the very same day that the AFL-CIO was calling for the resignation of Miami police Chief John Timoney for the attacks on protestors, the Chamber of Commerce was giving him an award for the same event. *See* UPI, *supra* note 4.

6 *See infra* note 104.

7 Mahoney v. Norton, DDC No. 1: 02CV01715 (Aug. 29 and Sept. 5, 2002) (on file with the author).

8 Neely Tucker, *Ban on Rallies Upheld for Lafayette Square; Park Service May Deny Permit for Vigils, Judge Tells Christian Activist Group,* WASH. POST, Aug. 30, 2002, at B3.

9 *Id.* (quoting the government's legal brief).

10 *See* A Quaker Action Group v. Hickel, 421 F.2d 1111 (D.C. Cir. 1969) (known as "Quaker Action I") (affirming the district court's preliminary injunction against the White House restrictions on demonstrations); A Quaker Action Group v. Morton, 516 F.2d 717 (D.C. Cir. 1975) (Quaker Action IV) (affirming the district court's findings that the White House restrictions on sidewalk and Lafayette Park demonstrations were unconstitutional, and that the government could only set limits at or above 750 for the White House sidewalk and 3,000 for Lafayette Park; the Court of Appeals further required the government to implement a procedure to waive the limit for demonstrations larger than 3,000 for the park); A Quaker Action Group v. Andrus, 559 F.2d 716 (D.C. Cir. 1977)

role as a First Amendment battleground when Reagan Administration Secretary of the Interior James Watt announced upon assuming office that he intended to ban all demonstrations in front of the White House and in Lafayette Park. The Interior Department then issued regulations restricting demonstrations on the White House sidewalk[11] To avoid arrest, demonstrators must keep moving. At the time the regulations were adopted, the government contended that little was lost by restricting activity on the sidewalk because demonstrators with signs could convey their messages across the street in the park.[12] But a series of creeping regulations followed for Lafayette Park as well. For example, persons protesting in the Park may not have signs "larger than three feet by three feet, demonstrators must remain within three feet of their signs, and they must not "camp."[13]

It was this last restriction, prohibiting "camping," that gave rise to a Supreme Court decision on the First Amendment and Lafayette Park. In *Clark v. Community for Creative Non-Violence*,[14] the Court held that the demonstrators' permit, issued by the National Park Service, authorized erection of two symbolic tent cities to demonstrate the plight of the homeless, but did not permit demonstrators to sleep in the tents. The plaintiffs "sought to begin their demonstration on a date full of ominous meaning to any homeless person: the first day of winter."[15] "The primary purpose for making sleep an integral part of the demonstration was 'to re-enact the central reality of homelessness,' and to impress upon public consciousness, in as dramatic a way as possible, that homelessness is a widespread problem, often ignored, that confronts its victims with life-threatening deprivations."[16]

But the Court held that the sleeping ban did not violate the First Amendment because it was a reasonable time, place, and manner limitation to protect the park. The regulation narrowly served the government's substantial interest in maintaining the parks in an attractive and intact condition for visitors. In dissent, Justices Marshall and Brennan noted: "Missing from the majority's description is any inkling that Lafayette Park and the Mall have served as the sites for some of the most rousing political demonstrations in the Nation's history . . . . [T]hese areas constitute 'a fitting and powerful forum for political expression and political protest.'"[17]

(Quaker Action V) (clarifying its earlier opinion to also require a waiver procedure for the 750-person limit on the White House sidewalk demonstrations).

11 Mark A. Venuti, *Lafayette Park: We Can Stand a Little 'Visual Blight,"* WASH. POST, Feb. 14, 1988, at C8.

12 *Id.*

13 *Id.*

14 468 U.S. 288 (1984).

15 *Id.*

16 *Id.* at 304 (internal citations omitted).

17 *Id.* at 303

B. *Out of Site, Out of Mind. Putting Demonstrators at a Distance.*

One of the most common tactics authorities employ to tame dissent is placing demonstrators a significant distance from the event they are protesting, or from those individuals with whom they wish to communicate. Prior to the 2000 Democratic National Convention at the Staples Center in Los Angeles, the city police department, in conjunction with convention planners, the United States Secret Service, and other agencies, established a "secured zone" around the Staples Center that encompassed numerous streets, sidewalks, and buildings—an area of more than eight million square feet.[18] A small protest site (the "Official Demonstration" area) was designated for use during the convention—it stood 260 yards from the entrance to the Staples Center.[19] The City of Los Angeles explained the breadth of the "secured zone" and the placement of the protest site on the basis of security concerns, offering as consolation to those wishing to express dissent in the presence of Convention delegates the observation that there was a "sight line" from the demonstration area to the Staples Center.[20] But the convention planners also arranged for a "media village" housing 10,000 members of the media, with their equipment, to sit on the "sight line" between the Staples Center and the Official Demonstration area.[21] A federal district court found, upon reviewing these plans, that "at this crucial political event, those who do not possess a ticket to the convention cannot get close enough to the facility to be seen or heard. The First Amendment does not permit such a result."[22] Not only are protestors put away from the object of their protests, they are also corralled and put in pens. The protestors are walled off, kept for long periods of time in police designated spaces, and effectively locked up. The New York City police are facing a lawsuit over this and other tactics they used during a large February 2003 anti-war protest.[23]

Such tactics are not simply limited to protecting politicians from unseemly opinions. In April 2003, a number of protest groups descended upon the city of Augusta, Georgia to demonstrate against the Augusta National Golf Club during its annual Masters golf tournament. The groups hoped to draw attention to the men-only membership of the club. But as the city prepared for the estimated 900

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18 Service Employee Int'l Union v. City of Los Angeles, 114 F. Supp. 2d 966, 968 (C.D. Cal. 2000).

19 *Id.* at 972.

20 *Id.*

21 *Id.*

22 *Id.* The Republican Convention of 2000 held in Philadelphia produced a more creative suppression of dissent; city officials gave, wholesale, permits to Republican groups to occupy all nearby sites and thus foreclose others from use. *See* Jonathan Janiszewski, *Comment: Silence Enforced Through Speech: Philadelphia and the 2000 Republican Convention,* 12 TEMP. POL. & CIV. RTS. L. REV. 121 (2002).

23 Ian Urbina, *Police Face Lawsuits over Tactics at Big Protests*, N.Y. TIMES, Nov. 19, 2003, at B4.

demonstrators with 125 sheriff's deputies and state troopers, it determined that the groups would have to congregate on a five-acre lot half a mile from the main entrance to Augusta National Golf Club, completely out of sight of the golf course.[24] The sheriff's deputies, it was planned, would use their cruisers, lined bumper to bumper, as barriers separating the various protest groups and establishing penned-in areas.[25] "We'll let 'em do it, get it over with and then go home," Lt. Johnny Whittle of the Richmond County Sheriff's Department said. "Hopefully, everybody will be happy and have fun."[26] The Eleventh Circuit Court of Appeals upheld a lower court's ruling rejecting the protestors' request to demonstrate outside of the front gate of the golf club.[27]

C. *Presidential "Security Zones"*

The problem of distancing demonstrators from the object of their dissent is particularly acute regarding the President. Indeed, the American Civil Liberties Union (ACLU) recently filed a lawsuit alleging an unconstitutional "pattern and practice" of discrimination against demonstrators by the Secret Service. The suit alleges that the Secret Service, by restricting protest activities to designated "protest zones,"[28] excludes protestors both from areas that are open to the general public and from areas where supporters of the President are permitted. Frequently, these protest zones are located so far away, or positioned in such a manner, that the protesters cannot see or hear, nor be seen or heard by, the President or other federal officials and the general public attending the event.[29]

For instance, in anticipation of a December 12, 2002, Presidential visit to Philadelphia, the local chapter of one of the nation's largest progressive activist organizations contacted the Philadelphia Police Department to notify it of the group's plan to demonstrate in front of a local Marriott Hotel, in view of the Presidential motorcade.[30] When the group arrived at that location, however, members of the Police Department informed them that protest was allowed only behind barriers that the Department had erected at a nearby intersection, where the motorcade would not pass on its way to the hotel entrance.[31] Yet other members of the public were allowed free access to the sidewalk immediately adjacent to the hotel's entrance, in view of the passing motorcade, even without going through any

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24 Bill Pennington, *GOLF; Sodden Lot Will be Site of Protests Tomorrow,* N.Y. TIMES, Apr. 11, 2003, at S3.

25 *Id.*

26 *Id.*

27 Union Tribune News Services, *Burk Loses Appeal over Gate Picket,* SAN DIEGO UNION TRIBUNE, Apr. 10, 2003, at D10.

28 ACLU website, *at* www.aclu.org/FreeSpeech/FreeSpeech.cfm?ID=13699&c=86.

29 Amended Complaint, Acorn v. City of Philadelphia, 2004 U.S. Dist. LEXIS 8446 (E.D. 2004) (No. 03-4312) (hereinafter "Complaint").

30 *Id.*

31 *Id.*

visible security measures.[32] Moreover, when the protestors were permitted to move north from the "protest area," their passage toward the motorcade route was quickly blocked again by a line of police officers. Individuals espousing views clearly supportive of the President, however, were allowed to remain on the final one-third of that block—an area otherwise restricted by security—and could be easily seen and heard by the President's motorcade.[33] As the ACLU complaint asserts, "Philadelphia police officers were fully aware that Bush administration supporters were occupying an area that [the protest group] was led to believe had been closed for demonstration purposes by order of the Secret Service."[34]

A similar incident occurred in September 2003, when the President delivered a speech in western Pennsylvania. Police were instructed by the Secret Service to force all protesters into a designated assembly area—a "designated free speech zone"—located in a large baseball field surrounded by a six-foot high chain-link fence.[35] Indeed, though only one protest group sought and obtained a permit to demonstrate in the baseball field, any individual with a sign critical of the President was forced into that area; police arrested those who refused such confinement.[36] A police officer subsequently testified that his orders came directly from the Secret Service: "There was a brief meeting. People were detailed to different areas and it was explained the assembly area was [in the ballpark], and the people protesting were to go into the assembly area."[37] Thus, one individual carrying a sign that read, "The Bush family must surely love the poor. They have made so many of us," was arrested for disorderly conduct when he refused to enter the baseball field to join all of those protesting President Bush's visit.[38]

In January of this year, President Bush made a swing through the South and stopped in Atlanta, Georgia to place a wreath on the grave of the Rev. Dr. Martin Luther King, Jr. When hundreds of demonstrators showed up to meet him, they were kept at a distance by barriers and the President was shielded from their view by a line of busses with police clad in riot gear standing on top.[39] The President has even tried to carry his insulating security zone on trips abroad. When President Bush traveled to London in November, 2003, the Secret Service, anticipating large crowds protesting the war in Iraq, wanted to cordon off a huge swath

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32 *Id.*

33 *Id.*

34 *Id.*

35 ACLU website, www.aclu.org/FreeSpeech/FreeSpeech.cfm?ID=13699&c=86.

36 Transcript of Proceedings, Pennsylvania v. Neel (2002), Defendant's Exhibit 2 (on file with the author).

37 *Id.* at 9.

38 *Id.* at 11-16.

39 Richard W. Stevenson, *Protestors Chant and Boo As Bush Honors Dr. King*, N.Y. TIMES, Jan. 16, 2004, at A11.

of that city. But British officials said no, and the protests occurred without incident.[40]

It should be noted that these are not isolated incidents. The ACLU has asserted that the same tactics have been employed on at least fifteen different occasions around the country.[41]

D. *Public Relations and Preemption—Keeping the Crowds Small and Divided*

Although it is nothing new,[42] police are using a variety of tactics to disorient, disrupt, and disperse protestors. For example, police have used the tactic of grossly exaggerating the size of protest crowds and advising the public to brace for violence and disruption. Police forces then swell, assisted by outside agencies, and display a show of force sometimes rivaling the size of the actual protestors. Such tactics permit the police to scare off people who may have wanted to participate in the protest but were afraid of getting caught up in violence and to then congratulate themselves that they prevented the hyped up harm.

Other tactics include preemptive arrests; delayed release of arrestees until a protest has ended; so-called "trap and detain" actions that isolate groups of protestors, pen them, and order dispersal under threat of arrest; arrest for minor infractions such as blocking an intersection or being off a permitted parade route; and "fire inspection" of premises used as headquarters for protest activity. According to lawsuits now pending, all of these tactics were used against people demonstrating against the actions of the World Bank and the International Monetary Fund (IMF) during the groups' meetings in Washington between 2000 and 2003.[43] And such tactics have been copied elsewhere.[44]

Sometimes the police play fast and loose with permits and approvals. Consider the case of the thousands of women called the "Code Pink" Women for Peace.[45] They wanted to protest President Bush's planned war against Iraq and, although they were permitted to march through certain Washington D.C. streets, they were denied a permit to march on the sidewalk directly in front of the White House. Instead police said that they would allow a few groups of 25 protestors to march

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40 Warren Hogue, *The Struggle for Iraq: Allies*, N.Y. TIMES, Nov. 12, 2003, at A8.

41 Complaint, *supra* note 29.

42 LUCY BARBER, MARCHING ON WASHINGTON: THE FORGING OF AN AMERICAN POLITICAL TRADITION (2002).

43 David A. Fahrenthold & Manny Fernandez, *City's Quandary: Peaceful Streets vs. Right to Assemble*, WASH. POST, Oct. 17, 2002, at T10; *Did D.C. Police Go Too Far?* WASH. POST, Oct. 1, 2002, at B1.

44 Robyn E. Blummer, *Miami Crowd Control Would Do Tyrant Proud,* ST. PETERSBURG TIMES, Nov. 30, 2003, at 1P (police shot rubber bullets and paint balls filled with pepper spray to disperse a crowd of protestors).

45 An anti-war group so named to respond to the government's color-coded terror alert system. Their chant: "Bush says Code Red; we say Code Pink." Sylvia Moreno & Lena H. Sun, *In Effort to Keep the Peace, Protestors Declare 'Code Pink'*, WASH. POST, Mar. 9, 2003, at C1.

on the Pennsylvania Avenue pedestrian mall in front of the White House. Initially even these groups were denied entry, but were later admitted, and then told that the area around Lafayette Square was closed and they must leave. Some refused and were arrested.[46]

III. Political Dissent and the Special Value of Protests and Demonstrations

It would be fair to ask why we should worry very much about limits on protests and demonstrations since public debate, such as it is, is almost exclusively conducted in the media. And, in any event, it may be that few are listening.[47] For many of us, people on street corners handing out leaflets are just an annoyance. The soapbox orator in the park doesn't exist or is viewed as a crank. Protestors who interfere with traffic are reviled and cursed. And, in Washington, D.C., the Mecca of mass demonstrations, most marches have become a tame and bureaucratic affair where protestors and police follow a script, and the chief disagreement is over how many people actually showed up. As Professor Lucy G. Barber notes in her history of marches on Washington, marches are now such commonplace, negotiated events that they are barely worthy of public notice. "The conventionality, familiarity, and predictability of marches have encouraged journalists to treat marches as unremarkable events, to pay less attention to their political demands, and to give them minimal coverage."[48]

Yet it is just when crises such as war or civil rights struggles or dire economic hardships emerge that the confrontational, boisterous, and sometimes disobedient demonstrations rise up. These are the "troublesome" demonstrations that oppose government policy and show the resolve to change it. And people do take notice. Demonstrations, particularly troublesome demonstrations, are one of the few remaining ways for dissenting views to be aired and to be made known to the larger public. The street corner remains the people's forum and, given media consolidation, homogenization, partisan tilt, and shrinking public access, the people's forum "takes on new importance for democratic theory."[49] As Justice Brandeis eloquently reminded us, the protection of protest, contrary voices, dissent and the myriad forms of robust and challenging speech is essential to secure liberty:

> Those who won our independence believed . . . that the greatest menace to freedom is an inert people; that public discussion is a public duty; and that this should be a fundamental principle of the American government. They recognized the risks to which all human institutions are subject. But they

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46 *Id.*

47 The fact that the public may have turned away from dissenting voices is itself a reason to strengthen protection for those voices. *See infra,* notes 50-58 and surrounding text.

48 Barber, *supra*, note 42, at 225.

49 Owen M. Fiss, *Silence on the Street Corner*, 26 Suffolk U.L. Rev. 1, 3 (1992).

> knew that order cannot be secured merely through fear of punishment for its infraction; that it is hazardous to discourage thought, hope and imagination; that fear breeds repression; that repression breeds hate; that hate menaces stable government; that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies.[50]

Thus public protest informs the public and serves as a safety valve. And, as First Amendment instrumentalists and those who celebrate free expression for its facilitation of truth and progress know, exposure to dissident voices can teach tolerance,[51] shake us up,[52] and be the catalyst of fundamental societal change.

Confrontational and troublesome protests and demonstrations, particularly those held in Washington D.C., have had a direct effect on the great public questions of the day. For years women suffragists kept their cause before the American people through marches and picketing throughout the Nation's capital, and most provocatively in front of the White House.[53] The "Bonus Marchers," thousands of desperate, unemployed World War I veterans, revealed their plight to the nation when they came to Washington, D.C. in 1932 to ask Congress to accelerate payment of their wartime"bonuses."[54] And the great civil rights marches of the 1960's, in Washington D.C. and throughout the South, awakened the Nation to the brutality and injustices of segregation and fueled support for passage of the Civil Rights Act of 1964.[55] By the early 1970's and after the repeated anti-war marches on Washington, commentators were beginning to see protests and demonstrations as a distinctive and integral part of democratic life, and they understood the phenomenon as an agent of political change, which undoubtedly it had become.[56]

Thus protests and demonstrations aimed at government officials and government policy are "high value"[57] speech, that is, political speech of the purest form. These are active forms of political participation that can energize the participants

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50 Whitney v. California, 274 U.S. 357, 375-76 (1927) (dissenting).

51 LEE BOLLINGER, THE TOLERANT SOCIETY 8-11, 104-05 (1986).

52 STEVEN SHIFFIN, THE FIRST AMENDMENT, DEMOCRACY, AND ROMANCE 86-87 (1990).

53 *See* BARBER, *supra* note 42, at 44-74.

54 *Id.* at 75-107.

55 Randall Kennedy, *Martin Luther King's Constitution: A Legal History of the Montgomery Bus Boycott*, 98 Yale L.J. 999, 1000-01 (1989); DAVID J. GAROW, PROTEST AT SELMA: MARTIN LUTHER KING, JR., AND THE VOTING RIGHTS ACT OF 1965 133-78 (1978); JACK BASS, TAMING THE STORM: THE LIFE AND TIMES OF JUDGE FRANK M. JOHNSON, JR. AND THE SOUTH'S FIGHT OVER CIVIL RIGHTS 254-55 (1993).

56 *See* BARBER, *supra* note 42, at 180.

57 High value speech is a term used by courts and commentators to denote political speech or discussion or debate of public policy or public affairs. *See, e.g.,* CASS R. SUNSTEIN, DEMOCRACY AND THE PROBLEM OF FREE SPEECH 37 (1993) (defining "political speech" and asserting that it is "high value" speech); *see also* David E. Steinberg, *Alternatives to Entanglement*, 80 Ky. L.J. 691, 714 (1992) (exploring implications of placing high value on political speech).

and change the country. Protests and demonstrations provide solidarity, political momentum, and they permit communication with otherwise distant and perhaps unaware leaders. It is democracy in its most elemental and, sometimes, its most powerful form. For some, especially people of limited means, it may be the only way to express dissent, and for their dissent to be seen or heard.[58]

The right to engage in protests and to express oneself in the immediacy of a public moment and in the proximity of controversial public events is also valuable as a liberty interest of the participant. She partakes of a higher form of self realization, an expression of one's complete citizenship, something more than the solitary and infrequent activity of voting.[59]

But protests against government officials and government policy present a direct and immediate challenge to the status quo. And because they are a challenge, because they often use radical rhetoric and unconventional methods, because they question basic assumptions and assail public leaders and presidents, because they sometimes employ tactics of civil disobedience and may involve groups viewed as troublemakers and malcontents, these protests have historically been, and are still now, resolutely suppressed. We now consider why First Amendment law, as currently cast, is too weak and deferential to be a reliable bulwark against such suppression.

IV. The First Amendment and the Increasingly Deferential Time, Place and Manner Test

Modern First Amendment doctrine draws a sharp line between government regulation of expression aimed at the content or communicative impact of speech and regulation aimed at the time, place, and manner of expression or the non-communicative aspects of expressive behavior. This line is thought to be an effective means of ferreting out illicit government attempts to censor certain views[60] while at the same time permitting the government to regulate in a wide range of

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58 *See* Clark v. Community for Creative Non-Violence, 468 U.S. 288, 314 (1984) (Marshall, J. dissenting) ("A content-neutral regulation that restricts an inexpensive mode of communication will fall most heavily upon relatively poor speakers and the points of view that such speakers typically espouse."); 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, 765, 806-810 (1986) ("Inexpensive media—such as leaflets, parades, street demonstrations, and picketing—are simply more important to poorly financed communicators than to the wealthy.") (hereinafter "Lonely Pamphleteers").

59 *See* Susan Williams, *Content Discrimination and the First Amendment*, 139 U. Penn. L. Rev. 615, 681 (1991) (discussing the value of expression from a democratic theory perspective and the recent republican revival) (hereinafter Williams).

60 "[A]bove all else, the First Amendment means that the government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." Police Dep't v. Mosley, 408 U.S. 92, 95 (1972). *See, e.g.*, Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 U. Chi. L. Rev. 413, 451-56 (1996); Geoffrey R. Stone, *Content Regulation and the First Amendment*, 254 Wm. & Mary L. Rev.189, 189-97 (1983).

areas, such as banning open burning or prescribing school dress codes, where the regulations are not aimed at expression but may have a substantial effect on it. Content regulations must satisfy strict scrutiny,[61] or sometimes the most "exacting scrutiny,"[62] and rarely will they survive.

Time, place, and manner (TPM) controls, on the other hand, must meet a lesser test. The Supreme Court, citing *Heffron v. International Society for Krishna Consciousness*, routinely states the test as follows: The regulation must, in fact, be content neutral, it must be justified by a "significant governmental interest," and there must be "ample alternative channels" for the affected party to communicate his message.[63]

Another familiar formulation of the TPM test comes from *O'Brien v. United States*:[64]

> A government regulation is sufficiently justified . . . if it furthers an important or substantial government interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction of alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.[65]

One would be forgiven for viewing the TPM test as pretty tough to meet. The government's interest must be "significant" and some fairly close tailoring seems contemplated. But while forgiven, one would be wrong. First, the astute observer will note that the two formulations of the TPM test are not the same. The *O'Brien* test, with its talk of "substantial" government interests and restriction "no greater than is essential," has a strict speech-protective cast. But the *O'Brien* test was forged in the context of the distinct problem of symbolic-speech[66] and, although the Court continues to cite it and purports to rely on it for TPM analysis, the *Heffron* test has become the operative approach in TPM cases.[67] And,

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61 *E.g.*, Simon & Schuster, Inc. v. Members of the New York State Crime Victims Bd., 502 U.S. 105, 116 (1991) ("[C]ontent-based burdens on speech raise the specter that the government may effectively drive certain ideas or viewpoints from the marketplace. The First Amendment presumptively places this sort of discrimination beyond the power of the government.").

62 Burson v. Freeman, 504 U.S. 191, 198 (1992) (upholding campaign-free zones near polling places on election day).

63 Heffron v. Int'l Soc'y for Krishna Consciousness, 452 U.S. 640 (1981) (upholding agricultural state fair regulation limiting fairgrounds distribution and sale of literature to a fixed booth location). The strands of the modern TPM test were first seen in cases decided in the 1930's and 1940's. *See, e.g.*, Kovacs v. Cooper, 336 U.S. 77 (1949) (upholding regulation of sound trucks).

64 391 U.S. 367 (1968).

65 *Id.* at 374.

66 *See* Williams, *supra* note 59, at 619-620 (noting the collapse of previously separate TPM regulations and symbolic speech regulations into one standard).

67 *See, e.g.*, Ward v. Rock Against Racism, 491 U.S. 781 (1989); Clark v. Community for Creative Non-Violence, 468 U.S. 288, 298 (1984); Members of the City Council v. Taxpayers for Vincent, 466 U.S. 789, 804-812 (1984).

second, with some exceptions, the *Heffron* test has become a flabby, deferential presumption in favor of government regulation and maintenance of the status quo.

Commentators have criticized the evolution of the time, place, and manner test into a subjective and deferential reasonableness/balancing test.[68] For example, speaking of protests and demonstrations, Professor C. Edwin Baker has noted that the test inevitably favors maintaining the status quo and the maintenance of order. "The daily orientation [of decision makers such as judges and politicians] predictably leads to a very restrictive view of the desirability and reasonableness of dissenting, disruptive activities."[69] And, "[b]alancing analyses most commonly and most logically employ some version of a utilitarian or public welfare standard" and a discounting or outright rejection of dissenting or dissident preferences.[70]

In some sense it was inevitable that the test would degenerate in this fashion. After all, the First Amendment is often championed by dissidents, radicals, and hated groups. Similar to the dynamic in the Fourth Amendment where rights are often championed by criminals, a reasonableness test, administered by those whose success lies in the order and comfort of the status quo, will tend to disapprove of expressive conduct deemed threatening, confrontational, unfamiliar, or disliked. In addition there is the tendency of ad hoc reasonableness tests to weigh the government interest in regulating at wholesale (e.g., the general interest in public order) against the value of the activity at retail (e.g., why does this group have to march right here, right now; don't they have other ways to communicate their message). Thus cast, it is almost inevitable that the government's interests will outweigh the individual's.

The ills of the reasonableness test and its applications are many and severe. In terms of protests and demonstrations, TPM restrictions that put protestors away from the object of their protest or out of sight dilute their message just as surely as if the government forced them to substitute a nice word for a bad one.[71] These kind of TPM restrictions also weaken public discourse, public exposure to dissenting voices, and the chance for public understanding. TPM restrictions that keep crowds small or render them irrelevant discount each person's liberty and associational interest in expressing oneself through joining others in protest. TPM restrictions on demonstrations also target certain formats for dissent. They thus discriminate against people who have limited means to use alternative avenues of communication and discriminate against the kind of messages likely to be sent by

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68 *E.g.*, *Lonely Pamphleteers*, *supra* note 58.

69 C. Edwin Baker, *Unreasoned Reasonableness: Mandatory Parade Permits And Time, Place, And Manner Regulations*, 78 Nw. U. L. Rev. 937, 942 (1983).

70 *Id.* at 943-44.

71 *See* Cohen v. California, 403 U.S. 15 (1971) (government could not sanitize protestor's message of "F— the Draft").

such individuals. And the troublesome protests can easily be made targets, because they most easily enable the government to conjure up danger and make vague claims about security and terrorist attacks.[72]

Looking at the components of the TPM test, we see that courts invariably approve almost any government interest as "significant." The government may regulate the time, place and manner of expression to prevent visual blight,[73] protect privacy,[74] reduce noise,[75] and control crowds.[76] The government is rarely put to its proofs about the likelihood that the projected harms will actually occur.

As for the narrow tailoring prong, the record is mixed. Some courts vigorously police a loose fit between the government's claimed objectives and restraints on speech while others do not. The Supreme Court invited this variability by dropping the one requirement of narrow tailoring that would keep the government honest while also providing heightened speech protection, namely, the least restrictive means test. Under such a test, the government has to consider whether there are alternative ways for it to accomplish its objectives. If such alternatives exist, and if they are less restrictive of expression, then the government has to employ them. The Court specifically held in *Ward v. Rock Against Racism* and subsequent cases that, under current TPM doctrine, the government is *never* required to show that it used the least restrictive means to advance its interests. As Justices Marshall, Brennan, and Stevens noted in the *Rock Against Racism* case, when one jettisons least restrictive means, there goes the heart of the narrow tailoring requirement:

> Until today, a key safeguard of free speech has been the government's obligation to adopt the least intrusive restriction necessary to achieve its goals. By abandoning the requirement that time, place, and manner regulations must be narrowly tailored, the majority replaces constitutional scrutiny with mandatory deference. . . . By holding that the guidelines (on noise regulation) are valid time, place, and manner restrictions, notwithstanding the availability of less intrusive but effective means of controlling volume, the majority deprives the narrow tailoring requirement of all meaning.[77]

The "sufficient alternative channels" prong of the TPM test also undervalues speech by inviting judges to determine, from their perspective, who the intended audience is and whether they think demonstrators had ample opportunity to get their message out. But with protests and marches, there may not be *any*, much

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72 *Compare* Mahoney v. Norton, *supra* note 5, (upholding government's claims) *with* Bay Area Peace Navy v. United States, 914 F.2d 1224 (9th Cir. 1990) (rejecting government's claims).

73 Members of the City Council of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789 (1984).

74 Frisby v. Schultz, 487 U.S. 474 (1988).

75 Kovacs v. Cooper, 336 U.S. 77 (1949).

76 Heffron v. Int'l Soc'y for Krishna Consciousness, 452 U.S. 640 (1981).

77 *Id.* at 803.

less any sufficient, alternative. Protests at some sites may be unique. If a group wants to petition the government or bring its grievances to Congress, there may be no even remotely equivalent alternative to going to the steps of the Capital, the "centerpiece of our democracy."[78] And even if a site is not unique, one's message must be set in a particular context at a particular time. When a group wants to protest a governor's refusal to halt an execution scheduled for January 1st, its message is diluted, even nullified, if they are forced to object in a place distant from the Governor's office on January 2nd. Courts have shown some sensitivity to time and place, but not always and not reliably.[79]

V. The Continuum of Content Control and Time, Place and Manner Control

Because the protection of expression turns so dramatically on whether courts view government action as aimed at content or, instead, as simply a TPM regulation, it is perfectly understandable that litigants have struggled mightily to cast government action as content control. One example is the ACLU's suit against the City of Philadelphia for unlawfully funneling those protesting a presidential visit in 2002 into a "protest zone" away from President Bush's motorcade. The suit appears to object to the government's action as content control. That is, the ACLU notes that only those *protesting,* and indeed only those protesting *against* President Bush, were relegated away from the hotel area where the Bush entourage was to pass and where the visit would be anchored.[80] Members of the public were given free access to sidewalks adjacent to the hotel's entrance, and people showing support for the President were permitted to gather in an area where they could be seen and heard by the President, part of the same area put off limits to the protestors. The distinction between protestors and members of the public seems, however, to be a regulation of protestors without regard to their message and, thus, under conventional doctrine, would fall under the TPM test. The distinction between the protestors and those demonstrating support for the President, however, does treat speakers differently based on their messages and, as such, would face strict scrutiny.

The problem with such an approach—trying to shoehorn all regulation of protest into a form of content control—is that the government's answer might just be to create Presidential security zones that keep *everyone* at a distance. But equal-

78 Lederman v. United States, 291 F.3d 36, 44 (D.C. Cir. 2003).

79 *Compare* Schneider v. State, 308 U.S. 147, 163 (1939) (striking down a ban on handbilling saying that any inquiry into alternatives available to the defendant is not appropriate because "one is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place") *with* Members of the City Council v. Taxpayers for Vincent, 466 U.S. 789 (1984) (approving ban on posting signs on public property and simply asserting that adequate alternatives exist).

80 *See* Complaint, *supra* note 29.

ity of treatment is not enough if everyone is to be treated equally shabbily. Moreover, try as one might, not all of these regulations, such as treating protestors differently from passers-by, can be fit into the content side of the current TPM/content control dichotomy. There may be a third way.

The discussion thus far has assumed that government regulations on expression can or should be divided into content or TPM controls. But, in fact, it is not at all clear that thinking about First Amendment protections is best done by putting all government regulation into one category, content control with its stringent test of strict scrutiny, or into another, TPM controls and its flimsy test of reasonableness.[81] It is not clear that the current line between content control and TPM control is defensible or that, even if some such line is defensible, it makes sense to put restrictions on protestors on the TPM side. It may be that government regulations affecting expression are best viewed along a continuum, and that there should be a category of "quasi-content" control.

The current content control/TPM dichotomy makes sense if we assume that the singular and worst thing the government can do in regulating expression is aim at suppressing particular messages. And indeed this kind of action is undoubtedly perilous to liberty and a free, open, and democratic society. As Justice Jackson observed in *West Virginia State Board of Education v. Barnette*: "If there is any fixed star in our constitutional horizon, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion . . . ."[82] Yet there are circumstances where, even though the government may not be aiming at speech as such, its regulation of the time, place, or manner of speech can have similarly devastating and distorting *effects*. Consider, for example, the difference between the government banning all large protest marches in the capital (a TPM regulation) and the government banning all large demonstrations in the capital which oppose the war on terrorism (a content regulation). The government claimed it needed the first ban so the streets would always be unobstructed in case a terrorist act necessitated immediate evacuation of the city. The government claimed it needed the second ban because protests against the war on terrorism might encourage a terrorist attack. The first action would be judged under a general reasonableness standard while the second would face strict scrutiny. Yet, in either case, the end result, or effect, of the government's action would have been to impose a substantial barrier to expressing opposition to government policy on terrorism.

Another shortcoming of the content/TPM dichotomy is that many different kinds of speech regulation are lumped on the TPM side of the line and then

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81 Many commentators have criticized this development, and one writer believes that the Court's preoccupation with content control is a main reason why TPM regulations have become just a neglected category of "other." *See* Williams, *supra* note 59, at 623.

82 319 U.S. 624 (1943).

evaluated under one all purpose test. The result is not always a sensible calibration of the different circumstances of each case but a general and deferential reasonableness test. Consider, for example, that TPM regulations fall on two quite different kinds of expressive activity. In some cases, the government's regulation touches only tangentially on expression, in that it is regulating activities that have no expressive qualities except that the speaker chooses to engage in these activities in order to "say something." Thus the government might regulate open burning, but someone might want to start a fire in order to protest nuclear energy policy. In such a case, starting a fire is not, of itself, an expressive activity nor, ordinarily, would it be understood as such. It only intersects with expressive activity because of the intention of the speaker. This connection could make an endless array of actions a matter of First Amendment protection. If that protection were anything but minimal, ordinary health and safety measures might be cast aside. There are other TPM regulations, however, that regulate activities that are expressive in themselves.

Actions such as protests, marches, demonstrations, and leafletting are speech by other means. Regulation of these activities is a direct restriction of expression, and we need not know the intention of the speaker to appreciate it as such. The fact that the government may not be aiming at the protestors' *particular* messages does not diminish the fact that the *activity of expression* is directly infringed. Courts have sometimes made this distinction, and commentators have attempted to capture it by casting free speech regulations into content control, control of expressive activities, and incidental regulation of speech.[83] Not everyone agrees on the same taxonomy,[84] but the effort is a recognition that separation of all speech controls into just two categories is inadequate.

There is a third way that the current content/TPM dichotomy fails to account for "quasi-content" effects, namely discrimination against certain forms or categories of expression. When the government, although not aiming at particular messages, systematically suppresses certain forms or formats of expression, such as banning leafletting or suppressing mass demonstrations, it is in fact discriminating against certain messages—anti-war, anti-establishment—and certain speakers—dissidents, and radicals. Some speakers may not have the means to command media attention or use more expensive or more sophisticated means of expression. They may have only the streets.[85]

Finally the current content/TPM dichotomy fails to account for the fact that sometimes the time, place, or manner of speech is the message, or at least is so

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83 *See, e.g,* David S. Day, *The Incidental Regulation of Free Speech*, 42 U. MIAMI L. REV. 491, 499-500 (1988) (describing incidental regulation as generally applicable laws applied to expressive conduct).

84 Indeed the categories set up in this paper, content controls, quasi-content controls, and TPM controls differ from the classifications used by Professor Day. *Id.*

85 *See Lonely Pamphleteers*, *supra* note 58.

inextricably bound up with it that certain controls of TPM are necessarily content or quasi-content controls. For example, when activists wanted to call attention to homelessness in the nation's capital and to the callous indifference of the powerful and secure to the plight of the homeless, it was a dramatic message of itself to sleep outside, in winter, across from the most famous house in the world, the White House.[86]

VI. RECASTING CONTENT/TPM FOR DEMONSTRATIONS AND PROTESTS AND A DOCTRINE OF SPECIAL PLACES

So, what is to be done? Is there a way to create a rich, speech-protective doctrine that also allows legitimate and measured regulation of the TPM of expressive conduct? What workable rules can we adopt? Commentators have offered some solutions. In a 1995 *Yale Law Journal* article, for example, Ronald J. Krotoszynski argued that we should recover a balancing test employed by District Judge Frank M. Johnson, a brilliant and courageous defender of the Constitution.[87] That balancing test, used by Judge Johnson to grant protestors the right to engage in a peaceful civil rights march from Selma to Montgomery, Alabama, explicitly recognized that the right to protest should receive greater judicial protection depending on the scope of the wrongs at issue. Thus government attempts to curtail protests against racial discrimination at the height of the 1960's civil rights struggles would have to be especially urgent and narrowly drawn. Courts would be less demanding about the same restrictions if the march concerned, say, a protest over the closing of an HOV lane. As sensible as this approach feels intuitively, it has been appropriately ignored because it offers little guidance and invites individual judges to weigh the importance of social issues on their own personal policy scale.

Another suggestion has come from Professor Vincent Blasi. He has argued that protest rights should be protected more or less depending on the historical context; that is, we should ask whether the protest arises at a time when the public is intolerant.[88] In other words, judges should be especially vigilant and protective of protest actions in times of suppression and conformity. This is a useful but perhaps fragile innovation. Judges need more than reminders to "stand tall" when assaults on liberty seem pervasive. As the late professor and dean John Hart Ely reminded us, in times of paranoia and intolerance, judges can be as

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86 *See* Community for Creative Non-Violence, 468 U.S. 288 (1984).

87 Ronald J. Krotoszynski, *Celebrating Selma: The Importance Of Context In Public Forum Analysis*, 104 YALE L. J. 1411, 1413-14 (1995).

88 Vincent Blasi, *The Pathological Perspective and the First Amendment*, 85 COLUM. L. REV. 449, 449-52 (1985).

easily swept up as the rest of us.[89] But, as he also reminded us, judges are less likely to be swept up if they have something more than general admonitions to guide them. What they need are concrete rules; rules that are decided upon ahead of time and that structure and steer a judge even in the most contentious times.[90] Professor Ely suggested strong categorical tests that would be crafted in times of quiescence and that would, when the storms hit, tie judges to the mast. Although he was speaking of how we should deal with the problem of "dangerous speech," his insights are directly relevant to the matter of protests and demonstrations.

The threads of a sturdy test can already be found among the decided cases. First, courts have recognized the importance of protestors' rights to be near the object of their protest and to be seen or heard by their intended audience.[91] A particularly sensitive protection of such rights can be found in *Bay Area Peace Navy v. United States.*[92] There the court considered the constitutionality of a 75 yard security zone which prevented small boats from demonstrating in front of a pier holding 3,000 invited military and civilian guests watching a parade of naval ships during "Fleet Week." The court described Fleet Week as "the largest annual Naval event in the United States . . . intended to demonstrate that the Navy is well-prepared, effective and represents a sound investment of public funds."[93] The protest boats carried signs and included a water-borne theatrical production expressing anti-war views. The court invalidated the government's security zone as overbroad, not demonstrably necessary to serve a real as opposed to hypothetical objective, and not saved by the existence of alternative means of communication. Although the court invoked the conventional language of the TPM tests, it displayed a stringency in application which was decidedly weighted toward the free speech interests.

The court accepted the government's argument that prevention of a terrorist attack or serious injury or the promotion of marine safety are significant government interests, but the court insisted that there be "tangible evidence" to show that these interests were threatened. It also insisted that there be tangible evidence that the Navy could not achieve its objectives with a smaller security zone. And it refused to accept that there were ample alternative means for the plaintiffs to convey their message if they had gotten bigger signs or bigger boats or passed out pamphlets on land. An alternative is not effective, the court said, if

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89 John Hart Ely, *Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis*, 88 HARV. L. REV. 1482, 1501 (1975) (hereinafter Ely, *Flag Desecration*); JOHN HART ELY, DEMOCRACY AND DISTRUST 57 (1980).

90 Ely, *Flag Desecration, supra note* 89, at 1501.

91 *See, e.g., infra* note 97.

92 914 F.2d 1224 (9th Cir. 1990).

93 *Id.* at 1225.

"the speaker is not permitted to reach the intended audience."[94] In that instance the demonstrators could not convey their theatrical protest to the persons on the pier unless they were able to move in closer. The court also noted that alternative means are not adequate if they are more expensive than the prohibited means, since some speakers may have only limited means.[95]

The Supreme Court, too, has recognized the need for stringent First Amendment proximity rules for speakers in the abortion protest cases. However the Court's leading case in the area, *Madsen v. Women's Health Center,*[96] arises in the context of an injunction against protestors[97] which the Court said made it a case for scrutiny beyond a conventional TPM case. But the approach is instructive. The Court applied a test of intermediate scrutiny bordering on strict scrutiny. "When evaluating a content-neutral injunction, we think that our standard time, place, and manner analysis is not sufficiently rigorous. We must ask instead whether the challenged provisions of the injunction burden no more speech than necessary to serve a significant government interest." Although the dissenters said the majority was not protective enough, the Court carefully preserved the protestors' rights to peacefully approach persons using the services of a clinic and struck down a 36 foot buffer zone around clinic property (although upholding a 36 foot buffer zone around clinic entrances and driveway).

Decided cases also stiffen First Amendment protection for protest and demonstrations when the venue, such as the grounds of a legislature, is especially connected to operation of the democratic process or is near the institutions of governmental power. Courts have struck down, for example, bans on demonstrations on the steps of the U.S. Capitol,[98] the sidewalks around the Supreme

94 *Id.* at 1229. *See also* Students Against Apartheid Coalition v. O'Neil, 660 F. Supp. 333, 339-40 (W.D. Va. 1987) (holding university regulation prohibiting erection of protest shanties on lawn of building where Board of Visitors meets is not rendered valid by permission to erect shanties elsewhere on campus, in a place not visible to the Board, the intended audience); Dr. Martin Luther King Jr. Movement, Inc. v. City of Chicago, 419 F. Supp. 667, 674 (N.D. Ill. 1976) (parade route through black neighborhood not constitutional alternative to route through white neighborhood when intended audience was white).

95 914 F.2d at 1229 n.3.

96 512 U.S. 753 (1994).

97 *Id.* The majority believed that injunctions should be viewed more rigorously than statutes since they represented only the view of a single judge and not a legislative choice to promote particular societal interests, and because they carry greater risks of censorship and discrimination. Justice Stevens thought the opposite approach was called for, since an injunction, entered into in response to proven wrongdoing, could be precisely targeted to the harms and not become a rule binding on the whole community.

98 Lederman v. United States, 291 F. 3d 36, 44 (D.C. Cir. 2003).

Court,[99] and statehouse grounds.[100] But these cases are few among many, and speech-protective outcomes are unpredictable.[101]

What is needed is a structured rule of decision. That rule should be: whenever there are expressive activities such as marches, protests, or demonstrations directed at government officials or policies, such activity is presumptively permitted to take place at a time and at a place proximate to the object of the protest and in such a manner as to be seen and heard by the object of the protest. Demonstrators who want to dissent from the policies of the major political parties, for example, should be permitted to hold their protest within sight and sound of the Convention delegates and not put out of sight in a demonstration zone. Moreover marches, protests, or demonstrations directed at government officials or policies are presumptively entitled to occupy special places of protest and venues for the redress of grievances. These are public spaces around governing institutions, such as state houses, Congress, the White House, the Supreme Court, state courts, and such spaces as have evolved to be recognized areas of political protest such as the Ellipse in Washington D.C. or town that squares in local communities. Any government regulation or condition that materially interferes with such a march, protest, or demonstration must substantially serve important government objectives and use the least restrictive means available.

This "intermediate scrutiny" test is not a panacea, and it is not even fully categorical in its cast. But it does tell the judge where the baseline is, imposes a heavy burden on the government to justify restrictions, and requires proof that alternatives were considered and no less restrictive means were available to deal with a real and substantial government problem.[102]

VII. How It Should Work—The Case of Lafayette Park

If there is a "special place" for holding political demonstrations, it is Lafayette Park in Washington, D.C. Facing directly opposite the front of the White House, this seven acre square patch is our American Hyde Park Corner. Together with

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99 United States v. Grace, 461 U.S. 171, 180 (1983).

100 Edwards v. South Carolina, 372 U.S. 229, 236-39 (1963).

101 For example, courts have also upheld bans or restrictions on protests in Lafayette Park, on the sidewalk in front of the White House, and near the entrance to the United Nations. *See, e.g.,* Clark v. Community for Creative Non-violence, *supra* note 58 (Lafayette Park); A Quaker Action Group v. Hickel, *supra* note 10 (White House sidewalk); and United for Peace & Justice v. City of New York, 243 F. Supp. 2d 19, *aff'd,* 323 F.3d 175 (2d Cir. 2003) (United Nations).

102 As an analogy to the point that judges need structured decision-making in times of stress on liberties, a recent article notes that during wartime, courts, contrary to conventional thinking, *do* play a significant role in checking executive power. That role is not, however, one of substantive judgment but of making sure that institutional structures and processes have been preserved and followed. Samuel Issacharoff & Richard H. Pildes, *Between Civil Libertarianism and Executive Unilateralism: An Institutional Process Approach to Rights During Wartime,* 5 Theoretical Inquiries In Law, 1 (Jan. 2004), *at* http://www.bepress.com/til/default/vol5/iss1/art1.

the Mall area of the Capital, it has been the forum for powerful expressions of dissent and political protest. On any given day, there could be three or more demonstrations going on in the park.[103] But after 9/11, that changed.

Since September 11, 2001, groups larger than 25 may not protest or demonstrate in Lafayette Park.[104] There is no such limit if a large group, such as a group of tourists, wants to enter the park, not to demonstrate, but, rather, to meet, take in the scenery, or discuss the comparative beauty of capital cities around the world. The 25-person demonstration ban is precisely the kind of case that should be reviewed under a new speech-protective, intermediate test. First, the site is not only a First Amendment "special place," it is unique. Second, the limit applies to demonstrations, a plainly expressive activity. And, third the limit has a substantial and material effect on protests. It effectively eliminates any large gathering in the park to express dissent.

The 25-person ban has already been challenged and upheld.[105] But if the intermediate test were applied, the ban would surely fall. Under that test, the numerical limitation is presumptively invalid, and the burden falls to the government to show it served a substantial government interest and was the least restrictive means of doing so.

In the actual challenge to the 25-person ban, the government filed an affidavit that the ban was needed as a protection against terrorists, specifically that (a) innocent demonstrators could be used as a cover for a terrorist attack on the White House or as a way to maintain surveillance on the White House, (b) the fact of a large demonstration might give terrorists special incentive to act because there would be media coverage, and (c) terrorists might attack the demonstrators. The government offered no proof of actual danger, and no support for the scenarios it painted. And, the government's position did not rest on the specifics of any actual protest. The trial judge appeared to accept, uncritically, the government's claims. Although concern for the President and the well being of innocent protestors is a substantial government interest, the unsupported specter of terrorism is not a sufficient basis for the ban. Nor is the ban well tailored. It is underinclusive and overinclusive. A large group of tourists might serve the same "cover" purpose for terrorists, but such a group is permitted access. It is overinclusive because it is not obvious why 26 or even 30 or 100 demonstrators are not as easily monitored as 25. And, there are less restrictive alternatives readily available.

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103 Clark v. Community for Creative Non-Violence, 468 U.S. at 288 (1984).

104 As this article went to press, the 25 person ban was lifted—at least for the time being. Since September 11, 2001, and until March 2004, the Department of the Interior imposed the ban pursuant to monthly requests from the Secret Service. Because the Secret Service did not make a request in either March or April, protests in the park are not now subject to restrictions beyond those required by the Department's normal regulations. Telephone interview with Randy Myers, Attorney-Advisor, Solicitor's office, Dep't of Interior (Apr. 5, 2004).

105 Mahoney v. Norton, *supra* note 6.

There can be a sufficient police presence, entrances can be monitored, and devices to check packages and to detect weapons or other dangerous items are available. Indeed the President will probably be more protected during a demonstration, given the security precautions that might be taken. Consistent with that assumption is the fact that there has *never* been a large demonstration near the White House that has posed a threat.

If the government's speculative reasoning is sufficient for the numerical ban in Lafayette Park, there is no place that cannot be similarly restricted. Neither the steps of the Capitol, nor the sidewalks of the Supreme Court, nor even "Freedom Plaza," a park located across the street from the Mayor and Council's offices in Washington, D.C. The Lafayette Park ban illustrates why judges need a pre-existing, sturdy, and structured First Amendment test; otherwise they will be swept along by government generalities and color-coded alerts.

VIII. CONCLUSION

The current moment in history is not the most dangerous we have witnessed for individual liberties or for the First Amendment freedom to dissent. But there are worrisome signs, and one is the spate of actions aimed at "troublesome" protests and demonstrations. Thousands of people have marched and demonstrated against current government policies concerning the war on terrorism, globalization, restriction on liberties, and environmental destruction. They have been met with violence, disruption, infiltration by police, surveillance, arrests, and stringent time, place, and manner restrictions. Very recently a federal grand jury issued subpoenas to four anti-war protestors and Drake University ordering them to provide information about an antiwar forum sponsored by the University's chapter of the Lawyers Guild and held at the school in the fall of 2003. Federal officials wanted, among other things, membership lists, agendas, and annual reports of the Lawyers Guild as part of an investigation, ostensibly, into an attempted trespass on an Iowa National Guard base in Iowa the day after the forum.[106] In the face of criticism, the U.S. Attorney's office withdrew the subpoenas,[107] but a chilling effect may linger. And, in the Fall of 2003, a confidential FBI memorandum, revealed by the *New York Times*, showed that the FBI is collecting extensive information on the tactics, training, and organization of antiwar demonstrators and asking local officials to report "suspicious" information to counter-terrorism units.[108]

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106 Monica Davey, *An Antiwar Forum in Iowa Brings Federal Subpoenas*, N.Y. TIMES, Feb. 10, 2004, col. 5, at 14.

107 Jeff Eckhoff & Mark Seibert, *U.S. Officials Drop Activist Subpoenas; Judge Lifts Drake Gag Ordering Probe of Antiwar Protest*, DES MOINES REGISTER, Feb. 11, 204, at A1.

108 Nat Hentoff, *J. Edgar Hoover Back at the 'New' FBI*, VILLAGE VOICE, Dec. 16, 2003, at 30.

In the face of these developments, it is not premature to think about the ways we protect the right to dissent. This symposium paper has focused on just one slice of the issue, namely, how courts monitor government restrictions on the time, place, and manner of demonstrations and protests. Current First Amendment doctrine is neither hardy enough nor reliable enough to insure that debate on public issues remains "uninhibited, robust, and wide-open."[109] What is needed is a structured, speech-protective test that can withstand the crisis of the moment. Rules to protect the timing, proximity, and special places of protests and demonstrations are one way to start.

109 New York Times v. Sullivan, 376 U.S. 254 (1964) (announcing new first amendment rules for libel actions).