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“The Constitutional Infringement Zone”:¹ Protest Pens and Demonstration Zones at the 2004 National Political Conventions

INTRODUCTION

On the morning of August 14, 1765, a lively crowd of Bostonians gathered at the giant elm tree at the intersection of Essex and Orange (now Washington) Streets, just blocks from Boston Common.² Local craftsmen and merchants had planned a rally to protest the British Parliament’s passage of the Stamp Act, a tax measure set to take effect later that autumn.³

Political theater continued at the tree throughout the day, culminating in the evening with a mock funeral procession and burning of effigies of the appointed local stamp collector and the Parliamentary Lord said to be the Stamp Act’s main proponent in England.⁴

On November 1, the day the Stamp Act took effect throughout the British colonies, tensions which had been building in New York City broke dramatically at night.⁵ An estimated crowd of two thousand colonials marched to the British military post at Fort George and hung an effigy of the colony’s royal governor.⁶ They next relocated with the effigy to the governor’s mansion, appropriated his fine carriage and used it to parade the effigy through the streets, concluding with a bonfire of both carriage and effigy.⁷ Similar protests occurred throughout the cities and larger

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1. Editorial, *Was It Worth It?*, Boston Globe, August 2, 2004, at A1.

2. Pauline E. Maier, *From Resistance to Revolution: Colonial Radicals and the Development of American Opposition to Britain, 1765–1776*, at 54 (1972); Gary B. Nash, *The Urban Crucible: The Northern Seaports and the Origins of the American Revolution 185* (1986).

3. Nash, *supra* note 2, at 186–88. The Stamp Act, an effort by Parliament to charge colonists for some of the costs of British military expenses in the colonies, set processing fees on legal and other official documents, including newspapers and advertisements, to be paid in silver or gold to the British colonial treasury. Violations of the Act were to be prosecuted in colonial common law and admiralty courts. Maier, *supra* note 2, at 51 n.1.

4. Maier, *supra* note 2, at 54, 56; Nash, *supra* note 2, at 185.

5. Maier, *supra* note 2, at 67–68; Nash, *supra* note 2, at 189–91.

6. Maier, *supra* note 2, at 68; Nash, *supra* note 2, at 192.

7. Maier, *supra* note 2, at 68; Nash, *supra* note 2, at 191.

towns of the North American colonies⁸ and the uproar eventually forced Parliament to repeal the Stamp Act in May of 1766.⁹

The Stamp Act Riots in Boston and New York City signaled the nascence of a revolutionary movement. During the next decade, self-professed Patriots and Sons of Liberty took to the streets and claimed highly visible public areas from local colonial authorities.¹⁰ According to historian William Pencak, the revolutionaries transformed these spaces into liminal realms—places where the authority of the British empire did not apply and where colonials employed protest, commemoration, and satire to act out the forms of revolution long before the Continental Congress signed the Declaration of Independence in 1776.¹¹

Over three centuries later, large scale protests loomed again in Boston and New York as the Democratic and Republican national political conventions neared during the summer of 2004. By this time, authorities were ready to meet the challenges. The Secret Service designated the conventions as National Special Security Events, ensuring the highest magnitude of attention and resources possible would be directed toward security concerns.¹²

8. Peter Shaw, *American Patriots and the Rituals of Revolution* 177 (1981). Locations of other Stamp Act protests included Annapolis, Charleston, Newport, Philadelphia, and Savannah. *Id.* at 177–82; Maier, *supra* note 2, at 55–60, 67; Nash, *supra* note 2, at 194–96.

9. Maier, *supra* note 2, at 107; Nash, *supra* note 2, at 200; Shaw, *supra* note 8, at 101, 182.

10. William Pencak, *Play as Prelude to Revolution: Boston, 1765–1776*, in *Riot and Revelry in Early America* 136–41 (William Pencak et al. eds., 2002).

11. Pencak applies the theories of the late philosopher Roberta Kevelson (1931–1998), who wrote extensively on law and semiotic theory. As described by Pencak, Kevelson argued in her 1977 book, *Inlaws/Outlaws: A Semiotic of Systematic Interaction*, that “one of the most important forces for change in human history is the interrelationship among play, artistic and intellectual creation arising from play, statutory law, and political protest.” Pencak, *supra* note 10, at 125. Pencak suggests convincingly that these crucial forces came together in revolutionary-era Boston during events like the Stamp Act protests. With their flouting of colonial authority, creative and satirical effigies, and control over the physical area surrounding the Liberty Tree, which they manipulated to serve their protest needs and interests, Pencak’s revolutionaries embodied Kevelson’s theories. *Id.* at 127–28.

12. Press Release, United States Department of State, *Ridge Says Al-Qa’ida Plans Large-Scale Attack on U.S.—Threat Appears Aimed at Disrupting November National Elections* (July 8, 2004), 2004 WL 59153662. When an event is designated a National Special Security Event, the Secret Service assumes its mandated role as the lead agency for the design and implementation of the operational security plan. Plans for the event are coordinated with local law enforcement and public safety personnel in order to ensure a safe and secure

Convention planners and police departments joined with the Secret Service to devise intense, complicated, and costly security plans.¹³ The proposed scheme for the Democratic convention in Boston included a “demonstration zone” to be set up nearby the Fleet Center arena where the convention was to be staged. This strictly designated and closed-off area would hold a limited number of protestors and surround them with metal barricades, mesh netting, and barbed wire.¹⁴ Armed police personnel would stand by to monitor the activities.¹⁵ In New York City, security plans included a restricted perimeter around Madison Square Garden and the police planned to close off protesters on all sides by using metal barricades.¹⁶

Within these enclosures, protestors were to enjoy freely and fully the rights of speech, assembly, and petition for redress of grievances guaranteed by the First Amendment to the federal Constitution. At the same time, Boston and New York City authorities confidently promised the safety and security of convention delegates, guests, and attendees.¹⁷ The conventions, national political events set within the centers of two of the country’s largest cities and the first such events since September 11, 2001, attracted intense national and international media attention. Months had been spent in planning and preparation. In

environment for Secret Service protectees, other dignitaries, the event participants, and the general public. United States Secret Service, National Special Security Events, <http://www.secretservice.gov/nsse.shtml> (last visited Sept. 15, 2005).

13. Congress appropriated fifty million dollars for security costs at each convention. Glenn Collins, *Preparing for the Convention: Security; Behind the Line of Fire*, N.Y. Times, Aug. 26, 2004, at B1; Editorial, *Was It Worth It?*, Boston Globe, Aug. 2, 2004, at A10.

14. Jonathan Saltzman, *Protest Zone Draws Ire: Court Asked to Rule on Use of High Barriers and Netting*, Boston Globe, July 21, 2004, at A1 [hereinafter Saltzman, *Protest Zone Draws Ire*].

15. Andrea Estes, *Police Getting Expert Aid on DNC Security*, Boston Globe, May 9, 2004, at B1. Estes’ article notes that Boston police received special training from, among others, Israeli suicide terrorism specialists and crowd control tacticians from Northern Ireland. *Id.*

16. Julia Preston, *Police and Protestors at Odds Over Details for August Demonstrations*, N.Y. Times, June 5, 2004, at B3.

17. Kevin Cullen et al., *Convention Gears for Top Security: U.S., State, and Local Officers Set for Boston*, Boston Globe, July 11, 2004, at A1; Press Release, Office of the Mayor of the City of New York, Mayor Michael R. Bloomberg, Homeland Security Secretary Tom Ridge and Governor George E. Pataki Announce Special Security Designation for New York City’s 2004 Convention (July 9, 2003), available at <http://www.nyc.gov>.

theory, the Boston demonstration zone and the New York City protest pens represented an effective compromise between dramatically opposing elements: the First Amendment rights of protestors and the demand for increased police power to ensure heightened security measures.^{18, 19}

In practice, the balance seemed likely to favor heavily the latter at the expense of the former. Shortly before the conventions opened, individual protesters, joined by loosely organized protest groups and the American Civil Liberties Union, brought federal suits in Massachusetts and New York. The plaintiffs prayed for injunctive relief, claiming that the protest pens and demonstration zone, as planned, would irreparably violate their First Amendment rights.²⁰ This comment will analyze the failure of the Boston plaintiffs and the relative success of the New York plaintiffs in an effort to formulate the contours of an emerging jurisprudence regarding this extreme form of crowd control.

Part I of this comment provides the relatively brief legal and historical background of protest pens and demonstration zones. It presents the standard test used by courts to analyze time, place, and manner restrictions on First Amendment rights in public fora, as articulated in the Supreme Court's 1989 decision in *Ward v. Rock Against Racism*.²¹ Part II describes the facts of the convention lawsuits, the parties' positions, and the courts' holdings. Part III focuses on the *Rock Against Racism* test used by both courts and explains how it fails to adequately protect protestors' First Amendment rights when applied to protest pen and demonstration zone schemes. Part IV suggests a progressive solution which may aid future event security planners and protest organizations in finding a viable middle ground. This is followed by proposed adjustments to the *Rock Against Racism* analysis which could

18. Winnie Hu & Michael Slackman, *G.O.P. Arrival to Close Streets and Divert Feet Near Garden*, N.Y. Times, June 26, 2004, at A1; Michael Slackman, *A Collision of Security, Democracy, and Daily Life*, N.Y. Times, May 8, 2004, at B1 [hereinafter Slackman, *Collision of Security*].

19. An alternate perspective might suggest that the conflict at issue here is one of competing First Amendment claims rather than a clash between the First Amendment claims of protesters and the police power of the convention cities as government actors, but such an inquiry lies beyond the scope of this comment.

20. *Coal. to Protest the Democratic Nat'l Convention v. City of Boston*, 327 F. Supp. 2d 61 (D. Mass. 2004), *aff'd sub nom.*, *Black Tea Soc'y v. City of Boston*, 378 F.3d 8 (1st Cir. 2004); *Stauber v. City of New York*, No. 03 Civ. 9162 (RWS), 2004 WL 1593870 (S.D.N.Y. July 16, 2004, *as amended* July 19, 2004).

21. *Ward v. Rock Against Racism*, 491 U.S. 781, 791, 109 S. Ct. 2746, 2753 (1989).

ensure protection of First Amendment rights without compromising the legal regime's long-settled familiarity.

I. LEGAL AND HISTORICAL BACKGROUND

In their current incarnation, protest pens and demonstration zones are fairly recent modes of crowd control. Wooden street barricades have long been used for general crowd control along sidewalks at parades.²² However, during Rudolph Giuliani's mayoralty in New York City (1994–2002), metal barricades became a daily presence to help smooth pedestrian and vehicular traffic at midtown intersections.²³ Use of barricades as complete enclosures at specific events is not new either,²⁴ but their deployment and intensity has increased dramatically in cities across the nation since the disastrous and widely publicized riots which occurred during the World Trade Organization's 1999 conference in Seattle, Washington.²⁵

Security arrangements for the conventions held in connection with the 2000 presidential elections demonstrated the effects of the Seattle debacle.²⁶ Although the Republicans' convention in Philadelphia that year saw a number of clashes between protestors and police,²⁷ no litigation arose over security procedures. However, the planned arrangements for the Democrats' convention

22. *Stauber*, 2004 WL 1593870, at *3.

23. Jack Newfield, *The Full Rudy: the Man, the Mayor, the Myth*, *The Nation*, June 17, 2002, at 11. The *Stauber* opinion notes that “[t]he NYPD has shifted from using wooden barricades for pens to using interlocking, metal barricades because the metal ones are more effective in keeping people inside the pen, because they interlock, and because they are more difficult to knock over.” *Stauber*, 2004 WL 1593870, at *9.

24. *Grider v. Abramson*, 180 F.3d 739, 744 (6th Cir.), *cert. denied*, 528 U.S. 1020, 120 S. Ct. 528 (1999) (Ku Klux Klan rally); *Olivieri v. Ward*, 801 F.2d 602, 604 (2d Cir. 1986), *cert. denied*, 480 U.S. 917, 107 S. Ct. 1371 (1987) (gay pride parade); *Housing Works, Inc. v. Safir*, 101 F. Supp. 2d 163, 165 (S.D.N.Y. 2000) (AIDS organization's press conferences and rallies).

25. *Coal. to Protest the Democratic Nat'l Convention v. City of Boston*, 327 F. Supp. 2d 61, 73 (D. Mass. 2004). A report commissioned by Seattle's city council and issued in September 2000 concluded that “this city became the laboratory for how American cities will address mass protests. In many ways, it became a vivid demonstration of what not to do.” Report of the Seattle City Council WTO Accountability Review Committee (Sept. 14, 2000), <http://www.cityofseattle.net/wtocommittee/arcfinal.pdf>.

26. Lynda Gorov, *Ruling Puts L.A. Protesters Closer to Democratic Convention*, *Boston Globe*, July 21, 2000, at A17; Todd S. Purdum, *The Democrats: The Protesters; Los Angeles Keeps Its Eyes On Protesters and the Police*, *N.Y. Times*, Aug. 16, 2000, at A1.

27. *Estes*, *supra* note 15.

in Los Angeles spawned at least one such lawsuit in federal court, *Service Employee International Union, Local 660 v. City of Los Angeles* [hereinafter *SEIU*].²⁸

The Los Angeles convention security arrangements foreshadowed those designed for the Democrats' 2004 convention in Boston. These arrangements, prepared by the Los Angeles police department, the Secret Service, and other convention planners and agencies, consisted primarily of an extremely large "secured zone" surrounding the Staples Center, with access limited to holders of convention tickets or Secret Service credentials.²⁹ Outside of this zone and quite some distance away (260 yards) from the entrance where convention delegates would arrive and depart, the planners located a small "demonstration zone."³⁰ The Los Angeles plaintiffs, a variety of protest organizations and individuals, claimed the zone arrangements would violate their First Amendment speech and assembly rights if officials deployed the plans as designed.³¹

In analyzing the plaintiffs' claim, the *SEIU* district court worked within the parameters of a long-settled First Amendment "time, place, and manner" standard required of government or state efforts to restrict speech and assembly in traditional public fora.³² The roots of this legal regime stretch back to the nineteenth century, when cities and towns began to deal with public preaching by Jehovah's Witnesses.³³ The doctrine evolved during the twentieth century through cases dealing with the labor movement during the Great Depression³⁴ and came to full flower during the civil rights and anti-war demonstrations of the late 1960s and early 1970s.³⁵

28. *Service Employee Int'l Union, Local 660 v. City of Los Angeles*, 114 F. Supp. 2d 966 (C.D. Cal. 2000).

29. *Id.* at 968, 969. See also Gorov, *supra* note 26.

30. *Service Employees Int'l*, 114 F. Supp. 2d at 968, 969.

31. *Id.* at 968.

32. *Id.* at 970–72. The Los Angeles parties stipulated that the locations in dispute were situated within a traditional public forum. *Id.* at 970.

33. *Saia v. New York*, 334 U.S. 558, 68 S. Ct. 1148 (1948); *Cox v. New Hampshire*, 312 U.S. 569, 61 S. Ct. 762 (1941); *Davis v. Massachusetts*, 167 U.S. 43, 17 S. Ct. 731 (1897).

34. *Schneider v. State of New Jersey, Town of Irvington*, 308 U.S. 147, 60 S. Ct. 146 (1939); *Hague v. C.I.O.*, 307 U.S. 496, 59 S. Ct. 954 (1939).

35. *Grayned v. City of Rockford*, 408 U.S. 104, 92 S. Ct. 2294 (1972) (black power demonstration outside high school); *Flower v. U.S.*, 407 U.S. 197, 92 S. Ct. 1842 (1972) (peace activist leafletting in civilian street within unrestricted area of military base); *Cox v. Louisiana*, 379 U.S. 536, 85 S. Ct. 453 (1965) (civil rights demonstration outside courthouse).

In recent decades the analysis has remained fairly settled.³⁶ The courts deciding *SEIU* in 2000 and the 2004 convention cases applied the “time, place, and manner” test as articulated by the Supreme Court in its 1989 decision, *Ward v. Rock Against Racism*.³⁷ In that case, the Court upheld a New York City noise regulation requiring that city sound systems and technicians be utilized at all musical performances in the city’s parks.³⁸ Essentially, the *Rock Against Racism* test ensures that government attempts to restrict the time, place, and manner for exercise of free speech and assembly in public fora must satisfy three test factors: “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) leave open ample alternative channels for communication of the information.”³⁹

Applying this test to the “secured zone” and “demonstration zone” arrangements for the Democrats’ 2000 convention in Los Angeles, the *SEIU* court initially noted the parties’ stipulations that the space in question was a traditional public forum and that the security plans were content-neutral, thus removing two elements from the analytical inquiry.⁴⁰ The opinion focuses primarily on the “narrowly tailored to serve a significant government interest” and “alternative channels” elements.⁴¹

Importantly for the purposes of this comment, the *SEIU* court rejected the Los Angeles defendants’ claims that the extensive nature of the planned zone arrangements could be justified as a “significant government interest” by the need for adequate security associated with the presence of prominent people, fears of terrorism, and the possibility that demonstrators might exaggerate their actions to engage the media.⁴² With the then-recent Seattle WTO fiasco likely in the minds of all involved, the *SEIU*

36. *Thomas v. City of Chicago Park Dist.*, 534 U.S. 316, 122 S. Ct. 775 (2002) (reaffirming suitability of analysis); *see also* *Capitol Square Review Bd. v. Pinette*, 515 U.S. 753, 115 S. Ct. 2440 (1995); *Forsyth County, Ga. v. Nationalist Movement*, 505 U.S. 123, 112 S. Ct. 2395 (1992); *U.S. v. Grace*, 461 U.S. 171, 103 S. Ct. 1702 (1983).

37. 491 U.S. 781, 109 S. Ct. 2746 (1989).

38. *Id.* at 789–90, 109 S. Ct. at 2753.

39. *Id.*

40. The court actually questioned the secured zone’s neutrality because, while speech and assembly rights were not restricted within its boundaries, access to it was limited to those persons chosen by the Democratic National Convention Committee and the Secret Service. *Service Employees Int’l Union, Local 660 v. City of Los Angeles*, 114 F. Supp. 2d 966, 970 (C.D. Cal. 2000).

41. *Id.* at 971.

42. *Id.* at 971–73.

defendants claimed the necessity to prepare for a “worst case scenario.”⁴³ The *SEIU* court could reasonably have gone against the plaintiffs on this point, but refused to do so: “The government cannot infringe on First Amendment rights on the mere speculation that violence *may* occur.”⁴⁴

In that regard, the *SEIU* court did not find the Los Angeles arrangements to be narrowly tailored: the secured zone was to be off limits for an unreasonable twenty-four hours a day (time); at nearly 185 acres, it was entirely too large (place); and its distance from the demonstration zone precluded virtually all possibility of communication between protestors and delegates (manner).⁴⁵

Finally, the *SEIU* court decided that the convention’s planned demonstration zone did not allow for ample alternative means of communication sufficient to compensate for the loss of speech, petition, and assembly activities forbidden in the secured zone.⁴⁶ The court acknowledged the importance to the protestors of communicating effectively with their primary audience, the convention delegates and attendees.⁴⁷ By situating protestors so far away, well outside the excessively large secured zone, the defendants’ scheme presented no alternative at all, much less an adequate one. Concluding tersely that “the First Amendment does not permit such a result,”⁴⁸ the court agreed with the plaintiffs on all counts, granted their plea for injunction, and ordered the convention authorities to rework the zones prior to the convention’s opening date.⁴⁹

The *SEIU* case, which was not appealed, stands as the most important precedent to the 2004 convention cases in nearly every respect. The court’s detailed and fully-considered application of the *Rock Against Racism* test, rational approach to security concerns, and recognition of the validity of plaintiffs’ First Amendment rights should have served as unquestionable precedents in the 2004 cases. Unfortunately, by 2004, the *SEIU* court’s approach seemed naive, archaic, and even quaint.

43. *Id.* at 972.

44. *Id.* at 971.

45. *Id.* at 971–72.

46. *Id.* at 972–73.

47. *Id.*

48. *Id.* at 972–73.

49. *Id.* at 975.

II. FACTS AND CONCLUSIONS OF LAW IN THE 2004 CONVENTION CASES

Like *SEIU*, the suits filed by protesters over the protest pen and demonstration zone schemes planned for the 2004 conventions were analyzed under the time, place, and manner test. However, much had changed in four years and the outcomes of the 2004 cases demonstrate the tenor of the evolving legal doctrine at work.

A. Coalition to Protest the Democratic National Convention v. City of Boston⁵⁰

The security plan developed for the Democrats' 2004 convention in Boston resembled the plan described in *SEIU*. The Secret Service controlled a "hard security zone" surrounding the Fleet Center and agents restricted entry to those with convention or Secret Service clearance.⁵¹ Unlike the Los Angeles scheme, however, the Boston plan also included a "soft security zone" to the south of the Fleet Center and the hard zone.⁵² The city retained control over the soft zone, which contained restaurants, bars, and stores which were to remain open during the convention.⁵³ Access to the soft zone was not restricted; the city planned to allow leafleting and small demonstrations of fifty or fewer people.⁵⁴

As in Los Angeles, the Boston authorities included a demonstration zone in their plans and opened planning negotiations with organization representatives as early as January of 2003.⁵⁵ These negotiations apparently concluded with a mutually acceptable compromise as to the zone's location, but the zone itself was not constructed until one week before the convention opened. When the creatively-named activist group Black Tea Society saw the actual site, they immediately filed suit in federal district court and moved for injunction.⁵⁶

50. 327 F. Supp. 2d 61 (D. Mass. 2004). Although the suit concerning the Republican National Convention in New York City was filed before the Boston suit, the Boston convention and the events at issue in the litigation occurred first, so they have been treated in that order in this comment.

51. *Id.* at 65.

52. *Id.*

53. *Id.*

54. *Id.* at 65–66.

55. Boston Globe Staff, *Impasse Seen on Protest Talks*, Boston Globe, Mar. 28, 2004, at B4.

56. *Coal. to Protest the Democratic Nat'l Convention v. City of Boston*, 327 F. Supp. 2d 61, 66 (D. Mass. 2004).

The judge assigned to the case toured the site personally and his striking description suggests the plaintiffs had good reason to complain: "The overall impression created by the DZ [demonstration zone] is that of an internment camp . . . [it] conveys the symbolic sense of a holding pen Indeed, one cannot conceive of what other design elements could be put into a space to create more of a symbolic affront to the role of free expression."⁵⁷

These "design elements" included abandoned elevated subway tracks fairly low overhead that were outfitted with loops of razor wire and supported by concrete girders planted throughout the zone.⁵⁸ On the ground, a double perimeter of concrete barriers topped with eight foot tall chain link fences and covered with heavy black mesh netting and fabric enclosed the zone area.⁵⁹

Atop the overhead tracks, convention authorities planned to post armed police and National Guardsmen, thus taking advantage of the tracks' elevation as a vantage point for convention security operations.⁶⁰ If the armed police and guardsmen overhead had an excellent view of the delegates coming and going, those underneath in the zone had little such chance due to the distance, angles, and nearly opaque mesh material between the zone and the convention arrival area.⁶¹

As in *SEIU*, the Boston trial court applied the Supreme Court's *Rock Against Racism* test: time, place, and manner restrictions in public fora must be content-neutral, narrowly tailored, and must leave open alternative channels for communication.⁶² Unfortunately, the court's analysis is somewhat incomplete. Although its introductory section on "General First Amendment Principles" refers to the public forum and content neutrality aspects of the inquiry,⁶³ the opinion does not mention these in its analysis of the Boston demonstration zone.⁶⁴ However, in its

57. *Id.* at 74–75.

58. *Id.* at 67. At the lowest point, the "ceiling" of the zone was just five feet, nine inches off the ground. Jonathan Saltzman, *Judge Inspects Protest Zone: Judge, Activists Compare the Area to a Prison*, Boston Globe, July 22, 2004, at B1 [hereinafter Saltzman, *Judge Inspects Protest Zone*].

59. *Coal. to Protest*, 327 F. Supp. 2d at 67. See also Saltzman, *Protest Zone Draws Ire*, *supra* note 14.

60. *Coal. to Protest*, 327 F. Supp. 2d at 67.

61. *Id.* at 68.

62. *Id.* at 69. In fact, the court cited *Service Employees Int'l* as a precedent. *Id.* at 73–74.

63. *Id.* at 69–70.

64. This lacuna seems due more to the compressed time frame in which this litigation occurred than to any conscious omission on the part of the court. The problem of timing in this litigation played as great a role in the plaintiffs' loss as

treatment of a companion case, brought by a separate set of plaintiffs to challenge the restriction against parades in the soft zone, the Boston trial court did note that the space in question constituted a public forum and that the parade restriction was clearly not content-based.⁶⁵ It may be assumed, therefore, that these conclusions extended to the court's analysis of the Boston demonstration zone plans.

Although the trial court's opinion suffers from a certain formlessness,⁶⁶ its analysis of the Boston demonstration zone focuses primarily, like that of the *SEIU* court, on the "narrowly tailored to serve a significant government interest" facet of the *Rock Against Racism* test. In light of Secret Service testimony that the (post-trial) reconfigured Los Angeles demonstration zone in *SEIU* proved insufficient to keep some protesters from throwing things at delegates and security personnel during the 2000 convention,⁶⁷ the Boston judge found the "design elements" of the Boston demonstration zone, however miserable, to be "reasonable in light of past experience."⁶⁸

In a footnote, the judge wrote that he had asked defense counsel for the Boston and federal authorities whether any "event-specific" threats had been posed.⁶⁹ The U.S. Attorneys participating on defense indicated the government did, in fact, have such evidence but they refused to share it with plaintiffs, citing "the potential difficulties for law enforcement and various investigations."⁷⁰ Still in the footnote, the judge noted first that he

any other factor and will be treated more fully in this comment's analytical section.

65. *Coal. to Protest*, 327 F. Supp. 2d at 70.

66. Again, probably due to time constraints.

67. *Coal. to Protest*, 327 F. Supp. 2d at 73.

68. *Id.* at 75.

69. *Id.* at 75 n.2.

70. *Id.* This claim engenders at least a shadow of doubt in light of reported statements by Homeland Security Secretary Tom Ridge that no specific threats to the Boston convention had been derived from intelligence sources. Cullen, *supra* note 17. Even so, undercover Boston police may indeed have been investigating organizations like the Black Tea Society. Jenna Russell, *Anti-Violence Black Tea Activists Draw Attention of Authorities*, *Boston Globe*, July 24, 2004, at A1. According to a report by CNN, the *New York Times* uncovered an October 2003 FBI memorandum directed to law enforcement agencies at all levels of government urging them to monitor protest activity in their localities and report any "potentially illegal acts" back to the FBI. Furthermore, the CNN report adds that the Department of Justice issued its own memorandum concluding that the FBI's suggested actions raised no First

omitted this *ex parte* information from his ruminations, then also, curiously, that he had considered it enough to aver that nothing in the received information disproved or refuted his decision to deny plaintiffs' request for injunctive relief.⁷¹ The judge then ordered the sensitive information sealed for potential use in connection with any appeal.⁷²

As to the "alternative channels" question, the Boston court's opinion says merely that the "constraints of time, geography, and safety" did not allow for modifications to the zone which might have rendered it less miserable.⁷³ While the judge found the situation "irretrievably sad," he denied the plaintiffs' request for injunction.⁷⁴

On expedited appeal to the First Circuit, the Black Tea Society plaintiffs initially hoped to convince the court that the convention zone arrangements constituted a prior restraint seeking to prevent speech rather than a "time, place, and manner" regulation of speech.⁷⁵ If so, the plaintiffs argued, the lower court erred in applying an intermediate standard requiring only that the regulations be reasonable.⁷⁶ The appellate panel rejected this challenge, citing Supreme Court precedent that security-based regulations do not rise to the level of prior restraints, which require a more strict burden of proof.⁷⁷

Examining the lower court's application of the *Rock Against Racism* time, place, and manner test, the First Circuit panel found the zone arrangements to be clearly content-neutral and accepted, without question as to proof, the government's claimed interest in the maintenance of security at the convention.⁷⁸ While the panel agreed that the zone arrangements did impose a "substantial burden on free expression," it nevertheless allowed significant deference to "the government's judgment as to the best means for

Amendment concerns. Bob Barr, *FBI Tactics Chilling Political Speech*, Aug. 25, 2004, <http://www.cnn.com/2004/LAW/08/25/chill.political.speech/index.html>.

71. *Coal. to Protest*, 327 F. Supp. 2d at 75 n.2.

72. *Id.*

73. *Id.* at 75–76.

74. *Id.* at 78.

75. *Black Tea Soc'y v. City of Boston*, 378 F.3d 8, 12 (1st Cir. 2004). The appellate panel delivered its decision on July 26, 2004, the first day of the convention. Their written decision is dated July 30, 2004, the day after the convention closed.

76. *Id.*

77. *Id.*

78. *Id.* at 12–13.

achieving its legitimate objectives.”⁷⁹ The panel’s opinion focuses instead on the narrowly tailored and alternative channels test elements.⁸⁰

The plaintiffs argued on the first point that because the city had shown no evidence that Boston demonstrators planned to use any of the disruptive techniques seen in Seattle and Los Angeles, the convention authorities’ police power should not extend to burdening protestors’ First Amendment rights so substantially on the basis of “unrelated past experiences.”⁸¹ The city’s authority, plaintiffs argued, should instead be limited to “arresting miscreants and punishing unlawful conduct after it occurred.”⁸²

The appellate panel rejected these arguments.⁸³ While its opinion noted that unsupported references to “isolated past events” should not justify substantial burdens on speech, it allowed that “the degree to which inferences drawn from past experience are plausible” is a valid factor.⁸⁴ Like the trial court, the appellate panel declined to consider the Secret Service evidence proffered *ex parte in camera*.⁸⁵ It thus found the lower court’s weighting of the security concerns to be reasonable and upheld the finding that the zone arrangements were narrowly tailored.⁸⁶

Concerning the “alternative channels of communication” element of the time, place, and manner test, the appellate panel dismissed plaintiffs’ argument that the zone arrangements left demonstrators no options “within sight and sound of the delegates.”⁸⁷ The demonstration zone itself, while “imperfect,” did indeed provide such an opportunity.⁸⁸ The court also noted the availability of the soft zone for leafleting and small scale group protests and the possibility of larger permitted protests at other locations in Boston.⁸⁹ Finally, the panel added, demonstrators could take their case to delegates via television, radio, the press, the internet and “other outlets,” so the lower court had not erred in finding against plaintiffs on the “alternative channels” test

79. *Id.* at 13.

80. *Id.*

81. *Id.* See also *Million Youth March v. Safir*, 63 F. Supp. 2d 381 (S.D.N.Y. 1999).

82. *Black Tea Soc’y*, 378 F.3d at 13.

83. *Id.* at 14.

84. *Id.* at 13–14.

85. *Id.* at 13 n.3.

86. *Id.* at 13–14.

87. *Id.* at 14.

88. *Id.*

89. *Id.*

element.⁹⁰ The appellate court thus fully affirmed the lower court's decision.⁹¹

Another panel member concurred, expanding on the issues of timing, choice of site, event-specific intelligence, and the post-9/11 environment.⁹² This writing's tone expresses a barely masked distaste with the plaintiffs' case. It criticizes the plaintiffs for bringing the lawsuit at such a late date (apparently disregarding the fact cited in the lower court's opinion that the demonstration zone had been set up only a week prior to the convention opening date),⁹³ suggests that their expectations of a better demonstration zone constituted "unjustified reliances on verbal representations" made by event organizers and local authorities,⁹⁴ and indicates that the trial court could, in fact, have had the authority to examine the Secret Service's *ex parte in camera* evidence without allowing the plaintiffs an opportunity to refute it.⁹⁵ Judging from the tone of this concurrence and the expressed deference of the majority opinion, it seems the Boston plaintiffs' case was lost from the outset.

B. *Stauber v. City of New York*⁹⁶

Unlike the Boston plaintiffs, the New York City protesters could file their suit well ahead of time, largely because the individual plaintiffs experienced the New York City police department's penning policies first-hand in a February 2003 demonstration opposing United States actions in Iraq.⁹⁷ The plaintiffs sought damages for injuries they alleged from the 2003 demonstration and injunctive relief to forestall similar treatment at the 2004 convention.⁹⁸ The *Stauber* court found the presented facts regarding the police department's use of pens at the 2003 demonstration and other similar events relevant and detailed them thoroughly.⁹⁹

At the 2003 demonstration, the New York Police Department set up metal barricades on either side of First Avenue, a wide

90. *Id.*

91. *Id.* at 15.

92. *Id.* at 15–19 (Lipez, J., concurring).

93. *Id.*

94. *Id.*

95. *Id.* at 18.

96. *Stauber v. City of New York*, No. 03 Civ. 9162 (RWS), 2004 WL 1593870 (S.D.N.Y. July 16, 2004, *as amended* July 19, 2004).

97. *Id.* at *18.

98. *Id.* at *2.

99. *Id.* at **3–8.

thoroughfare running north and south on the east side of Manhattan, in order to contain demonstration crowds near the United Nations building.¹⁰⁰ Each block had barricades set across its south end to permit vehicular traffic through the cross streets.¹⁰¹ As each city block “pen” filled to capacity, holding approximately four thousand people,¹⁰² police set up barricades across the north end to permit traffic across the next cross street, thus creating a four sided perimeter enclosing demonstrators.¹⁰³ These large pens began at Fifty-First Street and stretched north by perhaps thirty blocks as an estimated eighty thousand protesters arrived for the 2003 demonstration.¹⁰⁴

Police officers guarded the pens at the north and south edges which bordered cross streets.¹⁰⁵ Two of the *Stauber* plaintiffs testified that when they tried to leave the pens to use bathrooms or buy hot drinks, the police refused to let them out.¹⁰⁶ Witnesses testified also that when protesters did manage to leave the pens, they might not be permitted back inside to rejoin their friends and fellow demonstrators.¹⁰⁷

As a result of these experiences, the *Stauber* plaintiffs believed their speech and assembly rights had been violated and would be violated again if the police employed the same pen program during the 2004 convention.¹⁰⁸ The plaintiffs further alleged that the unpleasantness of the pens would chill the desire of people who might otherwise wish to attend the convention demonstrations.¹⁰⁹

The *Stauber* court analyzed this dispute under the threshold standard that “presence at a demonstration . . . is a form of speech and assembly in a public forum, and accordingly ‘receives a more heightened protection under the First Amendment.’”¹¹⁰ It applied the *Rock Against Racism* test: the intended time, place, and manner restriction must be content-neutral, narrowly tailored to

100. *Id.* at *4.

101. *Id.*

102. *Id.* at *9.

103. *Id.* at *4.

104. *Id.* at **5–6.

105. *Id.* at *5.

106. *Id.* at *6.

107. *Id.* at *10.

108. *Id.* at *15.

109. *Id.*

110. *Id.* at *24 (quoting *United Yellow Cab Drivers Ass’n, Inc. v. Safir*, No. 98 Civ. 3670, 1998 WL 274295, at *4 (S.D.N.Y. May 27, 1998)).

serve a significant government interest, and such as to allow ample alternative channels for expression.¹¹¹

The plaintiffs did not challenge the pen policy for content neutrality or for serving a significant government interest by allowing the police to reasonably maintain public peace and order.¹¹² Instead, their claim focused on the “narrowly tailored” aspect of the test and they asked the court to find that the pens might be managed to allow more freedom of entry and exit during convention protests.¹¹³

The city defendants responded that public safety concerns would be heightened during the 2004 convention, thus, the current restrictive pen policies should remain in effect.¹¹⁴ The city’s police chief testified that the pens were necessary to ensure emergency access through the streets so that medical or police personnel could address a crime situation or other emergency.¹¹⁵ The city also argued that the desired access adjustments sought by the plaintiffs would negatively affect the police department’s “crowd control and safety interests.”¹¹⁶ Finally, the city contended that penning was merely a practical preventive measure and not an active effort “conducted for unconstitutional reasons.”¹¹⁷ Despite these defensive efforts, the *Stauber* judge agreed with the plaintiffs, finding that the near-absolute entry and exit restrictions rendered the current pen practices unreasonable and not narrowly tailored.¹¹⁸

The *Stauber* court’s opinion stated that, having found a “narrow tailoring” violation, it need not address the “alternative channels” issue.¹¹⁹ However, for purposes of thoroughness, the court noted its finding that the pens, combined with street closings, left protestors no alternative to either protest elsewhere in the

111. *Stauber*, 2004 WL 1593870, at *25 (citing *Ward v. Rock Against Racism*, 491 U.S. 781, 791, 109 S. Ct. 2746, 2753 (1989)).

112. *Id.* at *25.

113. *Id.* at **22, 28.

114. *Id.* at *32.

115. *Id.* at *3.

116. *Id.* at *28.

117. *Id.* at *21. The defendants finally claimed, intriguingly, that if the plaintiffs’ requests were granted, the result would constitute a federalism problem of unfair intrusion by the federal government, in the form of the trial court, into the city’s police power. The court listed a number of previous cases where federalism concerns had not stopped trial and appellate courts from assigning and upholding similar injunctions and concluded that such intrusion was no more than minimal. *Id.* at *32.

118. *Id.* at *29.

119. *Id.*

vicinity or even to leave when they wished to do so.¹²⁰ The court granted the plaintiffs' motion for preliminary injunctive relief and directed the city to adjust its pen practices to allow greater freedom of exit and entry during the convention demonstrations.¹²¹ The case has not been appealed.

The New York City plaintiffs succeeded largely because their claim was pragmatic, backed by actual experience, and filed in sufficient time for the court to direct defendants' remediation of the asserted problems well in advance of the convention. Unfortunately, whatever promise of a peaceful convention *Stauber* brought remained unfulfilled. The whirlwind of events that ultimately occurred during the convention resulted in nearly two thousand arrests, a significant number of which have since been found to be wrongful.¹²² Even so, *Stauber* stands solidly on the middle ground between the *SEIU* and Boston cases.¹²³

III. ANALYSIS: PROBLEMS APPLYING THE *ROCK AGAINST RACISM* TEST

The courts deciding the 2004 convention pen and zone cases did not question whether the *Rock Against Racism* test might not be suitable for the subject matter. Although this test has long been the standard for "time, place, and manner" regulations on speech and expression in public fora, it does not adequately confront a number of factors unique to pen and zone cases. These include whether the pen and zone schemes are truly content-neutral, the extent to which government entities must provide evidence of an actual and not merely suspected security threat to demonstrate the significant government interest, increasingly low judicial standards as to what constitutes a narrowly tailored regulation, the inadequacy and unsuitability of suggested alternative channels, the considerable time sensitivity involved, and, finally, the lack of a

120. *Id.*

121. *Id.* at *33.

122. Jim Dwyer, *Videos Challenge Hundreds of Convention Arrests*, N.Y. Times, Apr. 12, 2005, at A1 ("Seven months after the convention at Madison Square Garden, criminal charges have fallen against all but a handful of people arrested that week. Of the 1,670 cases that have run their full course, ninety-one percent ended with the charges dismissed or with a verdict of not guilty after trial. Many were dropped without any finding of wrongdoing, but also without any serious inquiry into the circumstances of the arrests, with the Manhattan district attorney's office agreeing that the cases should be 'adjourned in contemplation of dismissal.'"); See also Editorial, *On the Streets, Police . . .*, Boston Globe, Sept. 3, 2004, at A20 (provides a contemporary account).

123. *Stauber*, 2004 WL 1593870.

written and promulgated statute, ordinance or regulation to be subjected to analysis.

A. Content Neutrality

Although content neutrality is generally listed in conjunction with the other elements of the *Rock Against Racism* test, it ranks essentially first amongst equals. In determining content neutrality, courts ask whether the restriction at issue has been justified (by the government or state actor) without reference to the content of the regulated speech,¹²⁴ or, more directly, whether the government or state actor seeks to restrict the speech at issue "because of disagreement with the message it conveys."¹²⁵ If the court determines the restriction is indeed based on the content of the message being conveyed, the analysis moves necessarily into a much higher degree of scrutiny. Such restrictions are "presumed to be unconstitutional"¹²⁶ and can only be justified by recourse to a compelling (not merely significant) state or government interest,¹²⁷ a much higher hurdle for a restriction to overcome. Thus, in the time, place, and manner analysis, if a restriction is deemed content-based, the analysis should not even reach the other two factors.

The current legal regime largely takes as a given that speech restrictions are content-neutral and the case opinions at issue in this comment spend barely a sentence on the question. However, Supreme Court Justices Thurgood Marshall and Antonin Scalia (who one might rarely find on the same side of an issue) have both expressed suspicions that facially content-neutral restrictions may often be far less neutral than they appear.

In *Clark v. Community for Creative Non-Violence*,¹²⁸ a direct ancestor of *Rock Against Racism*, protest groups who sought to highlight the plight of the nation's homeless requested permission to sleep overnight in temporary "tent cities" set up as campsites in Washington D.C.'s Mall and Lafayette Park.¹²⁹ The Court upheld the restriction at issue, a National Park Service ban on camping in

124. *Ward v. Rock Against Racism*, 491 U.S. 778, 791, 109 S. Ct. 2746, 2753 (1989) (citing *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293, 104 S. Ct. 3065, 3069 (1984)).

125. *Id.*, 109 S. Ct. at 2754 (citing *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 295, 104 S. Ct. 3065, 3070 (1984)).

126. *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 828, 115 S. Ct. 2510, 2516 (1995).

127. *Boos v. Barry*, 485 U.S. 312, 321, 108 S. Ct. 1157, 1164 (1995).

128. *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 104 S. Ct. 3065 (1984).

129. *Id.* at 291-92, 104 S. Ct. at 3068.

those particular parks.¹³⁰ In dissent, Justice Marshall sounded an alarm over the direction the time, place, and manner test was evolving, namely, toward a split between content-based regulations subjected to strict scrutiny and content-neutral regulations subjected to supposedly intermediate scrutiny. In Justice Marshall's view, undesirable expression could easily be squelched by a superficially neutral regulation: "[F]acial . . . neutrality is no shield against unnecessary restrictions on unpopular ideas or modes of expression."¹³¹

Justice Scalia, dissenting in the 2000 case *Hill v. Colorado*,¹³² explained how a First Amendment regulation could be neutral as written and promulgated, yet content-based in spirit and application.¹³³ The *Hill* Court upheld a complicated state criminal statute regulating "speech related conduct within one hundred feet of the entrance to any health care facility,"¹³⁴ finding the statute neutral as a time, place, and manner regulation.¹³⁵ Quite complex itself, Justice Scalia's dissent claims that the statute at issue, however blandly drafted, physically segregates pro-life activists who wish to demonstrate on sidewalks in front of abortion clinics and that it does so on the basis of the expected content of the activists' speech.¹³⁶

Although the *Hill* statute seemingly applies to everyone and anyone who might have a piece to speak in front of a medical facility, Justice Scalia posits that it is aimed at a specific class of protestors and, by extension, the content of what they may be expected to say.¹³⁷ For emphasis, Scalia avers that "I have no doubt that this regulation would be deemed content-based *in an instant* if the case before us involved antiwar protestors"¹³⁸

130. *Id.* at 289, 104 S. Ct. at 3067.

131. *Id.* at 316, 104 S. Ct. at 3080 (Marshall, J., dissenting). According to Justice Marshall, evidence in the record suggested that the restriction in question may have arisen out of political concerns and pressures to combat the plaintiffs' goal of sleeping in the parks as a symbolic protest to call attention to the plight of the homeless rather than, as the government stated, concerns for wear and tear on the park. Although this point is not developed, if proven, it might indeed have demonstrated that the regulation was content-based rather than neutral. *Id.* at 315–16, 104 S. Ct. at 3080.

132. *Hill v. Colorado*, 530 U.S. 703, 741–65, 120 S. Ct. 2480, 2503–15 (2000) (Scalia, J., dissenting).

133. *Id.* at 742–49, 120 S. Ct. at 2503–07.

134. *Id.* at 707, 120 S. Ct. at 2484 (majority).

135. *Id.* at 725, 730, 120 S. Ct. at 2494, 2497.

136. *Id.* at 744, 120 S. Ct. at 2504 (Scalia, J., dissenting).

137. *Id.*

138. *Id.* at 742, 120 S. Ct. at 2503.

Although Justice Scalia might be surprised to find himself in company with Justice Marshall, his dissent in *Hill* raises the same point: Statutes drafted in a neutral manner may be content-based once one looks beyond the words and divines the true intent of regulations which restrict First Amendment rights in public fora.

Taking this lead, the assumed neutrality of the 2004 convention pen and zone schemes should be questioned more thoroughly, particularly because these schemes were devised by authorities having a far greater interest in avoiding protest speech than in reasonably accommodating it. A large motive in luring the national political conventions, indeed, any major convention or significant event like the Olympics or the Super Bowl, is for a host city to attract the spending power of delegates and to put on a great show for those delegates and for the national media.¹³⁹ Convention boosters recruit business communities with promises of boom days.¹⁴⁰ Host city mayors become deeply involved in bidding for conventions and great effort is taken to resolve labor disputes and other such sticking points that might mar the presentation.¹⁴¹ Those representing the city, then, are motivated to keep the peace largely by keeping noisy and irate demonstrators far away from delegates and other visitors.

National political party personnel are equally interested in smooth sailing. Regarding clashes between Los Angeles police and demonstrators at the 2000 Democratic convention, a top aide to the Gore presidential campaign who observed the action from a rooftop announced that: "We knew what they [the police] were doing and we supported them."¹⁴² Arianna Huffington, a California political personage whose "shadow convention" in Los

139. *Was It Worth It?*, *supra* note 13.

140. *Id.* Although some predicted the Boston convention would bring \$154 million in benefits to the local economy, it is not clear whether this money materialized and many restaurants near the Fleet Center were reported to be "almost deserted" during the convention. *Id.* In New York City, the host committee urged local businesses to remain open because the area would be full of extra personnel for the convention and "they all must eat!" Hu & Slackman, *supra* note 18.

141. Rick Klein, *Convention Protests Must Meet New Rules*, Boston Globe, May 6, 2004, at A1. In the months preceding the convention, the Boston police and several city unions staged demonstrations during convention preparations at the Fleet Center. *Id.* New York City Mayor Bloomberg contended with persistent rumors that Penn Station, the nation's busiest commuter rail station, would be shut down as it is located right next to Madison Square Garden. Michael Slackman, *Penn Station is to Stay Open During G.O.P. Convention*, N. Y. Times, Feb. 28, 2004, at B3 [hereinafter Slackman, *Penn Station*].

142. Purdum, *supra* note 26.

Angeles was broken up by police, noted that the police “were making a distinction between the people inside the Staples Center, who had to be protected at all costs, and the people outside who they regard as a threat.”¹⁴³

In conclusion, the line between regulating speech and regulating where speech occurs is not always clear. Although the 2004 convention planners at no point discriminated against any groups in particular, their security measures may not have been as blandly neutral as alleged and the courts did not question them on this point. Although the Boston demonstration zone could theoretically have been filled by pro-Kerry demonstrators and the protest pens outside Madison Square Garden in New York City could have housed pro-Bush demonstrators, common sense argues this would not be the case. Thus, there is good reason to lend credence to Justice Scalia’s implication that the authorities who set such “neutral” regulations know, with a fair degree of accuracy, who will be targeted and thus may shape and place the regulations to meet unstated aims which may not be neutral at all. At the 2004 conventions, the pens and zones would most likely be filled by protesters expressing views that did not fit well into the upbeat and urbane images the Boston and New York City authorities wished to project. If so, the assumed content neutrality of the pens and zones should not be so easily accepted.

B. “Significant Government Interest” and Convention Security Concerns

Since the 1999 Seattle difficulties, those responsible for planning security at the national political conventions have largely maintained a “worst case scenario” mentality.¹⁴⁴ The courts deciding the 2004 convention cases acknowledged the importance of security concerns, but their differing treatments of the issue raise a concern unique to pen and zone schemes for which the *Rock Against Racism* test’s generic “significant government interest” requirement does not provide sufficient guidance: In the absence of event-specific evidence of an actual threat, how much may security planners rely on either past events or unspecified concerns to prove their claims of a significant government interest?

143. *Id.*

144. *Black Tea Soc’y v. City of Boston*, 378 F.3d 8, 13 (1st Cir. 2004); *Coal. to Protest the Democratic Nat’l Convention v. City of Boston*, 327 F. Supp. 2d 61, 64 (D. Mass. 2004); *Stauber v. City of New York*, No. 3 Civ. 9162 (RWS), 2004 WL 1593870, *12 (S.D.N.Y. July 16, 2004, *as amended*, July 19, 2004); *Service Employee Int’l Union, Local 660 v. City of Los Angeles*, 114 F. Supp. 2d 966, 972 (C.D. Cal. 2000).

1. *Boston: Triumph of Fear Over Freedom*¹⁴⁵

The decisions in the Boston convention cases illustrate what can happen to protest plaintiffs' First Amendment concerns when courts accept the government's claimed "significant government interest" at face value. In *Clark v. Community for Creative Non-Violence*, the Supreme Court easily accepted as sufficient and legitimate the Park Service's claimed interest in preserving the condition of Washington D.C.'s parks and upheld the proposed ban on symbolic camping.¹⁴⁶ Justice Marshall's dissent, however, pointed out that the government had not advanced any evidence that permission of the symbolic overnight camping would cause any greater wear and tear on park property than other permissible daytime forms of protest activity.¹⁴⁷

As to the government's claims of potential administrative overload that could accompany opening the capitol's parks to camping, Justice Marshall found no "factual showing that evinces a real, as opposed to a merely speculative, problem . . . there are no substantial government interests advanced by the government's regulations . . . [only] the prerogatives of a bureaucracy that over the years has shown an implacable hostility toward citizens' exercise of First Amendment rights."¹⁴⁸

The courts deciding the Boston convention cases clearly surrendered to the Boston authorities' reports as to unrelated past events and undocumented future scenarios and skipped over a reasoned assessment of whether the government had properly demonstrated its claimed significant government interest. Both Boston opinions refer to the 1999 Seattle fiasco, the security problems at the 2000 Los Angeles convention, and September 11, 2001, noting particularly that Boston's Logan Airport had been the embarkation point for the hijacked planes on that day.¹⁴⁹ While

145. Eileen McNamara, *Fencing Freedom In*, Boston Globe, July 25, 2004, at B1.

146. *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 296, 104 S. Ct. 3065, 3070 (1984).

147. *Id.* at 311, 104 S. Ct. at 3078 (Marshall, J., dissenting).

148. *Id.* at 311-12, 104 S. Ct. at 3077, 3078. Five years later, in *Ward v. Rock Against Racism*, the Court noted simply that "the city enjoys a substantial interest in ensuring the ability of its citizens to enjoy whatever benefits the city parks have to offer." 491 U.S. 781, 797, 109 S. Ct. 2746, 2757 (1989). Again in dissent, Justice Marshall averred that the majority "replaces constitutional scrutiny with mandatory deference." *Id.* at 803, 109 S. Ct. at 2760 (Marshall, J., dissenting).

149. *Black Tea Soc'y*, 378 F.3d at 10, 13, 16-19; *Coal. to Protest*, 327 F. Supp. 2d at 64, 73, 75.

security concerns doubtless deserved a great degree of weight, the Boston decisions allowed these concerns to override the plaintiffs' First Amendment rights on the basis of very little actual proof.

The Boston trial court, in particular, cited *Stauber*, then recently decided, where the court did indeed require "event-specific" proof from the government,¹⁵⁰ but declined to follow its lead, giving no particular reason for not doing so. It is inexplicable why *Stauber*, an indisputably current and on-point precedent decided by a jurisdiction in New York City, with its extensive history of mass public protest,¹⁵¹ should have been summarily ignored by the District Court of Massachusetts and the First Circuit, jurisdictions arguably having much less actual experience in the field.

Aside from the trial court judge's choices as to judicial precedents, the Boston convention cases raise a more disturbing problem, one not addressable within the generic confines of the *Rock Against Racism* test. This dilemma raises questions associated with the Secret Service's offer to provide the court, but not the plaintiffs, with apparently persuasive event-specific intelligence to substantiate the defendants' claims that security concerns mandated the extreme solution of the demonstration zone.¹⁵² Should compelling national security concerns like those presented by the convention justify an exceptional *ex parte in camera* judicial consideration of privileged information not shared with opposing counsel? If not, do projected problems and past examples of security failures and successes at unrelated yet comparable events constitute a sufficiently significant government interest to justify extreme measures like the Boston demonstration zone?

The Boston courts' answers to these questions are "Maybe" and "Yes." Both courts avoided the first question by expressly

150. *Coal. to Protest*, 327 F. Supp. 2d at 74. The *Stauber* case's approach will be more fully discussed *infra*.

151. Like Washington, D.C., New York City has long been a center of large scale public protest activity, with historical events like Samuel Gompers' 1886 May Day speech in Union Square, the occupation of Columbia University by anti-war demonstrators during 1968 and any number of demonstrations which occur almost daily near the United Nations building. Hu & Slackman, *supra* note 18; see also Will Kessler, *Anything But "Labor Day,"* Aspen Daily News, available at http://www.aspendailynews.com/search_columns/view_column.cfm?orderform=477; The Columbia University Electronic Encyclopedia, <http://www.factmonster.com/ce6/history/A0847020.html>; Andy Humm, *Restricting Demonstrations*, Gotham Gazette, Mar. 5, 2003, available at <http://www.gothamgazette.com/print/299>.

152. *Coal. to Protest*, 327 F. Supp. 2d at 75 n.2.

disregarding the government's selectively proffered evidence, however tempting it may have been.¹⁵³ However, the concurrence to the appellate opinion suggests that although judicial consideration of *ex parte in camera* information in non-criminal merits determinations is generally to be avoided, some circuits have suggested allowing such considerations in exceptional circumstances where national security is at issue.¹⁵⁴

While the sensitivity of confidential intelligence information must be protected, such an exception can only trouble First Amendment advocates. Allowing a judge to view the reports and take them into account but refusing plaintiffs an opportunity to challenge the reports' contents essentially allows the executive and judicial branches of government to mandate First Amendment claims without input or challenge from those most directly affected. Second, it encourages a misconception that all demonstrators are potential terrorists and criminals, thus subject not only to penning at public protests, but to surveillance and singling out even when they are not engaged in protesting.^{155, 156}

Without admission of the event-specific threat evidence, the Boston inquiry hinged on the second question asked above: whether the city defendants' projections and suspicions based on the Seattle and Los Angeles difficulties truly presented a significant government interest sufficient to justify the demonstration zone under *Rock Against Racism*. The Boston trial court judge pronounced himself "satisfied that past experience at comparable events . . . adequately supports each of the security precautions at the DZ as reasonable."¹⁵⁷ The appellate panel pointed out that while a government ought not be given free range to "impose harsh burdens on the basis of isolated past events,"¹⁵⁸ the lower court's conclusion was reasonable enough to be upheld.¹⁵⁹

While it is disturbing enough to First Amendment advocates that the extreme form of the Boston demonstration zone was upheld on the grounds of reports from unrelated, if similar events in the past, it is additionally troubling when one considers the

153. *Black Tea Soc'y*, 378 F.3d at 13; *Coal. to Protest*, 327 F. Supp. 2d at 75 n.2.

154. *Black Tea Soc'y*, 378 F.3d at 17-18 (Lipez, J., concurring).

155. See Barr, *supra* note 70.

156. Using such information could also constitute a Fourteenth Amendment due process violation, an important inquiry which is, unfortunately, not germane to this comment.

157. *Coal. to Protest*, 327 F. Supp. 2d at 75.

158. *Black Tea Soc'y*, 378 F.3d at 14.

159. *Id.*

source of those reports. Affidavits from law enforcement personnel will almost certainly be biased in favor of the government. Indeed, subsequent reports from the Boston convention suggested that some unruly protestor conduct had been provoked by police aggression and preemptive actions.¹⁶⁰

In the end, the Boston courts upheld the demonstration zone, even as all involved knew it violated the plaintiffs' First Amendment rights.¹⁶¹ The appellate concurrence closes with a dash of regretful purple prose, conceding that the demonstration zone offends the "spirit of the First Amendment," yet hopeful that such spirit "will not be offended again."¹⁶² As Justice Marshall feared, the *Rock Against Racism* test became, in these circumstances, a show of minimal scrutiny and mandatory deference which effectively gave "government officials a free hand in achieving their policy ends" even if those ends remained unsupported and evidentially undocumented.¹⁶³

After the dust settled from their failed litigation, demonstrators at the Boston convention largely avoided the demonstration zone.¹⁶⁴ Although as an actual structure, the zone apparently had little effect on First Amendment rights, as a legal structure, it set a dangerous precedent and allowed the city defendants to run through a gaping hole in the *Rock Against Racism* test. Even Boston's police superintendent, who devised the zone, referred to it as the "constitutional infringement zone."¹⁶⁵ Without fully demonstrating a significant government interest, Boston's authorities established a physical monument to the vulnerability of First Amendment rights, tailored just as they saw fit.

2. Stauber: *A Rational Approach*

160. Elizabeth Dwoskin & Jacob Wheeler, *Peaceful Protests Erupt Into Violence Near Republican National Convention Barricades*, Utne, Aug. 2004, available at http://www.utne.com/web_special/web_specials_2004-08/articles/11371-1.html.

161. *Black Tea Soc'y*, 378 F.3d at 19 (Lipez, J., concurring); *Coal. to Protest*, 327 F. Supp. 2d at 76.

162. *Black Tea Soc'y*, 378 F.3d at 19 (Lipez, J., concurring).

163. *Ward v. Rock Against Racism*, 491 U.S. 781, 803, 109 S. Ct. 2746, 2760 (1989) (Marshall, J., dissenting).

164. Marcella Bombardieri, *Boycott is Planned for Free-Speech Zone*, Boston Globe, July 25, 2004, at B8.

165. *Was It Worth It?*; *supra* note 13. As of several days before the convention began, the only event organizers who still planned to use the zone were demonstrators who wished to protest Israel's occupation of Palestine. They felt the zone's miserable characteristics represented "symbolic value for their particular message." Bombardieri, *supra* note 164.

The New York City *Stauber* decision demonstrates that the *Rock Against Racism* test can be applied in a balanced manner in spite of considerable pressure to adopt the “worst case scenario” mindset. The significant government interest in maintaining sufficient police power to combat security concerns was given proper weight, but the court demanded solid, event-specific evidence to support the government’s claims.

The *Stauber* case focused specifically on the New York City police department’s unwritten past policy of using metal barricades to pen in protesters and the plaintiffs’ expectation that police would use the same practice at the 2004 Democratic National Convention.¹⁶⁶ The plaintiffs’ ability to detail the problems resulting from excessive police constriction of the pens at the 2003 U. N. demonstration gave weight to their claim that the extant pens policy amounted to an insufficiently narrowly tailored time, place, and manner regulation.¹⁶⁷ This advantage gained strength when New York City’s police chief conceded that entry and exit modifications and consistent instructions to police personnel, two adjustments sought by plaintiffs for the 2004 convention, could probably be enacted so that the police department’s legitimate law enforcement interests and concerns about terrorism would not be undermined.¹⁶⁸

The New York City defendants did not raise any specific security threats at the upcoming Republican National Convention to bolster their case and the *Stauber* court expressly pointed out this failure. The defendants did argue that the national government considered the convention area to be a terrorism target, but the court dismissed the defense’s “general invocation of terrorist threats” as overly vague in that it lacked the necessary attendant evidence showing how the extant penning policies would stave off such threats.¹⁶⁹ As one contemporary commentator noted, the easy conflation of terrorists and protestors makes no sense upon examination: “[t]he true domestic terrorists—the Tim McVeighs of the world—are far more likely to be found in the trucks rigged with bombs than in the pens set up for speech The person

166. *Stauber v. City of New York*, No. 03 Civ. 9162 (RWS), 2004 WL 1593870, at *1 (S.D.N.Y. July 16, 2004, as amended July 19, 2004).

167. *Id.* at *29.

168. *Id.* at **10, 28.

169. *Id.* at **12, 31. These statements appear in the opinion sections dealing with the police department’s search policies, but the court’s conclusion can be extended to the pens policy.

holding the placard is probably not the one we have to worry about.”¹⁷⁰

Fears of terrorism and demonstrators gone wild in New York City during the 2004 convention, the “significant government interest” claimed by the *Stauber* defendants, could easily have swallowed up the other aspects of the court’s analysis under *Rock Against Racism*.¹⁷¹ However, the *Stauber* opinion is most striking for its refusal to allow the city defendants’ ungrounded suspicions to override the constitutional query. Quite simply, the *Stauber* plaintiffs ably demonstrated likely harm to their First Amendment rights and requested pragmatic and moderate adjustments which the defendants could not resist without showing likely and specific harm to public safety in return.

C. “Narrowly Tailored:” A Standard in Decline

Perhaps the major jurisprudential innovation advanced in *Rock Against Racism* was the Supreme Court majority’s refinement of the “narrowly tailored” standard. The Second Circuit appellate panel which had previously heard the case, following what it thought was appropriate and applicable precedent, rejected the city noise regulation at issue because it was not the least restrictive alternative sufficient to achieve the government’s asserted interest in noise control.¹⁷² The Supreme Court majority, however, looked to another line of precedent and found error in the Second Circuit’s conclusion that “narrowly tailored” meant “the least intrusive means” of achieving the claimed significant government interest.¹⁷³ Writing for the Court, Justice Anthony Kennedy stated with some finality:

Lest any confusion on the point remain, we reaffirm today

170. Julie Hilden, *The Constitutionality of Police-Imposed “Free-Speech” Zones*, Aug. 4, 2004, <http://www.cnn.com/2004/LAW/08/04/hilden.freespeech/index.html>.

171. In fact, as of the second week in August, well after this decision was handed down, warnings about new security threats to the New York City convention had been received: “Clearly the government believes that the information about specific threats to specific buildings warrants a ramping-up of security measures The specificity of detail does not necessarily make the threats any more credible than the generic threat we already know about and live with every day.” *Conventional Wisdom*, N.Y. Observer, Aug. 9, 2004, available at <http://www.observer.com/pages/story.asp?ID=9390>.

172. *Rock Against Racism v. Ward*, 848 F.2d 367, 371 (2d Cir. 1988), *rev’d*, 491 U.S. 781, 109 S. Ct. 2746 (1989).

173. *Ward v. Rock Against Racism*, 491 U.S. 781, 797, 109 S. Ct. 2746, 2757 (1989).

that a regulation of the time, place, or manner of protected speech must be narrowly tailored . . . but that it need not be the least restrictive or least intrusive means of doing so . . . [s]o long as the means chosen are not substantially broader than necessary to achieve the government's interest.¹⁷⁴

While this revised standard for the "narrowly tailored" element may rest on solid precedent,¹⁷⁵ it contributes uncomfortably to a trend allowing government and state actors ever greater latitude in regulating First Amendment expression and assembly. As in *Clark v. Community for Creative Non-Violence*, Justice Marshall dissented in *Rock Against Racism* over this point.¹⁷⁶ Justice Marshall first asserted that the majority's expansion of the "narrowly tailored" element rested on precedent language "taken out of context."¹⁷⁷ He then presented alternative recent jurisprudence stating that a time, place, and manner restriction "eliminate[s] no more than the exact source of the 'evil' it seeks to remedy."¹⁷⁸

Justice Marshall's primary criticism, as in *Clark v. Community for Creative Non-Violence*, resided in his evident disgust at the further degradation of the judiciary's crucial role in scrutinizing government restrictions on First Amendment rights. In Justice Marshall's view, the modified "narrowly tailored" rule "instructs courts to refrain from examining how much speech may be restricted to serve an asserted interest and how that level of restriction is to be achieved."¹⁷⁹ The *Rock Against Racism* majority's somewhat patronizing criticism of what it viewed as the Second Circuit's erroneous "sifting" through available alternative means to find a less restrictive alternative¹⁸⁰ and failure to "defer to the city's reasonable determination"¹⁸¹ bears out Justice Marshall's critique.

In the 2004 convention cases, this relaxed requirement and, in fairness to the Boston courts, the extraordinary time constraints at hand in that litigation, led to unfortunate results in Boston, less so in New York City. The Boston trial court's opinion announced the

174. *Id.* at 798–800, 109 S. Ct. at 2757–58.

175. *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 298, 104 S. Ct. 3065, 3071 (1984).

176. *Ward*, 491 U.S. at 803–07, 109 S. Ct. at 2760–63.

177. *Id.* at 804–05, 109 S. Ct. at 2761.

178. *Id.* at 804, 109 S. Ct. at 2761 (citing *Frisby v. Schultz*, 487 U.S. 474, 485, 108 S. Ct. 2495, 2503 (1988)).

179. *Id.* at 807, 109 S. Ct. at 2762.

180. *Id.* at 797, 109 S. Ct. at 2757.

181. *Id.* at 807, 109 S. Ct. at 2762 (citing majority opinion).

court's responsibility to "consider . . . all [of] the relevant circumstances" and make a "sound exercise of equitable discretion,"¹⁸² then stated the *Rock Against Racism* rule that "[n]arrow tailoring means that 'the means chosen are not substantially broader than necessary to achieve the government's interest.'"¹⁸³ Unfortunately, once the trial court accepted the government's affidavits as to the influence of past events like the 2000 Los Angeles convention on the security plans for the 2004 Boston convention, the judge determined almost automatically that the demonstration zone was indeed narrowly tailored, particularly "given the constraints of time, geography, and safety."¹⁸⁴

The First Circuit appellate panel spent somewhat more time reviewing whether the demonstration zone indeed presented a sufficiently narrow time, place, and manner regulation on protest speech and assembly,¹⁸⁵ but came to much the same conclusion. Echoing the *Rock Against Racism* majority's extension of "considerable respect" for the government's judgment,¹⁸⁶ the First Circuit panel agreed with the trial court's assessment that the defendants' security measures, "though extreme, were nonetheless narrowly tailored."¹⁸⁷

The *Stauber* court exhibited significantly less deference to the New York City convention defendants' discretion and judgment in setting restrictions on speech and assembly in public fora. In fact, the *Stauber* court's opinion made certain to express that the burden of proving whether a restriction is narrowly tailored falls on the government and not on the plaintiffs claiming First Amendment violations,¹⁸⁸ a point which the Supreme Court precedent and Boston convention case opinions neglected to communicate. As noted, the *Stauber* plaintiffs benefited tremendously from their past experience with barricade pens at the 2003 demonstration and from New York City Police Chief Joseph Esposito's concessions that the desired adjustments would not significantly impair law enforcement aims.¹⁸⁹ In their claim that the pens were insufficiently narrowly tailored, the *Stauber* plaintiffs had recourse

182. *Coal. to Protest the Democratic Nat'l Convention v. City of Boston*, 327 F. Supp. 2d 61, 69 (D. Mass. 2004).

183. *Id.* at 70 (citing *Ward*, 491 U.S. at 800, 109 S. Ct. at 2746).

184. *Id.* at 75.

185. *Black Tea Soc'y v. City of Boston*, 378 F.3d 8, 12–14 (1st Cir. 2004).

186. *Id.* at 13.

187. *Id.* at 14.

188. *Stauber v. City of New York*, No. 03 Civ. 9162 (RWS), 2004 WL 1593870, at *1 (S.D.N.Y. July 16, 2004, *as amended* July 19, 2004).

189. *Id.* at *28.

as well to another demonstration earlier in 2004 where a less restrictive pens policy was employed without trouble.

The *Stauber* court concluded easily that the extant police policy of metal barricade penning did not constitute a “narrowly tailored” time, place, and manner restriction on the plaintiffs’ First Amendment rights of speech and assembly.¹⁹⁰ The differences between the *Stauber* and Boston convention case conclusions, so strikingly diametric, led to incongruous end results: A demonstration zone described by even casual observers as an “internment camp” and a reminder of pre-unification East Germany¹⁹¹ was permitted to stand while a relatively mild, yet still problematic practice of enclosing protesters within waist-high metal barricades was found to be unconstitutional. Although the constraints claimed by the Boston courts seem as valid as the wealth of evidence presented by the New York City plaintiffs, the decisions still seem incongruous and, despite the Supreme Court’s apparent clarification in *Rock Against Racism*, reasonable and learned minds can and do still disagree about the nature of narrow tailoring.

D. *The Alternative Channels Factor*

The final element of the *Rock Against Racism* test that played out in the 2004 convention cases is the factor stating that time, place, and manner restrictions on First Amendment rights of speech and expression in public fora must be such as to “leave open ample alternative channels for communication of the information.”¹⁹² This factor is listed last in the standard test and often receives the least degree of judicial attention. For example, the Supreme Court majority in *Rock Against Racism* concluded, in a few brief sentences at the close of its opinion, that the noise regulation at issue in that matter left open ample alternatives because the regulation restricted only the volume of the plaintiffs’ expression and not the style or substance of the expression itself.¹⁹³

Case decisions paying greater attention to this factor have developed some rough guidelines. The main principle holds that

190. *Id.* at *29.

191. These observations were made, respectively, by one of the construction workers who installed the zone and a curious commuter who viewed the zone on his way to work. Editorial, *An Oppressive Zone*, *Boston Globe*, July 22, 2004, at A10; Saltzman, *Protest Zone Draws Ire*, *supra* note 14.

192. *Ward v. Rock Against Racism*, 491 U.S. 781, 791, 109 S. Ct. 2746, 2753 (1989) (quoting *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293, 104 S. Ct. 3065, 3069 (1984)).

193. *Id.* at 803, 109 S. Ct. at 2760.

“a speech restriction will be struck down . . . only if it largely impairs a speaker’s capacity to reach [his or] her intended audience.”¹⁹⁴ However, it is not clear whether a court should contemplate modifications that could increase accessibility or consider separate, independent modes of communication which might provide a speaker with the capacity to reach his or her intended audience if the disputed regulation is deployed as intended by the government.

The trial court judge in the 2004 Boston convention case viewed the “narrowly tailored” and “alternative channels” segments of the *Rock Against Racism* test as conceptually interrelated,¹⁹⁵ blurring the two factors by referring to the “lesser or least restrictive alternative” aspect of the “narrowly tailored” *Rock Against Racism* test element, as discussed above. However, once the judge concluded the zone was indeed narrowly tailored to serve the government’s asserted (if evidentially unsupported) interest in maximizing security, time and spatial realities precluded any modifications which might have provided alternative expressive channels for the plaintiffs.¹⁹⁶

The First Circuit appellate panel reached much the same conclusions by following the second suggested conception of “alternative channels,” in which it remains an inquiry independent of the “narrowly tailored” analysis factor. The panel ignored the notion of modifying the zone, noting that it did indeed afford protesters “sight and sound” contact with convention delegates, albeit in a less than optimum manner.¹⁹⁷ Instead, the panel focused on the Boston security plan as a whole and pointed out several available alternatives. Demonstrators could take their message to the “soft zone” in small groups or they could relocate elsewhere in Boston and demonstrate in larger groups at other public spaces throughout the city, subject to regulations at those sites.¹⁹⁸

The appellate panel concluded its discussion of alternative channels with a fairly stunning suggestion. In its view, the protest plaintiffs’ position “greatly underestimate[d] the nature of modern communications . . . [a]t a high-profile event such as the Convention”¹⁹⁹ and overestimated the effectiveness of direct

194. Kevin Francis O’Neill, *Disentangling the Law of Public Protest*, 45 Loy. L. Rev. 411, 446–47 (1999).

195. *Coal. to Protest the Democratic Nat’l Convention v. City of Boston*, 327 F. Supp. 2d 61, 70 (D. Mass. 2004).

196. *Id.* at 75–76.

197. *Black Tea Soc’y v. City of Boston*, 378 F.3d 8, 14 (1st Cir. 2004).

198. Twenty or fewer people could demonstrate informally and up to fifty people could stage a demonstration upon receipt of a permit. *Id.*

199. *Id.*

interaction with one's desired audience. To the appellate panel's way of thinking, a protester's ability to communicate first-hand with his or her audience, however desirable, is no different than having the message reach convention delegates by means of "television, radio, the press, the internet, and other outlets."²⁰⁰

This logical leap by the First Circuit panel conveniently sidesteps the severely problematic nature of the demonstration zone, a state of affairs the trial court judge at least attempted to rectify on paper. More disconcertingly, it lifts the veil on what appears to be a thinly concealed distaste and even disgust for the tradition of public protest in the United States. The First Circuit panel's suggestion implies that protest groups should either pool their assets and buy advertising time and space in Boston's media outlets or assemble *en masse* in some other location and hope that media coverage will land them on newscasts which may or may not be seen by delegates in their hotel rooms.²⁰¹

As to the first possibility, Justice Marshall averred in his *Clark v. Community for Creative Non-Violence* dissent that the trend toward greater restriction of public protest tended systematically to minimize and even silence the voices of those who lack the financial and political ability to convey their views through traditional and expensive modes of access like paid media and legislative lobbying.²⁰² As to the second possibility, the First Circuit's suggestion that protesters' ability to impact convention delegates from other parts of Boston would serve as a viable alternative to an improved demonstration zone outside the Fleet Center, the panel itself underestimated the gravitational pull of the convention site as the center of media attention. In any reasonable estimation, the panel's implied media alternatives could in no manner viably serve as an alternative channel for the Boston protesters' lost capacity to directly reach their intended audience, the delegates.

Turning to New York City, the *Stauber* court wisely limited itself to analysis of the actual and feasible alternatives available with respect to the disputed regulation.²⁰³ It found the police department's constrictive penning policy unreasonable for the simple reason that it "may leave an individual with no alternative

200. *Id.*

201. It is unlikely that many delegates spend a great deal of time absorbing local media output during the convention due to the probability that scheduled meetings and events, the main attractions on the convention floor, and other entertainments consume the bulk of their time.

202. 468 U.S. 288, 314-16, 104 S. Ct. 3065, 3080 (1984).

203. *Stauber v. City of New York*, No. 03 Civ. 9162 (RWS), 2004 WL 1593870, at *1 (S.D.N.Y. July 16, 2004, *as amended* July 19, 2004).

but to remain at a demonstration when she would prefer not to participate any longer.”²⁰⁴ The court pointed out that the First Amendment protects one’s right to cease demonstrating no less than the right to demonstrate, citing Supreme Court authority to that effect.²⁰⁵

Again, the striking distance between the Boston and New York opinions demonstrates the inconsistencies that can occur when different courts apply the same basic test. As noted throughout this comment, the differences between these cases can be found in their distinct fact patterns, the different cultures of the two cities involved, and even, one might venture, in the makeup of the judges who decided the cases.²⁰⁶ In concluding this treatment of how the courts applied the *Rock Against Racism* test to the 2004 convention pen and zone cases, however, two crucial additional elements must be examined that raise yet more doubts as to the applicability of the test in its current form to protest pens and zones.

E. Time Constraints and the Lack of Standards or Representation

Two final concerns with the protest pen and demonstration zone schemes implemented at the 2004 conventions must be addressed. First, time concerns played far too great a role in whether or not the courts could render adequate protection to the plaintiffs’ First Amendment rights. Second, the fact that such *ad hoc* schemes differ distinctly from the types of written ordinances and longstanding or promulgated policies normally subject to analysis under *Rock Against Racism* distinguishes them from the mass of disputes over time, place, and manner restrictions on speech and assembly in public fora. The *Rock Against Racism* test cannot adequately confront these factors, yet these very factors

204. *Id.*

205. *Id.* (citing *Wooley v. Maynard*, 430 U.S. 705, 714, 97 S. Ct. 1428, 1435 (1977)).

206. While many reject the view that a judge’s political background should be considered when evaluating his or her decisions, others find such information valuable. Judge Douglas Woodlock and Judge Bruce Selya, who wrote the Boston trial and appellate opinions respectively, are both appointees of Ronald Reagan, one of the more conservative Presidents of the modern era. By contrast, Judge Robert Sweet, who wrote *Stauber*, presents staunch liberal credentials, having served as deputy mayor of New York City during John Lindsay’s mayoralty in the late 1960s before being appointed by President Jimmy Carter during his term from 1976 to 1980. Bruce Selya, Robert Sweet, Douglas Woodlock—Biography, <http://air.fjc.gov/public/home.nsf/hisj> (search for Selya, Sweet, Woodlock respectively, then follow hyperlink to biographical information).

contributed significantly to the results of the 2004 convention cases.

1. *Time Constraints*

In Boston, time constraints dramatically affected the case's outcome by closing off alternatives which might have rendered the demonstration zone somewhat more acceptable.²⁰⁷ Negotiations between protest groups and convention planners began in January 2003, long in advance of the convention.²⁰⁸ It seems clear from available news sources that a mutually acceptable solution had been reached as to the zone's location by May 2004,²⁰⁹ but the zone itself was not constructed until just one week prior to the convention opening.²¹⁰

As to the last-minute timing of the Boston suit, the appellate panel's majority opinion shunned the plaintiffs' request for "eleventh-hour injunctive relief" and critiqued the plaintiffs' apparent tardiness in filing suit "despite considerable . . . notice of the planned security measures."²¹¹ This criticism was plainly wrong. The trial judge's opinion clearly stated that the zone had only been constructed one week prior to the convention and the plaintiffs filed suit two days thereafter.²¹² Either the appellate panel missed these sentences or, conveniently, chose to ignore them in its apparent disdain for the whole matter in its lap. The appellate concurrence echoed these sentiments, adding that "adequate time to seek recourse in the courts means months or at least weeks . . . [i]t does not mean five days before the event begins."²¹³

207. *Black Tea Soc'y v. City of Boston*, 378 F.3d 8, 15–16 (1st Cir. 2004); *Coal. to Protest v. City of Boston*, 327 F. Supp. 2d 61, 69 (D. Mass. 2004).

208. *Impasse Seen on Protest Talks*, *supra* note 55.

209. Editorial, *Protecting Protests*, *Boston Globe*, May 18, 2004, at A10.

210. *Coal. to Protest*, 327 F. Supp. 2d at 68. It is not clear whether the convention planners intentionally waited as a ploy to forestall complaints about the completed zone or if the zone simply fell to the bottom of the priority list. Kevin Joy, *Doubts Raised on Protest Site*, *Boston Globe*, May 25, 2004, at A4. In addition, the abandoned train tracks overhead and the supportive girders which contributed to the zone's "internment camp" feel were scheduled to be torn down prior to the convention, but had not been removed in time. *An Oppressive Zone*, *supra* note 191.

211. *Black Tea Soc'y*, 378 F.3d at 15.

212. *Coal. to Protest*, 327 F. Supp. 2d at 68.

213. *Black Tea Soc'y*, 378 F.3d at 16.

In New York City, the *Stauber* plaintiffs, largely due to their experiences at the 2003 demonstration, fortunately filed suit almost one year in advance of the 2004 convention and moved for injunction nearly two months before the convention opening date.²¹⁴ Due to this relative luxury of time, the *Stauber* court produced a fully fleshed-out treatment of the precedents and issues in its opinion, culminating with the injunction which gave New York City's police department roughly forty days to enact reasonable modifications to the pen policy.²¹⁵

The results in the Boston cases and *Stauber* demonstrate that a First Amendment claim challenging protest pens or demonstration zones may fail or succeed depending on when suit is filed. This disparity sets a dangerous precedent. In the future, planners of conventions or other similar events may actively choose to replicate the Boston scheme of unveiling a pen or zone as late as possible, confident that any First Amendment claims will be denied for lack of time and suitable options, regardless of whether or not a violation occurs. That this type of violation takes place within the framework of the *Rock Against Racism* test bears out Justice Marshall's fears that time, place, and manner jurisprudence could easily be used to harm, rather than protect, the First Amendment rights of those who take their message to the streets.

2. Lack of Legislative or Representative Input

Pen and zone security schemes, if properly employed, reside within the police power of a state or municipality, but they are not the results of debate and negotiation by elected representatives like state legislators or city council members, nor are they policies accepted or at least recognized through continued practice or promulgation. Although neither convention case dealt with this particular issue, it deserves inclusion in this analysis as a further factor contributing to the manner in which pen and zone schemes can violate First Amendment rights.

No clearly stated rule has emerged to dictate the extent to which police power alone, without a legislative action or longstanding policy in place, may regulate the time, place, and manner of expression and assembly in public fora. *Grider v. Abramson*, a 1999 Sixth Circuit case involving security arrangements for a Ku Klux Klan rally, shares some factual

214. *Stauber v. City of New York*, No. 03 Civ. 9162 (RWS), 2004 WL 1593870, at *2 (S.D.N.Y. July 16, 2004, as amended July 19, 2004).

215. *Id.* at *33.

features with the pen and zone lawsuits at issue in this comment.²¹⁶ The *Grider* plaintiffs claimed that the disputed security plan should be ruled a *per se* First Amendment violation because it had been enacted "in the absence of any legislative authorization or approval by official policymakers."²¹⁷ The plaintiffs supported their claim by recourse to a line of decisions mandating that locality discretion to award permits for use of public space cannot be unguided or unrestrained.²¹⁸ The Sixth Circuit disagreed, described the *Grider* plaintiffs' assertion as misconceived, and averred that even had the disputed regulation been enacted without legislative guidance or standards, such schemes were indeed within the general police power of states and their local subdivisions to regulate "community health and safety."²¹⁹

Although, to a degree, this may be the case, the *Grider* plaintiffs' assertion merits attention. The Supreme Court has not yet set rules regarding standardless and unlegislated time, place, and manner regulations on expression and assembly in public fora. The overwhelming majority of cases the Court has subjected to such analysis have resulted from disputes over written ordinances or at least fairly settled and promulgated policies and regulations.²²⁰ The only recent case where some analogy may be drawn is *Arkansas Educational Television Commission v. Forbes*.²²¹ In that dispute, Arkansas' public television broadcasting agency decided to limit participants in an aired pre-election political debate to major party candidates, thus rejecting

216. *Grider v. Abramson*, 180 F.3d 739 (6th Cir.), *cert. denied*, 528 U.S. 1020, 120 S. Ct. 528 (1999) (KKK rally and counter-demonstration physically segregated by police-occupied buffer zone and separated from general public area by larger restricted area perimeter).

217. *Id.* at 747.

218. *Id.* (citing *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 112 S. Ct. 2395 (1992); *Kunz v. New York*, 340 U.S. 290, 71 S. Ct. 312 (1951); *Stonewall Union v. City of Columbus*, 931 F.2d 1130 (6th Cir. 1991), *cert. denied*, 502 U.S. 899, 112 S. Ct. 275 (1991)).

219. *Id.* at 747-48.

220. *Thomas v. City of Chicago Park Dist.*, 534 U.S. 316, 122 S. Ct. 775 (2002) (municipal park ordinance); *Hill v. Colorado*, 530 U.S. 703, 120 S. Ct. 2480 (2000) (state criminal statute); *Ward v. Rock Against Racism*, 491 U.S. 781, 109 S. Ct. 2746 (1989) (municipal noise regulation); *Frisby v. Schultz*, 487 U.S. 474, 108 S. Ct. 2495 (1988) (municipal anti-picketing ordinance); *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 104 S. Ct. 3065 (1984) (U.S. Park Service camping regulation).

221. 523 U.S. 666, 118 S. Ct. 1633 (1998).

the bid of the plaintiff, an independent candidate with a fairly minor following.²²²

The Arkansas public television commission board had been purposely set up to be strongly insulated from problems associated with political pressure and partisanship and it had been granted broad editorial discretion as to programming decisions.²²³ Thus, it shares some characteristics with the police departments and federal security entities entrusted with planning security for the 2004 conventions. Both were largely shielded from the vicissitudes of public opinion and enjoyed fairly broad discretion and latitude to perform their duties.²²⁴

Although the Court decided *Forbes* for the defendants on the grounds that the aired debate constituted a non-public forum demanding mere rationality review, Justice John Paul Stevens raised concerns in dissent about the majority's deference to the defendant state agency. In Justice Stevens' view, this stance allowed dangerously for "nearly limitless discretion," risk of government censorship, and *ad hoc* decisions lacking recourse to standardized objectives.²²⁵

Although the *Forbes* majority decision suggests that government authorities' *ad hoc* "forum housekeeping measures"²²⁶ can receive a great deal of deference, not all courts have agreed. Courts having jurisdiction over New York City, in particular, have shown a marked refusal to defer easily to police penning and demonstration schemes. Despite its age, the 1986 Second Circuit

222. *Id.* at 669–71, 118 S. Ct. at 1637–38.

223. *Id.* at 669–70, 673–74, 118 S. Ct. at 1637, 1639–40.

224. The Court has even referred to editorial discretion as a "power" exercised to regulate speech activity, not unlike the role of the convention case defendants in devising the security pens and zones. *Id.* at 673–74, 118 S. Ct. at 1639 (citing *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 636, 114 S. Ct. 2445, 2456 (1994); *Columbia Broadcasting System, Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94, 124, 93 S. Ct. 2080, 2097 (1973)).

225. *Id.* at 686, 689, 118 S. Ct. at 1645, 1647.

226. O'Neill, *supra* note 194, at 514 (citing *Concerned Jewish Youth v. McGuire*, 621 F.2d 471 (2d Cir. 1980), *cert. denied*, 450 U.S. 913, 101 S. Ct. 1452 (1981)); *Fischer v. City of St. Paul*, 894 F. Supp. 1318, 1323, 1328–29 (D. Minn. 1995); *Int'l Soc'y for Krishna Consciousness, Inc. v. City of New York*, 504 F. Supp. 118 (S.D.N.Y. 1980)); *see also United Food & Commercial Workers, Local 1099 v. City of Sidney*, 364 F.3d 738 (6th Cir. 2004); *Grider v. Abramson*, 180 F.3d 739 (6th Cir. 1999), *cert. denied*, 528 U.S. 1020, 120 S. Ct. 528 (1999).

case of *Olivieri v. Ward*,²²⁷ one in a string of lawsuits brought by gay activists to challenge various city restrictions and permit rejections in association with New York City's annual St. Patrick's Day parade, presents a clear statement of judicial non-deference in its refusal to "kowtow without question to agency expertise" and thus to abandon its "independent responsibility to examine the constitutionality of First Amendment restrictions."²²⁸

The *Olivieri* court ultimately rejected as overly restrictive a New York City Police Department penning scheme, replacing it with a more balanced compromise.²²⁹ More recently, the Southern District of New York has rejected *ad hoc* regulations formulated to limit assemblies on New York's city hall steps and adjacent plaza and the Police Department's refusal to allow a rally in Harlem.²³⁰

In the context of these same-jurisdiction decisions, the *Stauber* court's ruling in the 2004 New York City convention case is not unusual, but it runs counter to an otherwise seemingly national judicial trend affording significant deference to the public forum "housekeeping" measures of law enforcement agencies. These agencies, generally police departments and the Secret Service, are largely removed from direct public and political accountability. However, they assert significant influence over the nation's public spaces where free expression and assembly have traditionally been afforded strong First Amendment protection. This deference trend can obscure aspects of the First Amendment inquiry, such as whether a planned scheme is content-based or neutral, whether the government interest being claimed has evidential support, and whether the scheme is narrowly tailored. The Second Circuit recognized as much in *Olivieri*, recalling the concerns voiced by Justices Marshall and Scalia: "Because the excuses offered for refusing to permit the fullest scope of free speech are often disguised, a court must carefully sort through the reasons offered to see if they are genuine."²³¹

227. 801 F. 2d 602 (2d Cir. 1986), *cert. denied*, 480 U.S. 917, 107 S. Ct. 1371 (1987).

228. *Id.* at 606, 607. Although the trial court in the Boston convention demonstration zone case cited *Olivieri* as an exemplar of proper police penning, it was ultimately resolved by judge-mandated compromise, not deference to police procedures and policies. *Id.* at 608.

229. *Id.* at 608.

230. *Housing Works, Inc. v. Safir*, 101 F. Supp. 2d 163 (S.D.N.Y. 2000); *Million Youth March v. Safir*, 63 F. Supp. 2d 381 (S.D.N.Y. 1999).

231. *Olivieri*, 801 F.2d at 606 (quoting *Olivieri v. Ward*, 766 F.2d 690, 691 (2d Cir. 1985) (a previous incarnation of the same lawsuit, brought annually for

The Boston convention cases demonstrated this danger and exemplify how large scale events like political conventions, global trade conferences, and the Olympics can swiftly move beyond the control of a city's elected leaders and representatives. Although an elected official like Boston's mayor Tom Menino plays a great role in bringing a convention to a host city, once the convention planners, party leaders, Secret Service and other security personnel begin planning their operations, the "normal" urban authorities must retreat to the sidelines.²³² At that point, costly and potentially repressive decisions²³³ are increasingly made by people who need not concern themselves with reelection. After the Boston convention concluded, both Mayor Menino and the host committee president noted that despite their role in arranging logistics for the convention, the extreme security measures taken in preparation for the convention were effectively beyond their control.²³⁴

F. Analysis Conclusion

In closing, security schemes for protest pens and demonstration zones at large scale urban events present special problems which remain unresolved under the traditional manner of analyzing public forum time, place, and manner regulations. As a first concern, one cannot presume that such schemes are content-neutral. Although they are neither justified with regard to the specific content of protest speech nor set up to favor one protest viewpoint over another, they are instituted to contain all forms of protest speech through an exercise of police power. Although such schemes can be designed to function reasonably and constitutionally, more attention must be given to the unspoken motives behind their superficial neutrality. As *ad hoc* regulations made by agencies and

years by homosexuals who protested various aspects of New York City's annual St. Patrick's Day parade).

232. *Was It Worth It?*, *supra* note 13.

233. These decisions often affect far more people than protestors. The Boston and New York City convention security schemes effectively closed off large portions of roadways and public transportation and impacted retail businesses in the areas surrounding the convention arena sites. Estes, *supra* note 15; Cullen, *supra* note 17; Rick Klein, *Convention Must Change, Planner Says: Urban Site is Less Likely to be Chosen*, Boston Globe, Aug. 1, 2004, at A1; *Was It Worth It?*, *supra* note 13; Slackman, *Penn Station*, *supra* note 141; Slackman, *Collision of Security*, *supra* note 18; Hu & Slackman, *supra* note 18.

234. Klein, *supra* note 233.

entities with little public accountability, they entail some likelihood of being content-oriented.

Second, the security concerns at issue may be significant, but extreme security measures should not be justified without some evidence that an actual threat exists and that the proposed measures are narrowly tailored to meet it. It is unlikely the nation will be caught off guard again as it was in 2001, but readiness must rest on more than memories and shadowy projections.

Finally, event authorities must not be permitted to drag their feet before revealing their security plans to demonstration organizers. The less time is made available in advance for a somewhat open exchange of positions or an effective and fair judicial resolution, the less time will be available to fashion reasonable and comparable alternative channels for protestors to express their views. Fifty protestors cannot convey their message as powerfully as five thousand or fifty thousand protestors. Pen and zone schemes minimize the message by limiting those who wish to express it. Time alone should not be the reason First Amendment rights are diminished.

IV. A PROPOSAL

Protest pen and demonstration zone schemes should be planned, implemented, and scrutinized in a more probing and open manner. Political conventions are awarded to host cities roughly two years ahead.²³⁵ Although this should afford enough time for protest organizations, city authorities, and security planners to reach arrangements that will account in some degree for both First Amendment rights and police power, this has not been the case. Three of the past four conventions have been riddled with litigation so close to the convention opening date that whatever the judicial holding, rancor and ill-will have exacerbated the actual relations between protestors and police during the conventions. While this might make for exciting news footage, it leaves the basic problem unresolved. The following suggestions may provide avenues for compromise.

Shortly after the naming of a convention city, a committee should be formed consisting of representatives from the city's elected officials, police and other emergency response personnel,

235. The Democratic National Committee officially awarded the 2004 convention to Boston in November 2002. Ralph Ranalli, *Critics Say \$10 M(illion) Budget Not Enough to Protect Convention: Amount Less Than Half That of 2000 Assembly in L.A.*, Boston Globe, Nov. 14, 2002, at A29.

protest organization leaders,²³⁶ and the Secret Service, which has field offices in all major United States cities.²³⁷ This committee should be charged with proposing and designing accommodations for demonstrations which will neither impair security procedures nor resign protestors to zones either too distant or too harshly designed to suit the many groups who wish to peacefully gather and demonstrate. Obviously, there will be groups who reject any restriction or feel unrepresented and the officials may resist sharing information, but once a dialogue has commenced amongst those who can look to the 2000 and 2004 experiences and use them to tailor and refine plans, perhaps there will be less combativeness and more cooperation.

Should this committee reach a dead end, alternative dispute resolution (ADR), scheduled as far in advance of the convention as possible, may provide a relatively neutral forum one level above the committee meeting room. Whether mediation or arbitration is selected, provisions must be in place to ensure good faith, reasonable compromise, and a neutral intermediary. Although ADR has its critics, it is still less expensive and combative than litigation.

In the event that the preceding two measures fail to produce a peaceful plan where security concerns and demonstration spaces can co-exist, litigation may indeed be the last resort. However, the *Rock Against Racism* test should be modified to afford greater protection of demonstration groups' First Amendment rights, which, as the preceding analysis shows, can be quite vulnerable and expendable. Although some convention protestors might not appreciate the comparison, many similarities exist between their tribulations and those of pro-life activists who gather outside clinics and facilities where abortions are performed. Both groups are seen as somewhat threatening and dangerous to the safety and peace of their audiences, who tend to be a specific group of persons at a specific physical place, be it a clinic or a convention hall. Both groups have also often wound up in courtrooms fighting for their First Amendment rights against regulations created to physically segregate them from their intended audiences or court orders imposed on them after the fact.

236. While it is true that organizations and groups do not speak for all those individuals who may join a march or a demonstration, they play a significant role in planning and publicizing protest events and thus their participation in sessions devising security arrangements can be invaluable.

237. United States Secret Service Field Offices, http://www.secretservice.gov/field_offices.shtml.

The resolutions of two recent Supreme Court cases dealing with abortion clinic protestors may be analogized to litigation arising over the use of protest pens and demonstration zones. In *Madsen v. Women's Health Center*,²³⁸ decided in 1994, and three years later in *Schenck v. Pro-Choice Network of Western New York*,²³⁹ the Supreme Court found that injunctions issued against pro-life protesters (as opposed to general ordinances regulating pro-life speech as in the case of *Hill v. Colorado*²⁴⁰) should be held to a slightly higher degree of judicial scrutiny than the current *Rock Against Racism* intermediate level.²⁴¹ In essence, this higher degree of scrutiny resembles nothing so much as the "least restrictive option available" standard that Justice Marshall wrote had been eradicated by the majority ruling in *Rock Against Racism*.

Justice William Rehnquist, who penned both majority opinions in *Madsen* and *Schenck*, contrasted injunctions with statutes in *Madsen*.²⁴² Statutes, which are drafted to address "particular societal interests" pertaining to the general public, represent "legislative choice[s]."²⁴³ Injunctions, by their nature, apply only to a specific group or individual and they operate to regulate the activities, and perhaps the speech, of that group or individual.²⁴⁴ Like security measures, injunctions also regulate the potential future conduct of the group or individual they target. Justice Rehnquist further noted that because injunctions are so specifically directed, the threat of censorship and discriminatory application can be greater than with statutes.²⁴⁵

Thus, according to Justice Rehnquist and his majority, when an injunction impacting First Amendment rights is analyzed, it should be held to a "somewhat more stringent"²⁴⁶ application of the standard test elements for time, place, and manner regulations. In particular, the *Madsen* Court found that the "narrowly tailored" element should be adjusted upward when dealing with injunctions, so that the injunction imposed "burden[s] no more speech than necessary to serve a significant government interest."²⁴⁷

238. 512 U.S. 753, 114 S. Ct. 2516 (1994).

239. 519 U.S. 357, 117 S. Ct. 855 (1997).

240. 530 U.S. 703, 120 S. Ct. 2480; see *supra* text accompanying note 132.

241. *Schenck*, 519 U.S. at 372, 117 S. Ct. at 864; *Madsen*, 512 U.S. at 765, 114 S. Ct. at 2525.

242. *Madsen*, 512 U.S. at 764–65, 114 S. Ct. at 2524.

243. *Id.* at 764.

244. *Id.* at 762, 114 S. Ct. at 2523.

245. *Id.* at 764–65, 114 S. Ct. at 2524.

246. *Id.* at 765, 114 S. Ct. at 2524.

247. *Id.*, 114 S. Ct. at 2525.

In essence, then, the *Madsen* Court carved out an exception to *Rock Against Racism* that applies when First Amendment rights are threatened by injunctions rather than general ordinances. Although Justice Scalia wrote in dissent that injunctions should be held to strict scrutiny rather than the slightly heightened intermediate scrutiny which the majority proposed,²⁴⁸ by the time the new rule was confirmed in *Schenck*, he did not dispute that particular aspect of the ruling.²⁴⁹

Demonstration zone and protest pen schemes resemble the injunctions addressed in *Madsen* and *Schenck*. Pen and zone schemes tend to be detailed, precise, and “directed at particular individuals because of their particular conduct,”²⁵⁰ in this case political protesters rather than pro-life activists. Like injunctions, pen and zone schemes are also generally created by non-elected figures that tend to be largely insulated from public accountability—police departments, convention planners and the Secret Service. This comment, in conclusion, argues that the *Madsen* and *Schenck* heightened standard of review for injunctions, a rule requiring that they be framed so as to burden no more speech than necessary, be extended to pen and zone schemes, which have the power to excessively infringe protesters’ First Amendment rights under the current *Rock Against Racism* test standard.²⁵¹ The rights of protest and demonstration, out of which a revolutionary consciousness formed over two hundred years ago, deserve at least this much.

CONCLUSION: FOUR MORE YEARS

On the last day of the 2004 Democratic National Convention in Boston, a band of demonstrators near the Fleet Center (and ostensibly outside the much-reviled demonstration zone) burned a

248. *Id.* at 792, 114 S. Ct. at 2538.

249. *Schenck v. Pro-Choice Network of Western New York*, 519 U.S. 357, 374, 117 S. Ct. 855, 865 (1997).

250. O’Neill, *supra* note 194, at 509–10.

251. The notion that protestors might bring suits alleging deprivation of their constitutional rights after events occur presents an intriguing alternative to pre-event negotiations, ADR, or litigation. The plaintiffs in *Stauber v. City of New York* had some success with the portion of their suit claiming injuries and losses sustained through police penning actions at the 2003 demonstration. No. 03 Civ. 9162 (RWS), 2004 WL 159870, at *1 (S.D.N.Y. July 16, 2004, *as amended* July 19, 2004). That litigation might serve as a model for future individuals and groups frustrated by efforts to negotiate pre-event compromises with event security planners and unsure if litigation before the event will succeed.

two-faced effigy representing President George W. Bush and his opponent, Senator John Kerry.²⁵² One cannot say how many demonstrators that day knew they were reenacting a ritual that spurred revolutionary sentiment against seemingly insurmountable odds over two centuries earlier. That now-ancient demonstration, the Stamp Act “riot” in colonial Boston, set in motion a ragged yet unbroken chain of public mass protest which has always heralded significant political and social change in the United States. Were the colonial rioters to be brought into court today, they would be subjected to the same standards the courts applied to the 2004 convention demonstration sites. With the re-election of President Bush, the Supreme Court seems likely to continue its policy of increasing deference to government authorities’ plans for securing public spaces and compartmentalizing the freedoms of speech and assembly. Yet, protests will continue as they always have. One can only hope the First Amendment will remain strong enough to protect them. In the words of anthropologist Margaret Mead, “Never doubt that a small group of thoughtful, committed citizens can change the world. Indeed, it is the only thing that ever has.”

Susan Rachel Nanes

252. Marcella Bombardieri et al., *Demonstrators, Police Tangle: Three Arrested*, Boston Globe, July 30, 2004, at A13.