“GOOD TROUBLE”: FIRST AMENDMENT PROTECTIONS OF POLITICAL PROTESTS IN PUBLIC FORUMS

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ABSTRACT

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Political protest has had a longstanding history within the United States, predating the country's formation. The First Amendment's ratification in 1791 was integral to the modernization of political protest, specifically the freedom of speech and assembly clauses. However, with the evolution of the fledgling nation came a decreased tolerance for the disorder, often associated with protests. After the change in the public's regard for protests, restrictions on political protests, such as permit requirements, were widely introduced, narrowing the permissibility of certain aspects of political protest. Likewise, protest's forum and content restrictions are subject to differing levels of scrutiny and permissible restrictions.

Recently, political protests have been brought to the forefront of the public's attention, yet there is a significant lack of literature on the legality of political protests and the role of criminal justice actors in enforcing protest protections. The purpose of this thesis is to provide an in-depth, legal discussion of political protest in public forums, specifying the legal parameters of protected political protest. This thesis will utilize an inductive, doctrinal methodology to examine the legal precedent established by the United States Supreme Court and the modern interpretations and application of this precedent by the U.S. Circuit Courts of Appeals. Specifically, the themes of protests and protest restrictions will be examined in-depth.

KEY WORDS: First Amendment, U.S. Supreme Court, U.S. Circuit Courts of Appeals, Political protest, Assembly, Constitutional restrictions

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CHAPTER I

Political Protest in the United States

Introduction

Political protest is an integral aspect of any democratic society and is cited as a critical component of democratic change (Li Donni et al., 2021). There has been a recent influx of political protests internationally, resulting in triple the amount of protest movements in the past 15 years (Taylor, 2021). Indeed in 2020, researchers identified 2,809 individual protests in the United States, consisting of 251 protest movements making these protests part of the largest social movement in America's history (Buchanan et al., 2020; Taylor, 2021). The media has pushed political protests to the forefront of the public's consciousness as a response to tumultuous current events, such as COVID-19 anti-masking and anti-vaccine protests and racial unrest due to police brutality against Black Americans (Bergengruen, 2022; Grunawalt, 2021l; Taylor, 2021). To understand the context under which political protest occurs in modern America, it is necessary to examine the relevant legal protections allotted to inhabitants of the United States (U.S.). The First Amendment to the U.S. Constitution provides critical safeguards to civil liberties, including the right to peaceably assemble, freedom of speech, and association.

The Origins of Legally Protected Political Protests

English common law and statutory authorities were influential in the development and implementation of legal protections of political protests (Brod, 2013). In 1689, after the Glorious Revolution of 1688, the English Bill of Rights was enacted, which was, at the time, the most expansive ratification of civil rights and freedoms (Bhagwat, 2016;

LaMonica, 2018). While historically unprecedented, the English Bill of Rights of 1689 granted little protection for free speech, outside of members of Parliament (Bhagwat, 2016; LaMonica, 2018). Additionally, the right to assemble was recognized by English common and statutory law, but Queens Mary I and Elizabeth I issued decrees that authorized justices of the peace to disband assemblies that they believed were or could transform into disapproved assemblies (Brod, 2013).

The significance of political protest has additional roots in the American Revolution, where the very foundation of the nation was built around political protests (Arnaud, 2016; Bhagwat, 2016; El-Haj, 2014). Within the American Colonies, protections of political protest advanced significantly. The Virginia Charter of 1606 carried the previously established rights of England to the Colonies (Galie et al., 2020). It was during this time that citizens' rights began to be conceptualized as natural and inalienable; further, philosophers during this time, such as John Locke (Laslett, 1967| 1713) and Thomas Paine (Foner, 1945), solidified this perspective (Gaile et al., 2020). These prominent philosophies of possessive individualism and moral law were reflected in state constitutions (Galie et al., 2020). The Pennsylvania Constitution of 1776, the 1776 Constitution of North Carolina, the Massachusetts Constitution of 1780, the New Hampshire Constitution of 1784, and the 1786 Constitution of Vermont all included articles that specifically protected peoples' right to assemble for the common good and included protest as a means of assembly (Gaile et al., 2020).

In the Colonies, acts of public dissent were common, rarely violent, and were widely supported as a means of expression (Brod, 2013; Gaile et al., 2020). Despite notable social disorder associated with protests during this time, disorderly protest

movements remained socially acceptable well into the 19th century (El-Haj, 2014). The first recorded petition of redress in the Colonies was prompted by the passage of the Molasses Act of 1733, which foreshadowed the series of events leading to the American Revolution (Orsolya, 2015). Among the "Founding Fathers," political protest was a priority with the experiences of undue restrictions as a British colony, an innate distrust of centralized government, and witnessing the sociopolitical power of protests in the American Revolution (Arnaud, 2016; Brod, 2013; El-Haj, 2014). The right to protest was so ingrained into society during this time that at the Constitutional Convention of 1787, it was deemed unnecessary to include, and the powers granted to federal and state actors were too restrictive to include in the nation's foundational documents (Cox, 1986; Inazu, 2010). The First Amendment was ratified in 1791 and was mostly penned by James Madison (Brod, 2013). It reads:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances. (U.S. Const. amend. I)

The precise language used in the First Amendment was pivotal in expanding protected political protest to the general populace, rather than exclusively the elite or wealthy (Brod, 2013). Interestingly, there has been some contention about the interpretation of the Assembly Clause, where 'peaceably' offers two different means of interpretation. One interpretation suggests that those who wish to assemble may do so without fear of interference, something which the government is tasked with enforcing (Brod, 2013). Another interpretation that is most widely applied among contemporary

scholars specifies that the government restrictions on assembly rights are only permissible in instances where there is a significant threat of or incitement of illegal activities (Brod, 2013). Ironically, only eight years after the ratification of the First Amendment, the Alien and Seditions Act of 1798 was ratified, criminalizing critical and unpopular speech that targeted the government (O'Brien, 2010). Notably, the First Amendment protections were only pertinent to federal jurisdictions before the Fourteenth Amendment (Cox, 1986). After the ratification of the Fourteenth Amendment, the rights nested in the Bill of Rights were applied to the states through a process of incorporation (Frankfurter, 1965).

Restrictions on First Amendment Rights to Political Protest

Societal tolerance for disorder, associated with protests, has diminished significantly in modern times. In 2020, the Pew Research Center found a six percent decrease, since 2018, in Americans' belief that it is very important for the country that people are free to engage in peaceful protests (Dohtery et al., 2020). This decrease is concerning, but still shows the majority of Americans support peaceful protest (i.e., 68% of Americans; Doherty et al., 2020). This decrease may be explained by the influence of respectability politics and media coverage of protests. Respectability politics i.e., a tactic that aims to prove marginalized groups' adherence to the social norms of the majority group which reduce negative group stereotypes had a pernicious effect on the public's perception of social movements, such as the gay liberation and Civil Rights movements (Dazey, 2021; Obasogie & Newman, 2016). Di Cicco (2010) depicts a departure in mass media's coverage of political protests (since the 1960s), finding an increased reliance on depicting political protests as bothersome, meritless, and unpatriotic. The decline in

public tolerance of political protests coincided with the implementation of restrictions on acceptable methods and practices (El-Haj, 2014).

From a historical perspective, in 1810, New York City (NYC) became the first of a rapidly growing number of cities, to implement a formal permit requirement (i.e., permission from local officials requested in advance) for public protests (El-Haj, 2014). These permit ordinances were typically only enforced against marginalized communities up until 1862 (El-Haj, 2014). In 1862, the roots of constitutional regulations of political protests originated in Boston, where permission from the mayor or city official(s) was required for anyone to lecture, hold sermons, or discourse in public spaces (El-Haj, 2014). Slowly, across the U.S. permit systems became commonplace for social and political gatherings in public areas; however, with acceptance of the permit system, public officials, tasked with the power of approving permits, were given unchecked discretion to enact unconstitutional and inequitable restrictions, especially for protests deemed unsavory (El-Haj, 2014). Ironically, limiting public protests that were disfavored was exactly the type of assembly the First Amendment was designed to protect.

Forums of Political Protest. In contemporary society, restrictions on political protest are largely dependent on the protest's forum or the type of place where the protest occurs. A protest may be set in a public forum, a limited public forum, or a nonpublic forum (Lidsky, 2011). Public forums are "a type of property that has the physical characteristics of a public thoroughfare, the objective use and purpose of open public access or inherently compatible with expressive conduct, and historically and traditionally has been used for such use and purpose" (Howard, 2011, p. 23). Public forums include streets, sidewalks, parks, government buildings or properties, public

areas, public transportation facilities, and institutions of education (Howard, 2011). Public forums have been the traditional setting for political protests and represent a quintessential aspect of a healthy democratic society, thus restricting political protests in public forums has been legally challenging (Bowland, 2008; Emanuel, 2021; Inazu, 2015; Lidsky, 2011).

Limited public forums are far more ambiguous. The U.S. Supreme Court has been cautious of concretely defining a limited public forum (Rohr, 2009); however, the closest definition of limited public forums includes spaces that are often a nonpublic forum that the government opened for a limited time for public use by specific groups for discussion of topics (Deutsch, 2008; Lidsky, 2011). Accessibility of limited public forums is largely based on the established precedent of groups/entities that have accessed this forum (Rohr, 2009). If the entity seeking access to this forum can establish that they are "of similar character," they will be qualified to enjoy access to this forum (Rohr, 2009, p. 307).

Nonpublic forums are government-retained spaces that have not been traditionally used or designated as a channel of public communication or expression (Lidsky, 2011). Unlike limited or public forums, protests in nonpublic forums can be more easily restricted since they have a lower burden of proof for the government to show (i.e., substantial interference), which entails rational, content-neutral justifications (Emanuel, 2021).

Content Restrictions. Content-neutral and content-based restrictions are relevant when the government tries to restrict political protest. Content-based restrictions are subject to significant scrutiny as they impose the most burden on the government to justify why expressive content should be curbed. As explained by Farber (2016), content-

based restrictions are specifically applied to the message, which is protected speech or expression under the First Amendment. Therefore, the government must satisfy a high burden of proof when attempting to restrict expression based on content.

Strossen (2010) argues that content-based restrictions are the most significant threat to the sanctity of the First Amendment, as these restrictions directly attempt to restrict individual choice in belief and expression and enables the government in their attempts to enact paternal governmental interference. Indeed, there is a presumption of unconstitutionality when the government attempts to restrict the expression of content. Content-based restrictions are subject to strict judicial scrutiny, the highest standard of scrutiny (Howard, 2012). The government must prove that the restriction serves a compelling state interest and is constructed to achieve these interests by the least restrictive means (Bowland, 2008; Howard, 2012). Usually, content-based restrictions are only granted when the expression incites criminal activity (i.e., where an imminent, credible threat or likelihood of law violation exists). Mere inconvenience or profanity does not justify the government restricting content-based expressions (Bowland, 2008; Emanuel, 2021; Howard, 2012; Sweeny, 2019).

Content-neutral restrictions are more common than content-based restrictions. Governmental entities may use permissible content-neutral restrictions if they serve a significant government interest, use the least restrictive means of restriction of rights, and offer alternative channels of expression (Emanuel, 2021; Lidsky, 2011). Additionally, these restrictions may not have a disproportionate impact on the expression of particular groups (Emanuel, 2021). Time, place, and manner restrictions are primary examples of content-neutral restrictions (Howard, 2018); this can include restrictions of protests

which disrupt and impede the flow of traffic (Emmanuel, 2021). Unlike strict scrutiny employed by courts assessing cases under public and limited public forums, content-neutral restrictions are subject to intermediate judicial scrutiny (Howard, 2012). Intermediate scrutiny is met when time, place, or manner restrictions are justifiable under legitimate governmental concerns that are not related to content (Howard, 2012). However, while well-intended, content-neutral restrictions can potentially disconnect expression from pertinent settings and meaning due to time, place, and manner restrictions (Inazu, 2014).

Acknowledging Disparities of Political Protest for Black Americans

The rights extended by the First Amendment have been central to some of the most important social movements in the history of the United States; however, these rights have historically not been extended equally to all residents within the country. For a sizable portion of the country's history, white, property-owning men were the exclusive recipients of these rights (Shiell, 2019). For Black Americans, the right to protest has been associated with a long, harrowing struggle to obtain equitable treatment, something which remains lacking (Lewis, 1998)

Before the founding of the nation, slaveholders constructed slave codes to prevent potential uprisings by cruelly excluding enslaved persons from even basic rights allotted to other inhabitants (Hansfield, 2018). Enslaved persons protested their horrendous mistreatment across the nation, with small pockets of revolt from the 1730s to 1804 (Aptheker, 1987). In 1804, the world felt the aftershocks of the first successful slave rebellion in Haiti, where enslaved persons, under the leadership of General Toussaint L'Overture, protested and successfully overthrew their British and French enslavers

(Charles, 2020). This revolution developed from a long history of Black Haitian leadership and opposition to slavery and the occupation of British and French colonizers. Despite the French Civil Commissioner emancipating the enslaved Haitians in 1793 (in an attempt to salvage their affected economic system), after Napoleon Bonaparte's coup d'état, he nullified the emancipation and sent forces to Haiti in 1802, prompting the Haitian Revolution (Charles, 2020).

This revolution struck fear in the hearts of enslavers across America, something which was further strengthened by additional domestic slave revolts, including John Brown's raid on Harpers Ferry and the Nat Turner Rebellion of 1831 (Aptheker, 1987; Inazu, 2010). These events prompted further restrictions criminalizing until the end of the U.S. Civil War, the possession of or reading books, holding religious meetings, and any other assemblies for enslaved persons (Hansford, 2018; Inazu, 2010; Inazu, 2012). While the legal protections of the First Amendment were extended to all U.S. inhabitants after the Civil War, the lived experiences of Black Americans who lived in the Northern versus antebellum Southern states were glaring (Inazu, 2012). De facto segregation, the founding of the Ku Klux Klan, and other means of terrorism against Black Americans, including Jim Crow laws in Southern states ravaged First Amendment rights for Black Americans (Cox, 1986; Hansford, 2018; Inazu, 2012). Meanwhile, in the Northern states, social activists relied on conventions as a means of organizing cohesive political assemblies (Cox, 1986; Inazu, 2012). Many social movements have been inspired by the Civil Rights Movement, which was a powerful catalyst for sociolegal changes. Nevertheless, the right of Black Americans to engage in political protest has continued to be a struggle and resisted by some white Americans (Branch, 2006).

The most recent iteration of this struggle for sociolegal change has been manifested in the Black Lives Matter (BLM) movement. Founded in 2012, in response to the death of Trayvon Martin, the BLM movement is motivated to "eradicate white supremacy and build local power to intervene in violence inflicted on Black communities by the state and vigilantes" and make space for Black joy, innovation, and imagination (Black Lives Matter, n.d.). BLM itself opposes respectability politics, instead emphasizing that all Black lives do, indeed, matter, "regardless of any perceived non-respectable behavior... their lives matter and should not be treated with deadly disregard" (Obasogie & Newman, 2016, p. 543). BLM exemplifies what the late Representative John Lewis called "good trouble." Good trouble "dramatiz[es] something that needs changing and correcting" and instead of waiting for change, enacting change (Lewis, 2020, p. 20). As compared to the Civil Rights Movement, BLM is headed by female leadership, has employed social media as a means of mass communication and information dissemination, but unfortunately continues to fight the same issues of relative deprivation (Jones-Eversley et al., 2017). While domestic attention was gained since the beginnings of BLM, international support was garnered after the tragic homicide of George Floyd in Minneapolis by the former police officer Derrick Chauvin (Borysovych et al., 2020).

However, there has been a backlash to this aberration from respectability politics. According to a content analysis conducted by Lane and colleagues (2020), 88.4% of news articles covering the protests after the death of Trayvon Martin had an anti-Black frame (e.g., included phrases such as "up to no good," a "bad bunch of people grabbing any excuse they can find to go and go and loot a store," and were generally depicted as

lawless and lacking leadership). Conversely, 81.9% of articles included pro-white sentiments (i.e., positive, sensitive depictions of the white individuals killing Black people), and generally pushed a narrative of BLM as an inherently violent and militant threat (Lane et al., 2020, pp. 797-798). This already divisive narrative has been exacerbated by the formation of the Blue Lives Matter countermovement.

In 2014, shortly after the creation of the BLM movement, the Blue Lives Matter movement was formed after the murder of two New York City police officers (Smith, 2020). Many police advocates believed that the murders were encouraged by the media and BLM, despite BLM leaders condemning the violence (Smith, 2020). This countermovement has primarily focused on the perceived social "war on cops" and targeting BLM, often failing to address pressing issues officers face, such as the physical and psychological burdens of the profession (Cooper, 2020; Smith, 2020). Solomon and Martin (2019) describe the transformation of common characteristics within policing culture (e.g., the warrior cop ideology and a distrustful, us-versus-them mentality) into the Blue Lives Matter countermovement in an attempt at competitive victimhood, citing the Black community and protesters as the "real" issue. Despite both negative media and the Blue Lives Matter countermovement influencing public perceptions of BLM, two-thirds of American adults stated that they support BLM (Parker et al., 2020). Only 19% of American adults, however, indicated that protests were a very effective tactic for groups or organizations that work to help Black people achieve equality (Parker et al., 2020). While, interestingly, BLM has become a politicized, contentious topic when discussing protests, this is seemingly commonplace for modern protests.

The First Amendment in Action

Despite political protest falling under the umbrella of free speech, association, and peaceable assembly, previous literature has failed to analyze political protest under a multiple rights framework. Instead, existing literature often focuses on one particular right, topic, case, or movement concerning political protest. Additionally, few articles examine U.S. Supreme Court precedent and even fewer have analyzed case law from the U.S. Circuit Courts of Appeals.

The introduction of the internet and social media has revolutionized modern society and political protest (Earl, 2013). Internationally, social media has been integral to the mobilization and organization of protests, dissemination of information, and has been influential in shaping public opinion concerning political protest (Gibson, 2018; Grefrath, 2019; Jost et al., 2018). For example, the use of social media was integral to the success of the "Arab Spring" (Khondker, 2011). In the current, anti-vax movement, social media sites such as the Joe Rogan podcast, Facebook, and Telegram have played pivotal roles in expressing frustration with the government (especially concerning the 2020 election) and in spreading misinformation (Bergengruen, 2022). Interestingly, social media has been proposed as a new avenue of public forum for political protest (Grefrath, 2019). The First Amendment's Free Speech and Assembly clauses have been cited in cases such as *Davidson v. Loudoun County Board of Supervisors* (2017) and *Knight First Amendment Institute at Columbia University v. Donald Trump* (2017), where the courts ruled that official social media accounts of government officials cannot block members of the public from the information they post. It is an unconstitutional infringement for government officials to deny the public access to their social media accounts, but courts

have acknowledged that social media is not a traditional public forum and is a topic that needs further exploration (Grefrath, 2019).

Outside of social media, a new controversial form of protest has emerged: hacktivism (Hampson, 2012). Beginning in the 1990s, hacktivism has been described as computer hacking for the purpose of political protest (Hampson, 2012; Lanterman, 2020; Li, 2013). Often with hacktivism, the protest subject matter remains largely out of the cyberworld, while hacktivism, itself, is aimed at spreading information/awareness, as opposed to the more destructive goals of hacking (Hampson, 2012). Defacing websites, redirecting users seeking particular sites, virtual sit-ins, and information theft are common methods of hacktivists (Hampson, 2012). According to scholars, legitimate time, place, and manner restrictions are still ambiguous; moreover, Supreme Court precedent concerning application of the public forum doctrine to cases involving the internet is evolving and many issues remain unresolved and unanswered (Hampson, 2012; Li, 2013).

While social media has been somewhat explored as a new venue for political protest, sports arenas have often been overlooked despite the increase in athletes engaging in political protest. Sports arenas hold many different meanings to the public and have become a viable place for meaningful political protest (Cavainani, 2020). Many athletes have continued the legacy of athletes like Tommie Smith, John Carlos, Muhammad Ali, and Billy Jean King in utilizing their platform to speak out against American social issues (Abrante, 2018). More recently, starting in 2016, the former San Francisco 49ers quarterback, Colin Kaepernick, began a series of protests against police brutality toward Black Americans by kneeling during the playing of the national anthem

(Cavainani, 2020; Rodriguez, 2020; Smeda, 2018). While this series of protests inspired many other athletes to follow and bring attention to police brutality, it also garnered notable public backlash for the perceived disrespect toward American troops, especially after conservative media outlets and former President Trump pushed this narrative (Cavainani, 2020; Rodriguez, 2020; Smeda, 2018).

However, the constitutionality of the attempts to restrict players from this form of expression is questionable; can private actors and organizations (i.e., the National Football League, NFL) impose First Amendment restrictions, loyalty tests, or compel employee speech? What expressive and speech rights do athletes possess (Abrante, 2018; Pfaff & Halsey, 2019; Rodriguez, 2020)? While few concrete conclusions have been made concerning these pressing issues, there has been a consensus that the NFL cannot compel its employees to stand during the national anthem, maintaining the standard set by *Spence v. Washington* (1974), which established that certain conduct is protected speech if the person's conduct intends to communicate a message and that the conduct's audience will be likely to understand the intended message (Abrante, 2018; Rodriguez, 2020).

Controversial and special interest topics have also been examined by previous literature. The infamous Charlottesville "Unite the Right" white supremacist rally garnered significant public attention and discussion (Heim, 2017; Hendricks; Marrico, 2019). This rally was contentious, as the number of armed protesters was disturbing and deadly (Zick, 2018). Regardless of the message expressed by these white supremacists, their armed presence and "protest" can be understood as a form of protected symbolic speech (Marricco, 2019; Zick, 2018).

That said, the First Amendment is not absolute and does not protect expression that threatens serious physical harm or death (Marricco, 2019; Zick, 2018). Gorsline (2011) discusses a similarly delicate balance of First Amendment rights of speech, religion, and assembly in the context of political protests during the funeral of troops killed in action. The Westboro Baptist Church, for example, has not been shy about exercising its First Amendment rights (see *Snyder v. Phelps*, 2011); however, federal courts are generally conflicted as free speech is often cited when dismissing these types of cases, but there is still significant governmental interest in protecting military families from harassment during their time of mourning (Gorsline, 2011).

The Criminal Justice System & Political Protests

While the courts have historically played an important role in the maintenance of First Amendment rights, the other branches of the criminal justice system are likewise influential. The courts may be responsible for interpreting the First Amendment, but the police and corrections systems are left to enforce the decisions of the courts. Further, as will be discussed in this research, law enforcement is often at the center of discussion concerning restrictions on political protest. While law enforcement plays a necessary role in maintaining public safety and order, this role is suspended in a fragile balance with the rights of citizens to engage in protest (Abbey, 2015). This delicate balance has been subjected to intense public scrutiny given current events.

Interestingly, thanks to the widespread use of social media in recent protest movements, the use of force against protesters has also gained significant attention from the public (Reynolds-Stenson, 2018). As explored in Abbey (2015), Earl and colleagues (2003), and Reynolds-Stenson (2018), protest movements that are deemed “bad” by

police (i.e., politicized movements) were found to be less tolerant, and police were more likely to rely on more aggressive strategies than protests deemed "good" (e.g., labor union pickets) by police. In a tragic sense of irony, protesters of police brutality were subjected to the very treatment being decried (Barker et al., 2021; Soule & Davenport, 2009). In undertaking the topics of First Amendment protections of political protest it is essential to understand how the courts' decisions make waves across the criminal justice system (Earl & Soule, 2006).

Current Study

While previous literature provides important applications of First Amendment protections of political protest, a comprehensive historical analysis of the Supreme Court's interpretation of First Amendment rights, applied to political protest, is lacking. Additionally, few articles have included an analysis of the U.S. Circuit Courts of Appeals' application of these Supreme Court decisions. A concrete understanding of the precedent and application in both the U.S. Circuit Courts of Appeals and the U.S. Supreme Court is vital to maintaining democratic freedoms, understanding the transformation of legal rights, and ensuring that modern protesters and members of the public know the legal nuances of political protest. When considering these precedents, understanding how criminal justice actors respond to political protests is of great importance. Moreover, the current political environment surrounding the topic of political protest has emphasized the necessity and timeliness of this study.

CHAPTER II

Methodology

This thesis utilizes doctrinal, inductive qualitative legal research methods to analyze legal precedent established by the U.S. Supreme Court concerning First Amendment protections of political protests. Similar to grounded theory, doctrinal legal research utilizes inductive, qualitative methods to create a framework that presents and contextualizes research findings (Egan, 2002; Hutchinson & Duncan, 2012; Webley, 2013).

As defined by Nolasco and colleagues (2010), doctrinal legal research is the "process of analyzing facts, identifying and organizing legal issues, finding, reading, and synthesizing legal authorities, and determining whether the law is valid" and often uses relevant primary and secondary materials (p. 7). This methodology differs from a content analysis as doctrinal legal research does not quantify the documents in question by predetermined categories (Hutchinson & Duncan, 2012). Moreover, content analyses are "reading judgments, legislation and policy documents as text rather than reading for the substance of the 'law' and legal reasoning" (Hutchinson & Duncan, 2012, p. 118). Doctrinal legal research is utilized to clarify legal doctrine, especially concerning more ambiguous aspects of the law, explaining legal challenges, and analyzing the significance of results (Hutchinson & Duncan, 2012; Nolasco et al., 2010). In following this method, themes will be revealed that show consistent and objective interpretations of First Amendment protections of political protest (Egan, 2002; Hutchinson & Duncan, 2012).

As mentioned, a comprehensive analysis of First Amendment protections of political protest is lacking from existing criminal justice literature. The utilization of the

legal, doctrinal methodology will allow for the needed qualitative exploration of the topic. Moreover, the inclusion of both U.S. Supreme Court Cases and U.S. Circuit Courts of Appeals are integral to understanding both the standards of the law and how Supreme Court rules are applied in the lower federal courts.

The U.S. federal court system is a three-tiered system where cases are first heard by one of the 94 federal district courts ("Court Role and Structure," n.d.; Farnsworth & Sheppard, 2010). Upon receiving a decision from the district court, one can appeal the decision to one of the 12 U.S. Circuit Courts of Appeals (Farnsworth & Sheppard, 2010). Finally, the Supreme Court is the last available avenue to appeal one's case and normally reviews decisions made by the U.S. Circuit Courts of Appeals (Farnsworth & Sheppard, 2010).

While the Supreme Court is the highest legal authority in the United States, the Circuit Courts of Appeals, sitting directly below the high court, handle a significantly larger number of cases (Cross, 2003; Westerland et al., 2010). While Supreme Court precedent provides general guidance to the lower courts concerning a particular area of the law, the Circuit Courts are often left to their own devices when applying precedent to novel factual patterns (Westerland et al., 2010). Additionally, while published Circuit Court decisions are only binding in that region, they can act as a persuasive guiding authority for other circuits (Cross, 2003; Hinkle, 2015; Klein, 2002; Westerland et al., 2010). Cases occurring after December 31, 1999 (i.e., cases from 2000 onward) in the U.S. Circuit Courts of Appeals will be examined to establish how U.S. Supreme Court precedent is interpreted and applied across the lower federal courts. This thesis uses cases from the year 2000 onward as this time period marks the beginning of the War on Terror

and subsequent changes in the courts' definition of First Amendment post the September 11, 2001 terror attack. Further, with the introduction and incorporation of the internet and social media into public life, the value of these technological tools in political protest has become clear.

The U.S. Supreme Court and the U.S. Circuit Courts of Appeals cases were found using Thomas Reuters WESTLAW (colloquially known as WestLawNext). Thomas Reuters WESTLAW (TRW) is an online legal research database that enables users to access cases and litigation from all 50 states, all federal courts (including the Supreme Court), as well as secondary legal resources such as *American Law Reports and Corpus Juris Secundum*. TRW is available from Sam Houston State University's Newton Gresham Library. Using the TRW homepage, under "Browse," "All Content," "Cases" were selected. For Supreme Court cases, the dropdown selection tool for jurisdiction (attached to the search bar) "United States Supreme Court" was selected in the all federal database. "Political & protest" was then inputted in the search bar. This preliminary search resulted in 170 cases. Unreported cases were excluded from this analysis, resulting in 169 cases. Unreported cases typically involve the clarification of minor details or fail to add to existing law; therefore, these cases will be excluded (Seligson & Warnlof, 1972). After reviewing the 169 cases, 142 cases were found to be irrelevant, as their subject matter was outside the topic of the current study, leaving a final number of 27 U.S. Supreme Court cases to be discussed from 1925 to 2014. This time frame emerged from the relevant, included cases.

In searching for cases in the U.S. Circuit Courts of Appeals, a similar process was used. Using the TRW homepage, under "Browse," "All Content," "Cases" were selected.

Using the dropdown selection tool for jurisdiction (attached to the search bar), “Federal Court of Appeals” was selected in the all federal database. Once the jurisdiction was selected, the “Advanced” search was activated. Then, “political/s protest” was inputted as an exact phrase under “all of these terms.” This particular connector was used to ensure that the search results would not be too specific, as anticipated when using the quotation expander phrase search, but was more pointed than using the “&” connector search. Under the “Document Fields (Boolean Terms & Connectors Only),” “All Dates After” 12-31-1999 were included in this search. Therefore, the search terms were: “advanced: (political /s protest) & DA(aft 12-31-1999).” Using these search terms, 432 cases appear. Cases that have been reported were utilized in this thesis, therefore, decreasing the number from 432 to 208. After reviewing the 208 cases, 180 cases were found to be irrelevant, as their subject matter was outside the topic of the current study, leaving a final number of 28 U.S. Circuit Courts of Appeals cases to be discussed from 2000 to 2021. This time frame emerged from the relevant, included cases.

Overall, these 55 cases will be examined, by jurisdiction, to elucidate overarching themes and standards concerning the First Amendment protections of political protest. Case summaries will be distinguished by court. Each section will include a brief description of the relevant cases, litigation process, explanation of the court’s decision, and how these decisions influence the overall body of cases within that thematic subsection of the paper.

CHAPTER III

U.S. Supreme Court Standards of Review of Political Protest

The context in which these Supreme Court cases occurred is integral to understanding their impact on modern legal decisions. Notably, the events of the 20th century have had the most significant impact on the Supreme Court cases of interest. While there were pockets of civil disobedience and protest before the turn of the 20th century, these movements often lacked organization, and thus, their constitutionality did not reach and impact the law (Murray, 1965). World War I triggered extreme expectations of compulsory patriotism and conformity, something which was further instigated by the resurgence of the Ku Klux Klan in 1915 in Atlanta (Murray, 1965). The "patriotic" right justified means of surveillance, suspicion, and violence against sociopolitical reform movements, especially Black and radical groups (Murray, 1965; Schmidt, 2000). The obsession with returning to pre-War life encouraged the public to broadly turn a blind eye to the aggression and oppression against individuals or groups deemed non-conforming (Schmidt, 2000).

Infamously, the Red Scare latched onto these post-War anxieties. An unprecedented surveillance state was created to monitor and quell sociopolitical change (Schmidt, 2000). During this time, Black individuals who were already experiencing the discrimination of the Jim Crow South and additional discrimination in the North during the Great Migration, were faced with federal scrutiny; there was a widespread belief that the (Russian) Bolshevik doctrines would prompt Black Americans to defect, promote disloyalty, or enable civil unrest (Schmidt, 2000). Thus, the formal surveillance and

investigation of Black “disloyalty” began under the authority of the Federal Bureau of Investigation.

While the Red Scare only lasted from 1919 to 1920, its effects persisted. The latent, informal distrust and scorn toward sociopolitical nonconformers found a new purpose in both the (Vietnam) antiwar, Civil Rights, and Black Power movements in the 1960s (Hall, 2010; Lieberman, 2019). Despite these movements appealing to the core American values of freedom, equality, and liberty, they were met with negative media portrayals, stereotypes, and general animosity (Hall, 2010; Husting, 2006; Lieberman, 2019). Decorated war veterans and Civil Rights leaders alike were met with vitriol from the general populace for their dissent (Hall, 2010).

Soon thereafter, the U.S. Supreme Court decision in *Roe v. Wade* (1973) sparked a new type of social movement, with the conservative right spearheading major anti-abortion protests (Hall, 2010). The anti-abortion movement began as an attempt to restore the conservative conceptualization of traditional American ideals (Hall, 2010). In the late 1990s, increased political power of evangelical Christians increased support for staunchly conservative ideology, and the strong anti-abortion foundations laid by the Catholic Church (dating back to Pope Innocent XI in 1679) facilitated the fervor of this movement (Hall, 2010). It is because of these significant events in history that the following Supreme Court cases emerged.

Case Precedents Concerning Protest Ordinances

State Incorporation of Federal Protest Rights

Prior to the 1925 Supreme Court's decision in *Gitlow v. People of State of New York*, the precedent established almost a century prior, in *Barron v. Baltimore* (1833), guided American courts (Bartholomew, 1964; Coenen, 2019): First Amendment protections of political protest were applicable to only the federal government (Bartholomew, 1964). However, *Gitlow* laid the foundations for the incorporation of First Amendment rights to states (Bartholomew, 1964; Coenen, 2019; Lender, 2011).

Benjamin Gitlow was indicted for criminal anarchy, under New York's Penal Law, after he distributed left-wing manuscripts at the annual conference of the Left Wing Section of the Socialist Party in 1919. The contentious manuscripts advocated for national strikes and subversive action with the intention of overthrowing a government perceived as ineffective and overbearing. Thus, the district court determined, that the distribution of this literature qualified as committing criminal anarchy (i.e., encouraging the violent or unlawful overthrowal of the government), which was supported by the 2nd Circuit holding the statute constitutional. However, Gitlow contested the presumption that merely expressing these subversive ideas would likely prompt "substantive evil" (*Gitlow v. People of State of New York*, 1925, p. 664).

The Supreme Court disagreed with Gitlow, affirming the 2nd Circuit's decision. Notably, Justice Sanford who wrote the majority opinion, noted that the Court assumes that the freedom of speech and press are fundamental rights that are protected by the First Amendment from congressional and state infringement. However, this extension of rights does not grant impunity to individuals who are encouraging or advocating the violent

destruction of the foundational tenants of our democracy. *Gitlow* marks a historic extension of freedom of press and speech, paving the way for other Constitutional rights protecting political protest to be extended to the States.

De Jonge v. State of Oregon (1937) shortly followed the *Gitlow* decision but was impressive in its own right. Dirk De Jonge was indicted in 1934 under Oregon's criminal syndicalism ordinance for his participation at a meeting of the Portland section of the Communist Party. As one of the many speakers at the meeting, De Jonge spoke against the treatment of the fishermen by local police who were currently on strike. The meeting was public, remained orderly, and did not encourage or advocate for meeting participants to engage in conduct defined by the criminal syndicalism ordinance (e.g., crime, violence, sabotage). Upon appeal, Oregon's State Supreme Court determined that the previous advocacy of criminal syndicalism by the Communist Party in the region sufficiently established engaging in criminal syndicalism, as the state's ordinance included participation in groups or organizations which teach or encourage this behavior.

While De Jonge did not raise concerns of unconstitutionality, the U.S. Supreme Court decided to hear the case under First Amendment concerns (Brown, 2013; Spencer, 1937). The U.S. Supreme Court reversed the decision of the Supreme Court of Oregon by emphasizing the critical evidence: during the Party meeting, neither De Jonge, nor other participants, encouraged criminal syndicalism. Therefore, the key conduct in question was a question of peaceful assembly. Notably, the Court noted that the "right of peaceable assembly is a right cognate to those of free speech and free press, and is equally fundamental" *(De Jonge v. State of Oregon*, 1937, p. 364). Again, the Court emphasized that, while freedom of press, speech, and assembly do not absolve citizens

from legal repercussions in instances where criminality is encouraged or prompted, states must protect these freedoms. Ultimately, this decision prohibited criminalizing peaceable assembly.

Cases Concerning Protest Ordinances Where Protesters Prevailed

Place of Protest Contested

A protest's setting can help to strengthen its message and is an important consideration for organizers and law enforcement alike. In *Carey v. Brown* (1980), members of the civil rights organization, Committee Against Racism, were arrested for their peaceful picketing in front of the mayor's place of residence. During their protest against the mayor's lack of support for school integration, the protesters were arrested for unlawful residential picketing, a statewide statute. This statute prohibited all residential picketing, apart from peacefully picketing places of work where the subject of the picketing is labor-related.

Affirming the district court's decision, the Supreme Court determined that the statute was unconstitutional on its face and as applied to the protesters. The court held that the statute's differential restrictions (i.e., content-based restrictions) between labor and nonlabor picketing cannot be permitted and was in violation of the Equal Protection Clause. Moreover, the blanket restriction of all nonlabor pickets lacked justification or review of the different levels of harm associated with these pickets. Also, the significant governmental interest, which could justify these content-based differences if sufficiently narrowly tailored to said interests, was lacking. While privacy concerns were raised, this content-based restriction did not assure any difference in privacy by only allowing labor pickets. The Court acknowledged the importance of having privacy in one's home was of

significant governmental interest yet must be sustained in a way that did not violate Equal Protection.

Manner of Protest Contested

Speech. While maintaining order and citizen safety are important governmental concerns, democratic societies require debate and expression of ideas, regardless of their contentiousness; this is supported by the Supreme Court's decision in *Terminiello v. City of Chicago* (1949). Reverend Arthur Terminiello was tried and found guilty of disorderly conduct for his inflammatory speech at the Christian Veterans of America meeting in Chicago. Terminiello blamed the Jewish ethnoreligion, Black Americans, and other marginalized groups for the deterioration of the nation's prosperity, and he heavily criticized the crowd of counter-protesters that had gathered. His conviction was upheld by the Illinois Appellate Court and Illinois Supreme Court; however, upon the Supreme Court's review, Terminiello's conviction was reversed. The Court explained that the ordinance's restrictions concerning breaches of peace (which included conduct/speech that angers, "invites dispute, brings about a condition or unrest, or creates a disturbance") were unconstitutionally applied to Terminiello (*Terminiello v. City of Chicago,* 1949, p. 4*)*.

The *Terminiello* decision specifically noted that while speech can be (and often is) provocative and offensive to others, it should not be censored or punished, except when there is a "clear and present danger" (*Terminiello v. City of Chicago*, 1949, p. 4). The clear and present danger standard, established in *Chaplinsky v. New Hampshire* (1942), exists when there is a clear and present danger of "substantive evil" beyond mere annoyance, disturbance, or inconvenience of the public (*Terminiello v. City of Chicago,*

1949, p. 4). Ultimately, the *Terminiello* decision reiterated governmental limitations for restricting speech.

Similar to *Terminiello*, *Brandenburg v. Ohio* (1969) addresses how inflammatory means of protest are protected in the interest of maintaining a democratic society. Clarence Brandenburg, the leader of the local Ku Klux Klan (KKK) group (a historically well-established hate group in America) was convicted of criminal syndicalism, under the state of Ohio's statute. After a reporter, who was contacted by Brandenburg, recorded a Klan rally, which included a speech made by the appellant and some of which were armed, local and national attention was brought to the hate-filled speech delivered by Brandenburg. Brandenburg, among his slew of slurs and white supremacist ideology, stated that the KKK has a large Ohio membership, who will not hesitate to act in "revengenance" (sic) if national politicians continue "to suppress the white, Caucasian race" (*Brandenburg v. Ohio,* 1969, p.446).

While acknowledging the detestable nature of the speech, the Supreme Court ultimately reversed the conviction of Brandenburg. The Court discussed its previously established precedents which asserted that simply teaching about the possible moral necessity or justifications for using violence to achieve sociopolitical changes cannot be criminalized without the additional element of (likelihood of) incitement. The Ohio syndicalism law failed to include a stipulation on the likelihood of incitement and therefore was determined to violate the constitutional rights of Brandenburg. This decision emphasized that, while Brandenburg's beliefs were deplorable, protests should be constitutionally regulated to protect the sanctity of our nation's democracy.

While controversial, these decisions have established a powerful precedent for protected speech. These Court decisions acknowledge that even offensive language is to be protected under the First Amendment. However, exceptions are made when the speech is qualified as fighting words (see definition in *Chaplinsky v. New Hampshire*, 1941) and when there is a clear and present danger or threat of criminal activity.

Marching. The decision in *Cox v. State of Louisiana* (1965) relied on the precedent established in *Edwards* (1963) to reverse the convictions of 23 civil rights protesters in Baton Rouge, Louisiana. This demonstration was a part of a series of protests organized by the region's chapter of the Congress for Racial Equality. Over 2,000 demonstrators participated in the demonstration in this case, despite the previous day's demonstrators being arrested. The demonstrators made their way, peacefully and orderly in lines of two, to the State Capitol building to begin their demonstration. While they approached the Capitol, the Captain of the City's Police force and the Chief of the Sheriff's office spoke with Reverend Elton Cox. After Cox explained the purpose and plan for their demonstration, law enforcement officers instructed Cox to stop their approach towards the Capitol and to disperse multiple times. After reaching the street block on the opposite side of the courthouse, Cox spoke with multiple other law enforcement officers, including a police chief, who informed Cox that the demonstration should only be held on the west side of the street, which Cox and witnesses interpreted as granting permission to hold their demonstration on that portion of the road. Arranging themselves in an unobtrusive manner along the sidewalk, the demonstrators displayed signs (with anti-discrimination messages), said the pledge of allegiance, prayed, and sang gospel hymns.

One-hundred-one feet away, workers from the Capitol building began to leave for their lunch break and began to observe the protesters. After some white onlookers began to complain about Cox's speech, which included an urge to conduct sit-ins in local stores, police intervened, telling the demonstrators that they needed to disperse otherwise face being charged with disturbing the peace. Less than five minutes later, police deployed multiple rounds of tear gas at the protesters, in an effort to forcibly disperse them. Demonstrators were arrested the following day for disturbing the peace and obstructing a public passage.

Like in the *Edwards* (1963) decision, the Supreme Court determined that the peaceful protesters were unconstitutionally punished for disturbing the peace. The defendants attempted to reason that the protesters' noise (e.g., singing and completing the pledge of allegiance) justified the conviction; however, witnesses, including a state witness, testified that the demonstration was orderly, did not impede unrelated foot traffic, and the noise level was not loud enough to disturb the Capitol workers.

Further, the conviction of obstructing public passages was reversed, and the related state's statute was deemed unconstitutional. The Supreme Court quickly determined that the demonstration did not obstruct the public sidewalk from numerous testimonies. Moreover, the statute in question had allotted unrestrained authority to regulate the use of public spaces (i.e., areas historically determined to be public forums) by local Louisiana officials. While acknowledging the importance of limited and appropriate discretion over such matters, this particular statute was deemed unconstitutional by the Court. Importantly, in the majority opinion, the Court emphasized that protesters have no inherent right to commandeer a street or entrance of a public or

private building in order to forcibly create an audience for their message. The captive audience caveat established in this case has become an important precedent in protest regulations.

Picketing. In *Grayned v. City of Rockford* (1972), Black high school students were protesting the treatment of Black students and the lack of action from the administrators. One-hundred feet from the school, demonstrators began their picketing, marching along the public sidewalk. After police, who were called by the school, arrived at the scene, the demonstrators were arrested and convicted under the city's antipicketing and antinoise ordinances. The Supreme Court of Illinois affirmed the trial court's decision, holding that bother ordinances were constitutional on their face. However, the Supreme Court concluded otherwise. The antipicketing ordinance was identical to that in *Police Department of Chicago v. Mosley* (1972), which was determined to be unconstitutional; therefore, the antipicketing ordinance in question was invalid, thus requiring the conviction under the ordinance to be reversed.

However, the anti-noise ordinance conviction was affirmed by the Supreme Court. The Court determined that the ordinance was not overly vague or broad. While the ordinance was not as specific as some others (raised by the defense), the ordinance clearly depicted what was permitted and specifically prohibited censorship of unpopular views. Citing the decision in *Tinker* (1969), the Court emphasized that the manner of expression in this case was disruptive to the normal operations of schools (a significant government interest). Moreover, the Court, citing *Edwards* (1963) and *Cox* (1965), determined that a similar impact could be made on students and teachers (i.e., the audience of the protesters' message) before or after the school day, which was

unrestricted by the anti-noise ordinance. In sum, the Court reversed in part and affirmed in part the decision of the lower courts. The Court's decision in *Grayned* affirmed the authority of school officials in maintaining order in school settings (Teel, 1973). While the use of public sidewalks and streets are, indeed, historically recognized by the Court, there can be legitimate reasons for restricting public protest.

Flag Desecration. As an identifiable symbol of the nation, the American flag has long been associated with public feelings of patriotism and unity (Schatz & Lavine, 2007). The sanctity of the flag began during the Civil War, when removing the flag from public spaces was an offense punishable by death (White et al., 2017). Further, the desecration of the flag was a serious social taboo that was conflated with subversive disrespect to the nation and its people (Marinthe et al., 2021; White et al., 2017). *Street v. New York* (1969), *Texas v. Johnson* (1989), and *U.S. v. Eichman* (1990) address the public desecration of the American flag.

In *Street v. New York* (1969), Sidney Street was convicted of public desecration of an American Flag under New York's Penal Law. After hearing the assassination of the civil rights leader James Meredith, Street went to the street outside of his house with his American flag and lit the flag on fire. As the flag was burning on the street, Street proclaimed to the small crowd that had gathered including a police officer, "if they let that happen to Meredith, we don't need an American flag" (*Street v. New York*, 1969, p. 579). Street was given a suspended sentence after his second trial before an additional New York City Criminal Court.

Upon review, the Supreme Court determined that Street had adequately proven that the constitutionality of his words was sufficiently raised at his trial and that under

Stromberg v. California (1931), if Street's conviction was solely based on his words, which it was, his conviction would be invalidated. While the Court acknowledged four possible governmental interests in maintaining Street's conviction but determined that each individual interest would not justify Street's censorship and punishment. The Supreme Court cited the decisions in *Terminiello* (1949), *Cox* (1965), and *Edwards* (1963) to reiterate that public expression may not be criminalized just because the message may be offensive to some.

Twenty-years after the decision in *Street, Texas v. Johnson* (1989) also questioned the constitutionality of criminalizing flag desecrations. This protest was a part of a larger demonstration protesting the Reagan administration and the political actions of certain local corporations. At the end of the demonstration, Johnson lit an American flag on fire in the street in front of the City Hall. Despite 100 other demonstrators participating in this protest, Johnson was the only one charged and convicted of desecrating a venerated object under Texas law. While the intermediate appellate court in Texas affirmed Johnson's conviction, the Texas Court of Criminal Appeals reversed his sentence. Affirming the Texas Court of Criminal Appeals, the U.S. Supreme Court determined that both state interests asserted (i.e., "preserving the flag as a symbol of national unity and preventing breaches of the peace") were insufficient justifications to criminalize flag desecration (*Texas v. Johnson*, 1989, p. 400). The Court determined that the state failed to show that even the threat of a breach of peace existed due to Johnson's expression. Moreover, the criminalization of flag desecration was found by the Court to be an unconstitutional, content-based restriction. In citing its previous decisions such as *Terminiello* (1949), *Cox* (1965), *Brandenburg* (1969), *Tinker* (1965), *Chaplinsky*, and

Street, the Supreme Court noted that governmental restrictions on the use of symbols only to communicate few, approved messages would be extremely concerning and antithetical to the premises of our democracy.

Shortly after the *Texas* decision, *U.S. v. Eichman* (1990) was decided by the Court. In response to the *Texas* decision, Congress passed the Flag Protection Act of 1989, which effectively criminalized the desecration of the American flag in all instances except when properly disposing of a decrepit flag (Darling, 2004; DeQuick, 1990). The constitutionality of the Flag Protection Act of 1989 was at the heart of the *U.S. v. Eichman* case (Darling, 2004). Demonstrators were charged with violating the Flag Protection Act of 1989 when they knowingly burned an American flag during their protest in Seattle. Demonstrators questioned both the facial validity and the application of the Act in their convictions. While the government acknowledged that the protesters' actions were protected as expressive conduct, they argued that the Act was constitutional as it did not target specific conduct.

Heavily citing *Texas v. Johnson*, the Supreme Court determined otherwise. Affirming the decisions of the district courts, the Court held that the Flag Protection Act of 1989 was unconstitutional. The Court determined that this Act targeted any expressive conduct deemed disrespectful to the American flag. Therefore, the Court was required to examine the Act under strict judicial scrutiny, as the Act was a content-based restriction on expression. Findings that the Act impeded the exercise of First Amendment rights, the Court stood firm in their previous decisions prohibiting the criminalization of flag desecration. While controversial to some, the desecration of flags remains a constitutional means of expression.

Protest Permits

In the same series of protests as in *Walker, Shuttlesworth v. City of Birmingham, Ala.* (1969), examines the unadulterated authority granted to the officials of Birmingham concerning protest permit approvals. Several ministers, including Fred Shuttlesworth, lead a peaceful march to protest racial discrimination and inequality. Evidence showed that the demonstrators did not impede traffic and remained orderly throughout the march. Demonstrators were arrested for violating § 1159 of the General Code of Birmingham (i.e., requiring permits for public demonstrations, which is to be granted unless it violates "public welfare, peace, safety, health, decency, good order, morals or convenience") despite the numerous attempts by Shuttlesworth to seek a permit from city officials (*Shuttlesworth v. City of Birmingham, Ala.*, 1969, p. 149). Moreover, after Shuttlesworth, himself, sent a detailed telegram seeking a permit, the city Commissioner responded rebuking Shuttlesworth's plan to picket; in short, it was made clear to Shuttlesworth that no version of his picketing plans would be permitted.

While the Alabama Court of Appeals reversed the convictions, due to discriminatory practices in granting permits and the lack of evidence that the protestors even required one for their purposes, but the Supreme Court of Alabama reversed. Since the Supreme Court of Alabama had narrowed the code concerning permits (four years later), the code's revisal was deemed to be sufficient to restore the conviction's validity. The U.S. Supreme Court disagreed by reversing the Supreme Court of Alabama's decision, saying that the later amendment of the protest code was acknowledged, but Justice Stewart (who wrote the majority opinion) stated that one would have to be clairvoyant to interpret the original code (which gave unrestricted discretion to city

officials to deny permits) in the manner that the code was later narrowed to. The retroactive application of this updated code was invalidated. Further, the Court emphasized the importance of content-neutral time, place, and manner restrictions for political protests.

Cases Concerning Protest Ordinances where the Government Prevailed

Manner of Protest Contested

While the First Amendment protections of political protest have long protected citizens from overbroad and frivolous censorship, the U.S. Supreme Court has consistently maintained that these rights are not absolute. These limitations were especially relevant in cases where there was a danger of violence and insurrection: *Feiner v. New York* (1951), *Dennis v. United States* (1951), *Walker v. City of Birmingham* (1967), *Clark v. Community for Creative Non-Violence* (1984), and *Hill v. Colorado* (2000) serve as primary examples of this.

In *Feiner v. New York* (1951), the conduct of Irving Feiner was called into question when he failed to comply with police instructions to stop his public speech. Feiner was charged with disorderly conduct, whereafter he was convicted. His conviction was confirmed by both the County's Court and the New York Court of Appeals.

Feiner had been standing on a wooden box, using a microphone, expressing his discontent for the current politicians in office and decrying the country's widespread racial discrimination. A large crowd gathered around Feiner, spilling over from the public sidewalk into the street, inhibiting foot traffic and creating street traffic. Police arrived at the location, where they observed the gathering until the crowd began to push each other and eventually became agitated. While most members of the crowd appeared supportive

of Feiner's message, some observers became angry with his criticism of segregation and racial discrimination. These upset observers called for the police to intervene and stop Feiner from continuing his speech or they would violently do so themselves. With the pressing concern of violence, police approached Feiner to ask him to disperse several times over the span of about five minutes. Feiner ignored them, leading to the police arresting Feiner. The trial court agreed with Feiner that he was legally practicing his constitutional rights but noted that this conduct transitioned into disorderly conduct when he failed to comply with police orders.

The U.S. Supreme Court acknowledged that the mere presence of a hostile audience does not permit censorship of Feiner's speech via police intervention or suppression. However, as in this case, where there was an imminent threat of violence (and the speaker fails to comply or attempt to pacify probably violent crowds), police have the authority to intervene and protect public peace and order. With this determination in mind, the Court affirmed the lower court's conviction of Feiner for disorderly conduct.

During the peak of the Red Scare, there was a serious concern among the government and the public that a communist insurrection would take place. An example of the legal sentiments during this time is expressed in *Dennis v. United States* (1951). Eugene Dennis, among other petitioners who were in the upper echelon of the Communist Party of the United States of America (CPUSA), was convicted of conspiring to violate the Smith Act 18 U.S.C. (1946 ed.) § 11. Their convictions were later upheld by the Court of Appeals. Their charges included knowingly and willingly organizing CPUSA meetings (an organization that instructed and advocated for the violent

overthrow of the American government) and, in their leadership capacity, advocating and encouraging violent insurrections. Dennis and colleagues argued that their beliefs simply expressed discontent with the current operations of the government and peaceful transformation was possible.

The Supreme Court granted limited certiorari: whether the application of the Smith Act in this case (or generally) was unconstitutional and whether the Smith Act generally, or as applied, infringed on First and Fifth Amendment rights due to vagueness. The Court determined that the discussion of (including hypotheticals) philosophy, Communism, and even violent insurrections is not the target of the Smith Act; rather, the Act targets endorsement and conspiracy to commit an insurrection. Therefore, the clear and present danger test applied to this case. The Court rejected the necessity of including the likelihood of success (of overthrowal), opting to examine whether speech's severity (i.e., 'evil') outweighs personal freedoms. As the petitioners had amassed a large, organized, and obedient following, the Court determined that the danger of potential violent action was an acceptable application of the Act's restrictions. Additionally, the Court determined that Dennis's vagueness claim was unsubstantiated, as the trial jury determined that the CPUSA "intended to overthrow the Government as speedily as circumstances would permit" (*Dennis v. United States*, 1951, p. 515). Further, the Court agreed that the standard was not transparent but clarified that the precedents previously established by the Court and the clear and present danger test (as the standard for restricting speech) are not required to be included in the Act verbatim. This decision was powerful in the context of the country's anticommunism sentiments (Rohr, 1991; Wiecek, 2001).

Because of the circumstances of *Walker v. City of Birmingham* (1967), one of the most famous pieces of civil rights literature, Dr. Martin Luther King Jr.'s *Letter from Birmingham Jail*, was written (Kennedy, 2018; Oppenheimer, 1993; Pedriloli, 2010). In this case, members of the Alabama Christian Movement for Human Rights and the Southern Christian Leadership Conference (two prominent Civil Rights organizations) were enjoined from "participating in or encouraging mass street parades or mass processions without a permit by a Birmingham ordinance" (Kennedy, 2018; *Walker v. City of Birmingham*, 1967, p. 309). A petition for injunctive relief was filed by city officials after the petitioners had conducted a series of demonstrations (e.g., sit-ins, street parades, picketing private businesses) that took place the week before. The defendants believed these demonstrations were intentional breaches of peace that would continue to endanger safety. From Good Friday to Easter Sunday, protestors, including Dr. Martin Luther King Jr., conducted peaceful demonstrations along the streets and sidewalks of Birmingham. The protesters were held for contempt of the enjoinment in the Birmingham jail for five days and fined, in accordance with the Alabama statute. Despite the protesters raising concerns about the ordinance being unconstitutionally overbroad and vague, the circuit and Supreme Court of Alabama affirmed the trial court's ruling. Upon review, the U.S. Supreme Court agreed with the lower courts.

While the protesters had valid concerns about the constitutionality of the ordinance, the Court noted that the protesters did not try to apply for a protest permit, attempt to have the ordinance changed or invalidated, and deliberately ignored the demonstration injunction. In the Court's decision, the majority opinion emphasized that just because an individual suspects an ordinance/law to be unconstitutional does not

permit them to ignore the law with impunity. Interestingly, *Walker* differs from both *Feiner* and *Dennis*, in that the Supreme Court recognized that their city's protest ordinance was contestable.

Unlike the previous cases, *Clark v. Community for Creative Non-Violence* (1984) involved a unique manner of protest: sleeping in temporary structures in national parks. The Community for Creative Non-Violence (CCNV) obtained a permit to use two national parks, run and maintained by the National Park Service (NPS) under the authority of the Interior Department, in their demonstration protesting the inhumane treatment and difficulties of homeless populations. While demonstrators were permitted to build temporary tent cities (a total of 60 tents between two parks), the demonstrators were not allowed to sleep in these tents. The NPS had designated areas in which camping overnight was permitted but the tent cities were erected outside of these spaces. The NPS claimed that this regulation was narrowly tailored to their substantial interest in maintaining an attractive, accessible park for its millions of visitors.

While the trial court granted summary judgment for the NPS, the Court of Appeals reversed on the belief that enforcing the regulation would unconstitutionally infringe upon protesters' right of free expression. The Supreme Court determined that the regulation was constitutional on its face or as applied to the CCNV. The Court acknowledged that sleeping, as connected to a demonstration, is somewhat protected under expressive conduct, however, the Court also noted that the message can still be communicated effectively without the overnight stay, as 24-hour demonstrations were permitted, and that the NSP's interest was sufficient in maintaining the regulation. Additionally, the Court pointed out that if the CCNV were allowed to conduct the

sleeping demonstrators, a slew of other demonstrations might try to follow, thus significantly burdening the operations of the NSP.

Hill v. Colorado (2000) affirmed the constitutionality of a Colorado state statute creating an eight-foot buffer, preventing the unwanted approach and sidewalk counseling (i.e., attempts to educate or persuade individuals using various methods like speech, pamphlets, signs, etc.) of individuals who are seeking abortion care. This statute did not require protesters to not approach individuals and did not target specific speech; rather the statute targeted unwanted approaches and infringing on the "right to be let alone" as discussed in *Olmstead v. United States* (1928). Both the Colorado Court of Appeals and the Supreme Court of Colorado affirmed the constitutionality of this restriction, as did the U.S. Supreme Court. In its majority opinion, the Court determined that the restriction was sufficiently content-neutral, was narrowly tailored, and did not subject protesters to unconstitutional prior restraint.

Overall, these cases clarified important boundaries concerning citizens' First Amendment rights to protest. *Feiner* established that police may intervene when there was an immediate threat of violence from an audience (or speaker). The Court was also mindful that a hostile crowd alone did not permit the intervention. The Smith Act was upheld in the *Dennis* decision, maintaining that conspiring to overthrow the government was a criminal violation of the law. Additionally, this decision helped to clarify and further validate the use of the clear and present danger test when considering permissible legal intervention in protests. The *Walker* decision clarified that even when protesters suspect that a law or ordinance is unconstitutional, protesters do not have a green light to knowingly violate these laws without at least attempting to challenge them in a court of

law. The use of national parkland in protests was explored in *Clark*. Despite being historically recognized as a public forum, parks reserve the right to (constitutionally) restrict its use, especially in instances where permitted use of land for protests will substantially burden the park system. Finally, buffer areas were discussed in *Hill*, where the Court maintained that buffers help balance the different interests of two parties: the patients' right to privacy (and to be let alone) and the protesters' right to protest and spread their message.

Case Precedents Concerning General Protest Restrictions

Cases where Place of Protest is Contested

Jail Grounds. In *Adderley v. State of Florida* (1966), student demonstrators, protesting national and statewide racial segregation policies and the prior arrests of their peers, went to the local jail to conduct their demonstration. The demonstrators entered the jail grounds using the jail's driveway, which was used strictly for jail purposes (i.e., not used by the public). The county sheriff, who had legal authority over the safety and security of the jail, along with a multitude of others (e.g., deputy sheriffs and a local paster), spoke with the protesters urging the protesters to leave the grounds or face arrest for trespassing. After these warnings, the protesters moved further away from the jail but remained on the property and were now blocking the jail entrance. The county sheriff gave the protesters 10 minutes to leave the premises or face arrest. While some demonstrators left or began to leave, a sizeable number remained after the 10 minutes were up. Police began to arrest the demonstrators who remained but let the individuals leaving do so untouched. After their arrest and conviction for trespassing with a malicious and mischievous intent, the petitioners argued that the *Edwards* (1963) and

Cox (1965) decisions, the vagueness of the Florida trespass statute, the Civil Rights Act of 1964, and the use of petty crimes to violate the constitutional rights of minority community members supported their claims. However, the U.S. Supreme Court ultimately disagreed.

The Court determined that while *Edwards* (1963) also involved civil rights demonstrations (including similarly peaceful manners of protest like singing), the petitioners in *Edwards* (1963) were on public grounds and had a constitutional right to access that forum. Moreover, both *Edwards* (1963) and *Cox* (1965) involved vague ordinances which were invalidated upon Supreme Court review, but the Florida trespass law, in this case, was sufficiently specific. In reference to the Civil Rights Act of 1964, the petitioners attempted to argue that it was unlawful racial discrimination from places of public accommodation, yet, the decision in *Hamm v. City of Rock Hill* (1964), referenced by the petitioners, was only applicable to customers. Additionally, while the petitioners were correct that petty criminal charges cannot be used to violate the constitutional rights of minority community members, the Court held that was irrelevant to the facts of this case. Therefore, the Court affirmed the convictions of the protestors.

The *Adderley* decision has been used to distinguish between the constitutional right to access public forums versus nonpublic forums. While the protesters may have overestimated the confines of traditionally public forums to include the jail's roadway, this was a well-established nonpublic forum, as there were no recorded instances where anyone from the public was able to access this driveway, let alone hold a demonstration there.

Military Installations. Military installations are currently heavily regulated and secured spaces that require authorization to enter or to be near; however, in the past, military installations used to allow the public access to unrestricted areas of the post. The use of military installations as a place of protest was examined in *Greer v. Spock* (1976). Fort Dix, New Jersey, is a U.S. Army post that had allowed civilians to freely visit unrestricted parts of the post. While some civilian speakers (e.g., clergy members and financial advisers) had been allowed to speak on the post, political demonstrations and speeches were banned from occurring on the Fort Dix property. Additional restrictions to other expressive activities (e.g., distribution of handbills or signs) were only allowed under the written approval of the Post Commander. Benjamin Spock and other members of the People's Party were formally denied their written request to handbill on the post and had been evicted from the post after being caught, on multiple occasions, for handbilling without permission. These civilians were informed that they were banned from entering the post or face arrest. The district court issued a permanent injunction prohibiting interference with First Amendment activity (e.g., handbilling) in the areas of Fort Dix that have been open to the public, which was affirmed by the Court of Appeals.

However, the U.S. Supreme Court reversed, holding that the court misapplied the precedent established in *Flower v. United States* (1972) to mean that whenever the public is freely able to access government property, it may be regarded as a public forum. The Court said that historically and constitutionally, civilians had no constitutional right to access military installations. The Greer case clarified that military installations are not public forum and emphasized that limited access to governmental property does not guarantee a right to access. While Fort Dix may have voluntarily granted the public some

degree of access to the post, civilians do not have unrestricted access to all public activities.

Cases where Protest Manner is Contested

Civil Rights. By their very nature, civil rights protesters are often expressing unpopular (i.e., unpopular to the majority and/or the powerful) messages and demands. By participating in protests, not only is the content of the protest scrutinized, the manner is as well. In *Edwards v. South Carolina* (1963), 187 Black students (both high school and college-aged) were convicted of violating South Carolina's breach of the peace law during their protest of legal and governmental racial discrimination. In small groups of 15, the protesters walked two blocks to the South Carolina House property, which is public fora. Once at the House, the protesters were met by over 30 police officers, who verbally acknowledged the protesters' legal right to (peacefully) access this public space. After this brief acknowledgment between law enforcement and the protesters, the group walked through the state's House, in a manner unobtrusive to pedestrian or street traffic (i.e., in a single file or side by side) for the next thirty to forty-five minutes carrying signs. During their demonstration, a large, curious crowd had gathered to observe. Due to the crowd's composure, compliance with law enforcement's orders, and general maintenance of traffic, police were determined to be well equipped to handle any possible disorder associated with the Black students' demonstration. Police, after noticing the sizeable crowd of observers gathering, ordered the demonstrators that they would be arrested if they did not disperse within 15 minutes; instead, for 15 minutes, the demonstrators sang patriotic and religious songs until they were arrested and jailed. The Supreme Court of South Carolina affirmed the state trial court's convictions of the

demonstrators, boldly stating that there is no definitive definition of violating the breach of the peace law but rather a general definition that police could follow.

However, the demonstrators called attention to the fact that the state failed to present any evidence violating the state's broad definition of breach of the peace. Unlike the facts in *Feiner*, there were no threats or incitement in the *Edwards* case. The Supreme Court reversed the convictions of these protesters as it was determined by the Court that their arrest and conviction were merely based on their expression of unpopular views and the sizeable crowd that gathered to observe them. The *Edwards* decision was important in protecting protester rights, where demonstrations may not be dispersed simply because of a large gathering of onlookers when both are conducting themselves in peaceful and legal manners.

Henry v. City of Rock Hill (1964) closely resembles the facts of *Edwards* (1963). A large group of Black demonstrators assembled at the Rock Hill's City Hall to protest racial discrimination. They peacefully sang religious and patriotic songs. During their demonstration, a tense but peaceful large crowd had gathered to observe. Around thirty minutes into the demonstration, police ordered them to disperse; protesters continued their demonstration, leading to their arrest and being charged and convicted of breach of the peace. On appeal, the U.S. Supreme Court reversed the conviction of the protesters. Citing *Edwards* (1963) and *Fields v. South Carolina* (1963), the Court reiterated that the petitioners were convicted simply because they were expressing unpopular views, despite the legality and peaceful nature of protesters and the demonstration itself.

These cases exemplify the unconstitutional suppression of civil rights protests; however, these police actions are not something of the past, as many supporters,

protesters, and organizers of the Black Lives Matter movement can attest. The attempt to quell protests concerning basic rights (which have become heavily politicized) remains relevant to modern society and legal proceedings.

Anti-War. America's involvement in the Vietnam War was vastly unpopular across the sociopolitical spectrum (Lieberman, 2019). Reflecting this widespread criticism of the war, Dr. Martin Luther King, Jr. wrote, "if America's soul becomes totally poisoned, part of the autopsy must read Vietnam" (Hall, 2010, p. 13). Tinker v. Des Moines Indep*endent Community School Dist.* (1969) was a landmark case in extending First Amendment rights to teachers and students on school grounds. In protest of American involvement in the Vietnam conflict and the desire for peace, students planned to wear a small black armband throughout the winter holiday season. This protest was part of a wider, community-level demonstration. In anticipation of this protest, local school administrators adopted a policy that students who refused to remove armbands would be suspended until they stopped wearing them. While aware of the regulation, the petitioners proceeded to wear the small black armbands. Outside of the presence of the armband, nothing differed in the students' daily schedule or behavior. Moreover, there was no evidence, besides minor rude remarks made by fellow students outside of the classroom, that the protest disturbed the normal schedule or events of the school.

When the U.S. Supreme Court reviewed the case, the Court emphasized that the students' actions were in no way disruptive of school operations or the rights of their peers. As the school's policy did not prohibit wearing other symbols of political or controversial ideology, the Court determined that the armband policy unconstitutionally targeted the message and expression of these protesters.

Anti-Abortion. In *Bray v. Alexandria Women's Health Clinic* (1993), anti-abortion protesters were permanently enjoined from obstructing or impeding access or trespassing on the property of healthcare facilities that provided abortion-related services. The primary question posed within this case is whether Rev. Stat. § 1980, 42 U.S.C. § 1985(3) (i.e., the remaining protections from the Civil Rights Act of 1871) would protect clinics from anti-abortion protesters who have blockaded said clinics (Fischer, 1993; Richter, 1993). After protesters from Operation Rescue, a confrontational anti-abortion organization, blocked all entrances and means of exit, the U.S. District Court for the Eastern District of Virginia granted a permanent injunction to the clinics in the district, prohibiting these protesters from trespassing on or impeding access to said clinics. The district court based its decision on § 1985(3) and also ordered the protesters to pay the clinics' legal expenses; the 4th Circuit affirmed.

On appeal, the U.S. Supreme Court reversed, saying that a critical aspect of applying § 1985(3) is proving that the actions/conspiracy of the governmental or private organization was based on an intentional form of racial or class discrimination. First, the clinics suggested that the class in question was women seeking abortions. The Court determined that this grouping was too broad: a class cannot be defined as a group of people wanting to engage in the same conduct. Next, the clinics clarified that the class affected was women, in general, rather than just those seeking abortion care. The Court concluded that the actions of the protesters were not targeting all women, but rather women seeking voluntary abortions. Justice Scalia, in delivering the Court's majority opinion, differentiated that it is readily presumed that opposition to seeking abortions

does not equate to the animus of women, but "a tax on wearing yarmulkes [would be] a tax on Jews" (*Bray v. Alexandria Women's Health Clinic*, 1993, p. 270).

The Court invalidated the use of § 1985(3) further by noting that neither protection of interstate travel (raised by the clinics as many women seeking abortions must use interstate travel) nor was the hindrance clause applicable to this case. The Court noted that § 1985(3) prohibited both the creation of physical barriers (e.g., blockades) to prevent interstate travel and differential treatment of interstate travelers. Protesters did not intentionally, preemptively hinder interstate travel for those seeking abortions (i.e., aiming to deprive groups of their rights). Furthermore, the Court did not entertain the hindrance clause as the representatives of the clinic have admitted that the necessary claims were not present to successfully meet the requirements.

In its decision, the Supreme Court reversed the 4th Circuit's application of § 1985(3) (in favor of the clinics), vacated the financial relief of the clinics, and remanded the case. This, quite contentious, decision has been criticized by scholars for its loosening of protections for abortion access and denying the protected class status for women seeking abortions (Banks, 1994; Fischer, 1993; Haring, 1994; Richter, 1993).

Similar to *Bray*, *Madsen v. Women's Health Center, Inc.* (1994) examined the constitutionality of a permanent injunction against a group of anti-abortion protesters. A permanent injunction against a group of anti-abortion protesters was granted after a series of protests had obstructed access to healthcare clinics, which provided abortion services. Six months after the injunction, the respondents sought to expand the parameters of the injunction, as the injunction had failed to subdue the protesters' hindrance of access to abortion care. While the Florida Supreme Court upheld the constitutionality of this

expansion, the Eleventh Circuit had struck down the validity of the injunction's expansion.

Upon review, the U.S. Supreme Court examined the constitutionality of the 36-foot buffer zone (protecting the access to the clinic, its parking lot, and the connecting street) and the noise restriction (e.g., prohibiting yelling, singing, and use of sound amplification), outside the clinic, Mondays through Saturdays, from 7:30 in the morning to noon. Also examined were prohibiting the display of observable images (i.e., upsetting or disturbing images), the 300-foot buffer preventing protesters from approaching anyone going to these clinics (unless voluntarily consented to be approached), and demonstrations and use of sound amplification devices within 300 feet of the homes of clinic staff. While the expansion of this injunction was partially affirmed, the rights of protesters were significantly expanded in this decision.

The Court determined that both the 36-foot buffer zone around clinics and street passageways and the limited noise restrictions (outside of the clinics) were constitutional and did not unnecessarily burden protesters. These restrictions were deemed necessary to protect access and safe operations of the health clinics; however, the remaining expansions were determined to burden more speech than necessary. Prohibiting observable images was determined to be overly broad, as the clinics could have focused on threatening signage, but this absolute ban was unconstitutional. The 300-foot buffer zone that prevented protesters from approaching individuals who were seeking abortion care was determined to unduly burden protesters' speech, as this was not only overly broad, but the Court's precedent has established that insulting or inflammatory speech was still protected. Finally, the Court determined that the 300-foot buffer zone preventing

demonstrations at or near the clinic staff's residences was not narrowly tailored and overbroad. The Court noted that sound amplification devices could have had volume limits, rather than outright banned, and that the breadth of this buffer would prevent demonstrations even in the same block as clinicians.

The Madsen decision benefited anti-abortion protesters in regaining legal access to particular protest tactics; however, *Madsen* was most notable for its expansion of the standards required for constitutional, content-neutral injunctions (Nielson, 1996; Wohlstadter, 1995). In addition to the previous standards, the Court added that the injunction must not "burden no more speech than necessary to serve a significant governmental interest" (*Madsen v. Women's Health Center, Inc.*, 1994, p. 765).

Military Funerals. The constitutional protections of picketing military funerals were examined in *Snyder v. Phelps* (2011). The Westboro Baptist Church (WBC), an infamously inflammatory organization that opposes the supposed social collapse of America, picketed the funeral of a young Marine who was killed in action. The protesters held (morally objectionable) signs in an area 1,000 feet away from the burial site that was pre-approved by the local police. The protesters remained orderly and those in attendance of the funeral only saw the top of their signs rather than their messages. After learning about the extent of the picketing, the father of the deceased Marine successfully sued WBC, its founder, and its founder's daughters for "intentional infliction of emotional distress, intrusion upon seclusion, and civil conspiracy claims" (among the five total state tort claims initially brought by Snyder; *Snyder v. Phelps*, 2011, p. 448). However, the Court of Appeals ruled for the church, reversed the trial court's decision, and determined that the civil damages could not be recovered by Snyder.

On appeal, the Supreme Court affirmed the decision of the appellate court. In delivering its opinion, the Court cautioned that the courts should not unwittingly become a tool for censorship. While sympathetic to Snyder's grief, the Court determined that the WBC's actions were not targeting Snyder (i.e., WBC's speech was a public, not a private concern) and that the funeral's attendees were not a captive audience as there was significant distance maintained and lacked interference. Additionally, the WBC had the constitutional right to picket as they had approval from police, kept their distance from the funeral, and remained orderly. Moreover, in citing *Texas v. Johnson* (1989), the Court noted that the government could not enact content-based restrictions simply because the message may be offensive.

Cases Concerning Law Enforcement Misconduct

Cases Where Protesters Prevailed. Police in Gregory v. City of Chicago (1969) attempted to quell an unruly group of onlookers to a peaceful protest concerning desegregation. The demonstrators peacefully marched from city hall to the mayor of Chicago's house. At no point were the protesters unruly or disorderly, but the large crowd of observers that had gathered became a concern for police. Police ordered the demonstrators to disperse or face arrest, and when they failed to do so, police arrested them for disorderly conduct. The Supreme Court rebuffed the convictions of these protesters as the trial judge allowed for the conviction of the protesters despite their actions being clearly protected under the First Amendment and lacking any evidence justifying their convictions.

Cases Where the Government Prevailed. In *City of Greenwood, Miss. v. Peacock* (1966), protesters who had participated in civil rights activities during 1964

sought to apply the civil rights removal statute to their variety of charges. While the district court remanded the case to the city's police court for trial, the 5th Circuit reversed this decision, as the case involved the denial of civil rights through state statutes. The protesters based their argument on 28 U.S.C. § 1443, which has roots in the Civil Rights Act of 1866 and 1871 (*City of Greenwood, Miss. v. Peacock*, 1966; Morton, 1967). The protestors alleged that they were innocent of all allegations, for which they were arrested (and were subsequently convicted) due to the fact that they were Black Americans or because they were assisting other Black Americans to exercise their federally protected civil rights, and that they would not receive a fair (state) trial.

However, the Supreme Court disagreed with the protesters, reversing the decision of the 5th Circuit. The Court maintained that since its formation, the civil rights removal statute has strictly been applied only to federal officers (and those professionally affiliated with these officials) when acting in the capacity of their official duties. In short, the Court determined that the prerequisite to qualify for removal, i.e., "color of authority," does not apply to the defendants and, therefore, was unable to support granting removal (*City of Greenwood, Miss., v. Peacock*, 1966, p. 815). This case maintained that civil rights removal statutes should continue to only apply to federal officers, even in cases where civil rights or fair trials have been, or suspected of being, violated or when fabricated charges were leveled against (private) individuals. Interestingly, in the majority opinion, the Court expressed concern over the potential repercussions of granting removal (effectively expanding who would qualify under the "other person" category) would substantially burden federal courts (*City of Greenwood, Miss. v. Peacock*, 1966; Morton, 1967).

In *Wood v. Moss* (2014), protesters sued two Secret Service agents for damages after allegedly violating the protesters' First Amendment rights. During a trip taken by President Bush, a sudden change in dinner plans, caused the presidential motorcade to stop to eat at a restaurant's outdoor patio. Two groups of protesters had gathered to demonstrate along the original route that the presidential motorcade was planned to pass by. One group, supporters of the president, remained in their original location, while protesters who opposed the president moved closer to where the president was dining. Under the direction of the Secret Service, law enforcement moved the large crowd of protesters (opposing President Bush) twice. Ultimately, the protesters were allowed to remain in a location about two blocks away from the restaurant. As President Bush was eating outside, relocating the protesters outside of (lethal) weapons range was critical for maintaining Presidential security (i.e., a significant government interest).

The district court determined that the protesters had established sufficient violations of clearly established constitutional rights, therefore, the Secret Service agents were not entitled to qualified immunity. The 9th Circuit affirmed; however, the Supreme Court reversed, determining that the relocation of these protesters was not a content-based restriction, but rather one based on security. As the protesters argued that the pro-Bush demonstrators were allowed to remain in their original location, it was determined that this was due to the fact that they were out of weapons range. Since the government had a significant interest in protecting its national leader, the restriction was valid. Moreover, the precedent was not well established that the Secret Service agents were required to ensure equitable places for demonstrating for numerous groups, so as to not

violate the First Amendment. Therefore, there were no clearly established rights to forbid qualified immunity.

Police misconduct or disparate treatment of political protesters are serious allegations and are treated as such. The decision in *City of Greenwood, Miss.*, clarified the legal actions that protesters, who asserted that they were subject to civil rights violations under 28 U.S.C. § 1443, could bring against law enforcement. The Court emphasized that this cause of action could only be brought against federal officers, as the Court asserted that allowing this to be used against non-federal officers would flood and overburden the courts. Additionally, in *Wood*, the Court maintained that the security and safety of the nation's President is a legitimate justification for moving protesters (who were in weapons range).

Cases Involving Preemptive Restrictions

Historically, there have been legitimate concerns about the chilling effect that governmental surveillance has had on protestors (see Bedoya, 2020; Taschner, 2021). This is especially true after the illegal surveillance of prominent social activists under the Federal Bureau of Investigation's COINTELPRO program was revealed to the public (Churchill & Vanderwall, 1990; Greenburg, 2010; 2012; Gutiérrez, 2019). Surveillance concerns do not necessarily equate to unconstitutional activity. These privacy concerns were addressed in *Laird v. Tatum* (1972), where a class-action lawsuit was brought against the U.S. Army for their data-gathering system on activities or organizations which were determined to be possible sources of civil disorder or unrest. This data-gathering system was initially established under President Johnson as a way to plan or increase local police preparedness in instances of civil unrest. After the assassinations of Dr.

Martin Luther King Jr., Senator Robert F. Kennedy, and the nationwide unrest that resulted, the expansion of this surveillance system increased. While the Court of Appeals reversed and remanded the district court's dismissing the complaint, the Supreme Court reversed.

The petitioners claimed that the collection and dissemination of information on potentially disorderly organizations or persons would discourage (i.e., have a chilling effect) the free exercise of constitutional rights. However, the Court disagreed. A large portion of the information in the database was collected from different publicly available media sources. Additionally, the petitioners failed to establish that they sustained injury. While Supreme Court cases restrict governmental regulations that chill First Amendment expression, the Court determined that there was no chilling effect on citizen rights neither by the knowledge that the government possessed nor by the resulting (citizen) concerns of the potential government use of such information.

CHAPTER IV

U.S. Circuit Courts of Appeals Applications

Cases Concerning Protest Ordinances

Cases Involving Protest Ordinances Where Protesters Prevailed

Place of Protest Contested. Shifting from a visible march in the streets, to walking along a sidewalk can minimize a protest's impact. This is especially true when protesters have organized and prepared for one place of protest, but are suddenly moved. In *Seattle Affiliate of the October 22nd Coalition to Stop Police Brutality, Repression, and the Criminalization of a Generation v. City of Seattle* (2008), the city's parade ordinance was challenged. All protesters were required to obtain a permit, under the formal permission of the Seattle Chief of Police, at least 48 hours before the planned demonstration. Despite the city having no stipulations requiring a minimum number of protesters to obtain a permit, the plaintiffs experienced multiple instances where their protests gathered less than 200 people and, despite their permit, were forced to walk along the public sidewalks. The district court decided that the ordinance was not facially unconstitutional and granted the city's motion for summary judgment. The district court held that the Chief of Police was not authorized to deny permit requests, but was allowed to modify parade routes.

The 9th Circuit agreed that the Chief of Police had the authority to redirect the protesters from the road to the sidewalks, but had ultimately been enforcing an overly broad ordinance and, in doing so, gravely infringed on protesters' rights; on multiple occasions, when the minimum number of demonstrators (a standard arbitrarily established by police) was not met, the police rescinded the permit, forcing protesters to

use the public sidewalks, where no permit was required. Not only were streets and sidewalks distinctly different venues for expression, the police's interpretation of the ordinance (i.e., unauthorized expansion of power over parades) posed a considerable threat to free, uncensored expression. The ordinance was determined to allot overly broad discretion to police, especially when considering that the denial or modification of permit requests did not require any justification. As the court determined that the ordinance granted police overly broad discretion, the ordinance was rendered unconstitutional.

The use of street medians, as a place of protest, was examined in *McCraw v. City of Oklahoma City* (2020). This ordinance was initially targeted at the presence and activity of panhandlers, but, under legal advice, the city expanded the ordinance to include demonstrations and protests. After the change, all pedestrian presence on traffic medians that were less than 30 feet wide or within 200 feet of an intersection was criminalized, with exceptions for first responders and emergency situations. Despite attempts to justify the blanket ban on median use, the city could neither produce any traffic accident report showing that a person on one of the city's medians was injured nor prove that any accident was caused by the presence of pedestrians on medians. The district court ruled that the ordinance was a constitutionally valid, content-neutral restriction that served significant governmental traffic and safety interests. Further, the district court dismissed the plaintiffs' claims of First Amendment infringement and vagueness.

In the 10th Circuit's decision, the dismissal of the First Amendment claims was reversed. Pointing to the obvious lack of data, the court determined that the city was unable to demonstrate significant interest in maintaining safety and traffic. Additionally,

the ordinance placed a substantial burden on the plaintiffs, even considering the possible alternatives for expression. Further, the city failed to consider the burden that the ordinance placed on the public and ultimately decided to implement a blanket ban as an easy way to address potentially unconstitutional restrictions. The court also determined that the ordinance was overly broad and did not leave ample alternative channels of communication. Citing the decisions in *McCullen* (2014), *Clark* (1984), *Cox* (1965), *Hill* (2000), and *Bray* (1993), the court partially affirmed and partially reversed and remanded, ultimately deeming the ordinance unconstitutional.

In *Brewer v. City of Albuquerque* (2021), the city's rigorous restrictions on pedestrian traffic were examined. Under the city's ordinance, pedestrians were prohibited from loitering within six feet of the ramps connected to the highway, occupying any median designated incompatible with pedestrian use, and interacting with traveling vehicles. While these spaces were used for a vast number of different activities, the restriction on protesting in these spaces was of particular concern. The city argued that it was a valid and narrowly tailored content-neutral restriction as the government has a significant interest in addressing the high rates of vehicular accidents in the city (that this ordinance was directed at). The district court disagreed, declaring the ordinance unconstitutional, which the Tenth Circuit of Appeals affirmed.

In their review, the district court did not find that the city's claims that pedestrian presence in these areas posed safety or traffic concerns. The city relied on the testimony of a civil engineer (reliant on general urban planning manuals), general traffic and accident reports, and statistics. The 10th Circuit said there were no (safe) available alternatives made for pedestrians to express their messages, especially since the

ordinance effectively restricted every space that could qualify. Therefore, the ordinance substantially burdened more speech than necessary to maintain traffic and civilian safety. Interestingly, in delivering its opinion, *Police Dep't of Chi. v. Mosley* (1972) was the only Supreme Court case referenced (albeit in passing) that was included in this analysis. Rather, the court heavily relied on the decisions in *McCullen v. Coakley* (2014) and decisions from other Tenth Circuit cases such as *Evans v. Sandy City* (2019) and *McCraw v. City of Oklahoma* (2020).

Place of protest is not only important to protesters logistically but can also connect and strengthen the message of a protest. *McCraw*, *Brewer*, and *Seattle* all examined how protest ordinances impact the use of certain public forums. In both *McCraw* and *Brewer*, the 10th Circuit examined the median use and other restrictions on pedestrian traffic. The court determined that both cities lacked substantiating evidence that there was a significant safety risk or impediment to traffic. The court emphasized that legitimate, content-neutral restrictions, with alternative channels for expression, are required of permit systems. Moreover, creating blanket restrictions, which are easier for cities to implement and enforce were only permitted when they are the last resort for safety standards. In *Seattle*, a particular permit system gave broad discretion to deny permits and required an arbitrary number of protesters present or the permit would be effectively rescinded. While authorized to use the streets for their protests, *Seattle* protesters were forced to march along public sidewalks, which would have otherwise not required a permit. Again, frivolous restrictions on the place of protest were impermissible.

Manner of Protest Contested. Picketing has been a long and celebrated manner of protest in America; however, an often overlooked aspect of picketing is the construction and content of the signs. In *Edwards v. City of Coeur d'Alene* (2001), a counterprotest to a demonstration being held by the Aryan Nation, protesters carried signs (on wooden handles) decrying the white supremacist hate group. Police approached Edwards and other counter-protesters to get them to surrender their signs, but they resisted and were arrested for obstructing the duty of a peace officer. A federal district court granted Edwards's motion for temporary injunctive relief, barring the city from enforcing policies against the plaintiffs for carrying signs with handles, unless the policy was enacted by the elected city officials, equitably enforced, and followed reasonable time, place, and manner restrictions. Three days after the initial ruling, the city enacted an ordinance that essentially criminalized the presence of weapons at protests or public assemblies. This ordinance included a section specifically banning the use of any sort of handle or support system for all signs.

Again, Edwards sought a preliminary injunction against the city to stop enforcing the section of the ordinance banning signs with handles for fear of future arrest for similar protest activity. Later, Edwards added a facial challenge of the ordinance's constitutionality to the request for a preliminary injunction. The district court ruled that the ordinance was a narrowly tailored content-neutral restriction concerning public safety interests and left alternative channels for communication.

Upon review, the 9th Circuit reversed after determining that the ordinance's section banning sign supports was unconstitutional. First, the city was unable to prove that their blanket banning sign supports was necessary as there were no previous violent

incidences involving the use of signs with handles as weapons. Further, after examining public safety ordinances from other cities, less restrictive means are readily available. Also, the ordinance lacks necessary alternative means of expression. Interestingly, this case only passively cited *Hill* (2000) in its decision concerning significant governmental interest in protecting citizens from violence.

In *Bell v. Keating* (2012), the 7th Circuit examined the constitutionality of a failure-to-disperse provision of a city-wide disorderly conduct ordinance. During a protest of Operation Iraqi Freedom, a protester was arrested for approaching the police in the street with a banner. In response, fellow protesters also entered the street, nearing the officers with their banners, chanting for the officers to release the protester. After the officers ordered the protesters multiple times to get off the road, they were arrested for disorderly conduct. Under the city's provision, the protesters were found guilty of knowingly failing to comply with law enforcement's dispersal order, while in a group of three or more, participating in behavior that could cause substantial harm, inconvenience, or annoyance. After being acquitted of the criminal charges, Bell sued the city and law enforcement for false arrest and malicious prosecution. The constitutionality of the city-wide provision was called into question by Bell when seeking declaratory relief and a permanent injunction from enforcing this provision.

The district court determined that Bell had no standing to challenge the ordinance, comparing the facts of the case to a 7th Circuit decision, *Schirmer v. Nagode*, 2010. However, the 7th Circuit disagreed on all points. In opposition to the city's argument, the ordinance was found to be facially invalid. Overall, the ordinance lacked definitive enforcement guides, therefore chilling speech; Bell could reasonably assume that the

ordinance will always be enforced and thus refraining from protest to avoid legal/criminal repercussions. The ordinance was overly vague in its definition of criminalized behavior (posing a serious threat of frivolous enforcement), and unconstitutionally overbroad in its inclusion of substantial harm, serious inconvenience, annoyance, and alarm in the punishable qualifying conduct. Further, in citing decisions in *Brandenburg* (1969), *Chaplinksy*, *Feiner*, *Terminiello* (1949), and *Cox*, the 7th Circuit emphasized the real threat of arbitrary or discriminatory enforcement of this ordinance, where speech would inevitably be censored by law enforcement. The 7th Circuit concluded by reversing the decision of the district court and remanding for reconsideration.

After the funeral of a soldier, who was killed in action, the Westboro Baptist Church (WBC) picketed. In response, the state of Missouri created a funeral protest ordinance. In *Phelps-Roper v. Koster* (2013), the constitutionality of this Missouri funeral protest ordinance was challenged by members of the WBC. Specifically, § 578.501(2), which criminalized picketing on or near funeral grounds an hour before or after funeral ceremonies. The statute defined funerals to encompass the procession, ceremony, and memorial services for the deceased, and it created a 300-foot buffer for any protest activity near a funeral service one hour before or after the services (§1578.502(3)). The district court ruled these sections to violated the Free Speech Clause of the First Amendment and partially granted the plaintiffs summary judgment.

The 8th Circuit, cited the decisions in *Chaplinsky* and *Snyder*, affirmed the district court's determination that WBC's speech did not qualify as fighting words and, instead, was (inflammatory) protected speech. Like other funeral protest ordinances, the court said the government had a significant interest in ensuring the privacy and security of

funeral attendees. Additionally, the 8th Circuit determined that the definition of funeral used in the ordinance would essentially create a floating buffer, following the various processes associated with a funeral, thus, creating an unconstitutionally broad reach for the buffer. However, removing the word procession would solve this issue for § 578.502, but not for § 578.501, as the limits to the buffer zone were not concretely defined, thus affirming the district court's decision that § 578.501 was an unconstitutional violation of the Free Speech Clause. Alternatively, the court reversed the summary judgment of § 578.502, as it is a narrowly tailored restriction with alternative channels of communication, with the removal of the phrase procession.

In some instances, well-established Supreme Court standards are overlooked by local and state authorities. A straightforward example of this is *Snider v. City of Cape Girardeau* (2014), where the plaintiff was arrested for flag desecration. The plaintiff, in a demonstration of his hatred for the country, tried to light an American flag on fire. When the flag did not burn, Snider took a knife to it, shredding and throwing it into the road. After a neighbor called the police, Snider, was initially only cited for littering; however, the officer submitted a statement of probable cause to the county attorney pursuant to the Missouri state flag desecration ordinance resulting in the arrest of Snider. Both the arresting police officer and the prosecuting attorney claimed that they had allegedly never heard of the decisions in *Texas v. Johnson* or *United States v. Eichman*. After a local reporter questioned whether the attorney had ever read *Texas v. Johnson*, prompting him to do so, the charges against Snider were dropped. Snider later filed a suit, alleging that his arrest was unconstitutional, that the city maintained and enforced antiquated and invalid laws, and that the city ineptly trained the local police force.

In affirming the decision of the district court, the 8th Circuit denied the motion for a summary judgment concerning the police officer on the grounds of qualified immunity. Since this precedent has been well-established, the court concluded that a competent officer would be aware that Snider's conduct was protected under the First Amendment. Further, as the Missouri flag desecration ordinance was targeting expressive activity, the district court was correct in their conclusion that the ordinance was facially unconstitutional, so the allegation of vagueness was not examined. Finally, regarding inadequate training, the court affirmed that the city was not responsible for the inadequate training of the arresting officer, as all law enforcement officers in the state are trained under the Missouri Department of Public Safety.

Overall, these cases discuss ordinances that target a wide variety of manners of protest. In *Bell*, the chilling effect on speech is discussed when questioning the constitutionality of a failure to disperse ordinance. The ordinance applied to as few as three people gathered and included annoyance as an acceptable basis to disperse protesters, yet Supreme Court precedent contradicting this existed. In *Edwards*, the use of handles on signs was challenged by protesters. The court determined that the justification for this blanket ordinance (i.e., the ability of protesters to use these signs with handles as weapons) was historically unfounded. *Phelps-Roper v. Koster* (2013), a funeral protest ordinance was found to be partly unconstitutional, as the overbroad wording of the ordinance would have created a floating buffer across the city, during different activities associated with funerals. Moreover, the WBC's infamous and often offensive speech is constitutionally protected. Finally, *Snide*r deals with a well-established constitutional means of political speech: burning the American flag. At the time of the case, over 20

years had passed since the Supreme Court made its *Eichman* decision; therefore, the court determined that the criminal justice actors involved would not be protected under qualified immunity. While not all of these cases are as straightforward as *Snider*, the various Circuits were able to apply Supreme Court precedents to ensure the constitutional protection of First Amendment rights.

Protest Permits. Unrestricted decision-making authority for protest permits has been a significant concern. Like in the early days of protest permits in NYC and Boston, there were challenges in ensuring proper constitutional restrictions persist. In *Burk v. Augusta-Richmond County* (2004), members of the National Council of Women's Organizations and the Rainbow/PUSH Coalition challenged the constitutionality of a county ordinance requiring permits for political demonstrations with five or more members. In anticipation of the county hosting the Masters Golf Tournament, the ordinance also required the personal details (i.e., address, name, and protest description), indemnification (i.e., contractual protection against losses) agreement approved by the county attorney, and give the county sheriff a host of reasons to deny the application (*Burk v. Augusta-Richmond County*, 2004; Garner, 2019a). The plaintiffs sued to enjoin the enforcement of the ordinance, alleging unconstitutional restriction of speech. After the district court converted this into a preliminary injunction, the court ruled against the plaintiffs, citing a likely lack of success in proving facial unconstitutionality.

However, the 11th Circuit reversed, citing *Police Dep't of Chicago* (1972) and *Hill* (2000), the court determined that this ordinance was a prior restraint on speech and was not content-neutral, as it targeted political protest. Moreover, the court determined that the least restrictive means was not used in its requirement for as few as five people to

necessitate a permit to protest. Additionally, in citing the decision banning unrestricted discretion on authorizing protests in *Shuttlesworth*, the court determined that the county had no legitimate system in which permits would be approved; this was also found to be true for indemnification agreements.

Cases Involving Protest Ordinances Where the Government Prevailed

Place of Protest Contested. In Washington D.C. the request of the Act Now Stop War and End Racism (A.N.S.W.E.R.) Coalition to use Freedom Park and surrounding sidewalks during the presidential inauguration to conduct their protest was examined in *A.N.S.W.E.R. v. Basham* (2017). The National Park Service permitted A.N.S.W.E.R. to use a limited portion of the Freedom Plaza, pursuant to a 2008 amendment that designated specific portions of the National Parks in the District of Columbia (D.C.) to the events connected with Presidential Inaugural Ceremonies. In response, A.N.S.W.E.R. challenged the allocation of the park space to the ceremonies (and related viewing, sanitary stations, etc.), rather than to the general public. This case was initiated in 2005, before the 2008 priority permit system was implemented; later, in 2011, A.N.S.W.E.R. was informed that the Inaugural Committee reserved this space, but in about 11 months (after the formation of the committee and the presidential election), the committee would decide whether additional space could be allotted to the protesters if it was not being used for the ceremonies. Several months after the Presidential Inaugural Ceremonies took place, the district court ruled in favor of the Parks, stating that their restriction was narrowly tailored and served significant governmental interests. The D.C. Circuit affirmed the district court, stating that the ordinance was a reasonable content-neutral restriction, was not retaliatory against the coalition, and left ample alternative space for

expression (i.e., 70 percent of the ceremony's route remained accessible). In their decision, the D.C. Circuit Court cited the precedents established in *McCullen* (2014), *Clark* (1984), and *Hill* (2000), among other Supreme Court decisions and D.C. Circuit precedent.

Manner of Protest Contested: Military Funerals. Predating the *Snyder* decision, *Phelps-Roper v. Strickland* (2008), the expansion of Ohio's funeral picketing ordinance was challenged by members of the Westboro Baptist Church (WBC). The plaintiff was a member of the WBC, a far-right Christian sect, and has an extensive record of protesting military funerals. Military funerals often receive significant media coverage, where the WBC can express their discontent with national policies (such as legalized gay marriage) to a broad audience. WBC protests have historically been lawful and nonviolent, and the WBC notifies and coordinates with local law enforcement their protest plans. First, the restriction of picketing funerals was expanded from one hour before the funeral or burial service also to include the hour after the ceremony. Next, the amended ordinance added a 300-foot buffer, where previously no boundary existed. Finally, the ordinance added restrictions regarding other protest activities that would disrupt funeral services. Contrary to the plaintiffs' allegations, the district court found that the ordinance was a narrowly tailored, constitutional, content-neutral restriction. The plaintiffs appealed.

The 8th Circuit held the funeral ordinance did not serve a significant government interest, the ordinance was not narrowly tailored, and there was a lack of ample channels of communication. Acknowledging that even controversial speech is protected (i.e., the decisions in *Street* and *Madsen*), mourners have the right to privacy, something which the

government has a significant interest in protecting. When considering the overly broad allegation, the court determined that the ordinance was more narrowly regulated than *Hill* and *Madsen*, thus determining that it was narrowly tailored. Finally, as the ordinance only restricts protest activity for a limited duration and the target audience is not the mourners themselves, the court affirmed that there were ample alternative channels for communication. Heavily citing the *Hill* decision, the 8th Circuit affirmed the district court's ruling that the ordinance was constitutional.

Similarly, in *Phelps-Roper v. Ricketts* (2017), the constitutionality of a Nebraska State Funeral Law was examined. During the plaintiff's original motion for a preliminary injunction of the funeral law, the buffer mandated by the law was expanded from 300 feet to 500 feet. The district court, in considering the previous decisions of the 8th Circuit in *Phelps-Roper v. Troutman* (2011) and *Phelps-Roper v. City of Manchester* (8th Cir. 2012), determined that the funeral ordinance was constitutional as applied to the plaintiff and on its face.

Upon appeal from the plaintiff, the 8th Circuit affirmed, saying the ordinance was content-neutral, was serving a substantial governmental interest (i.e., protecting the privacy and peace of funeral attendees), and that the increased size of the buffer zone did not substantially restrict more speech than necessary. The funeral law neither unfairly targeted the content of the WBC protesters nor favored the Patriot Guard Riders, who attended the funeral and helped to honor the seaman who was killed in action. Additionally, there was no evidence to support WBC's claims that they were restricted to protest in an area further than the 500 feet buffer. In addition to the previous decisions in the 8th Circuit, the decisions in *Gitlow* (1925), *Police Dep't of Chicago* (1972), *Wood*

(2014), *Chaplinsky*, *Hill* (2000), and *Madsen* (1994) were cited. Interestingly, this case only briefly references *Snyder v. Phelps* (2011), despite there being a similarity in the facts.

Manner of Protest Contested: Anti-Military. The overly broad failure to disperse provision in Chicago's disorderly conduct ordinance was examined in *Schirmer v. Nagode* (2010). The plaintiffs were protesting military recruitment by a downtown military recruiting booth. Police, who had cordoned off the protesters from the booth, ordered them to relocate to a designated protest zone. After some of the protesters refused, police arrested and charged them with disorderly conduct. When it became clear that the state did not intend to pursue charges against the plaintiffs, they sued the city, alleging that their constitutional rights were violated. Summary judgment was granted to the plaintiffs, as the district court concluded that the ordinance was facially invalid, vague, and permanently enjoined the city from enforcing the failure to disperse provision. Interestingly, the 7th Circuit determined, under the standard set by *Laird,* that the plaintiffs had no standing to challenge the constitutionality of the ordinance. In vacating the decision of the district court, the court cited the decision in *PeTA v. Rasmussen* (2002), as the plaintiffs were unable to establish that there was a threat of future injury, despite improperly being prosecuted for violating the law.

Manner of Protest Contested: Anti-Abortion. The Massachusetts ordinance, creating a six-foot floating buffer for all pedestrians and motorists approaching abortion healthcare facilities was examined in *McGuire v. Reilly* (2001). The ordinance also includes an 18-foot buffer from clinic entrances but allows protesters to stay in place if pedestrians approach them. The ordinance was heavily influenced by the statute in *Hill*

but is arguably less restrictive (e.g., specific types of clinics and a narrower entrance buffer). The district court enjoined the defendants from enforcing the ordinance after determining that the First Amendment rights of the plaintiffs, regular anti-abortion protesters, were violated under this ordinance. The 1st Circuit, however, concluded that the ordinance was content-neutral, and there was no indication that these restrictions would be arbitrarily enforced. Moreover, the six-foot buffer was only relevant for nonconsensual approaches, therefore, there are ample alternative means of expression available to the protesters. Both Supreme Court case precedent (e.g., *Hill, Clark,* and *Madsen*) and precedent established in the 1st Circuit were cited in the decision-making process.

Later, in *March v. Mills* (2017), a portion of the Maine Civil Rights Act was challenged as unconstitutional, after its amendment expanded protections concerning abortion healthcare clinics. More specifically, this case examines the noise provision within this act, which criminalized the continuation of making noise after being ordered to stop by law enforcement; the law criminalized the intent to interfere with the safe and normal operations of the clinic and the patients' health. The plaintiff sued various defendants for injunctive and summary relief, alleging that the ordinance was unconstitutional on its face and as applied to him. This suit was filed after the plaintiff conducted a protest at a Planned Parenthood clinic, where law enforcement ordered March to lower his volume, to be in accordance with the ordinance; but, police were unable to specify what volume level was permitted. Hence, the plaintiff alleged that this incident chilled his expression for fear of criminal repercussions. In granting the injunction against enforcing the noise ordinance, the district court determined that the

noise ordinance was a content-based restriction that admittedly serves significant governmental interest but does not do so in the least restrictive means possible.

Upon the defendants on appeal to the 1st Circuit successfully argued that the district court erred in concluding that the ordinance was a content-based restriction. The 11th Circuit said the ordinance did not mention the noise's content and included noises, like sirens, that do not express any message. Moreover, the restriction on noise was dependent on whether there was intent to be disruptive and, therefore, does not allow unlimited discretion to police enforcement. After clearly establishing that the ordinance was content-neutral, the court determined that it must be scrutinized under appropriate intermediate judicial scrutiny. Using this standard, the court determined that the ordinance was narrowly tailored and left ample alternative channels for communication; therefore, reversing the district court. In the 1st Circuit decision, the Supreme Court cases precedents cited, the decisions in *Grayned* (1972), *Gregory* (1969), *Madsen* (1994), *McCullen* (2014), *Hill* (2000), and *Clark* (1984), as were passive references to other 1st Circuit decisions (including *McGuire v. Reilly*, 2001).

Manner of Protest Contested: Animal Rights. Protests can often be passionate and abrasive to others; however, in *U.S. v. Fulmer* (2009), the manner of protest was volatile and was found to be in violation of the Animal Enterprise Protection Act (AEPA). The defendants, members of the animal rights organization Stop Huntingdon Animal Cruelty (SHAC), challenged the constitutionality of the AEPA and their convictions for interstate stalking, among other stalking charges, and conspiracy to use telecommunications to abuse, threaten, and harass. Members of the Huntingdon Life Sciences (a product testing corporation that used animal testing in all of their labs

internationally) were the target of the SHAC's protest and harassment. The SHAC's website was their primary tool for mobilization, and it posts their accomplishments (i.e., legal and illegal protests they took part in), information doxing the personal information of Huntingdon workers and their families, activist education (informing protesters of their rights), and tactics for civil disobedience (e.g., reposting the "Top 20 Terror Tactics"). In doxing (i.e., publicly releasing private information like phone numbers, home addresses, pictures, social security numbers, etc.) the workers and their family members, significantly more members of the SHAC can participate in these "protests" (Bei-Lei, 2018; *U.S. v. Fulmer*, 2009). SHAC conducted online protests such as virtual sit-ins, where hundreds of protesters simultaneously tried to access a Huntingdon website, effectively shutting the website down for a prolonged period of time. Physical protests, such as the protest at the house of a Huntingdon business partner, where protesters were recorded threatening arson and that the police would not be able to protect their family.

The defendants argued that their protests were simply part of their efforts to, directly and indirectly, pressure Huntingdon to change their business practices, activities protected under the First Amendment. Indeed, lawful protest was not only protected under the First Amendment but is mentioned explicitly as permissible under the AEPA. The 3rd Circuit affirmed the district court's that the AEPA was not impermissibly vague and that the application of the AEPA was not unconstitutional. Acknowledging that some of the speech used on the SHAC's website was protected under the *Brandenburg* (1969) standard, unprotected and illegal speech was also hosted on the site (e.g., true threats). Further affirming the decision of the district court, the 3rd Circuit affirmed the convictions

of the protesters citing the plethora of physical and digital evidence connecting them to AEPA violations and other criminal charges.

Protest Permits. While there have been historical and modern examples of unconstitutional ordinances governing protest permits, legitimate ordinances are essential to fairly regulate granting permits. An example of this can be seen in *Sullivan v. City of Augusta* (2007), where certain stipulations that were required for obtaining a protest permit were questioned. The March for Truth Coalition applied for a permit to host a protest march in the public streets of Augusta. The local police department informed the group that the permit required an initial $100 fee, in addition to fees for extra officers and equipment needed for traffic control and some form of insurance or bond. The plaintiffs claimed that both additional costs (i.e., for traffic and insurance) were unconstitutional burdens on peaceful protest rights. The district court granted the plaintiff's request to enjoin the city from enforcing these conditions and also enjoined the city from enforcing an additional mass outdoor gathering ordinance that required a bond. After the city removed the bond stipulation from the ordinance, the plaintiffs paid their required fees, were granted a permit, and hosted their protest. After the protest, the plaintiff amended his complaint, adding a second plaintiff who filed for a permit the same year, but was unable to pay the $2,000 in fees, was unable to get a waiver for the cost, and was unable to obtain a permit. The district court held that the plaintiffs had the standing to challenge the two permit ordinances and that portions of the ordinances were unconstitutional, but the city's waiver (for an event honoring law enforcement) was not in violation of the city's constitution.

However, the 1st Circuit ruled that the plaintiffs generally lacked standing to challenge these ordinances, as they could not prove that they sustained an injury. The district court's decision concerning the fee provision was reversed, as was the decision rendering the lack of an indigency waiver unconstitutional. However, the 1st Circuit held that the plaintiffs had standing to challenge the requirement that a permit request must be sent 30 days in advance of the intended protest and ultimately affirmed its unconstitutionality. The ordinance's requirement to have an in-person meeting with the police chief, to discuss the details and route of the protest, was also determined to be an undue burden for protesters, thus affirming the district court's decision of unconstitutionality. Additionally, after noting that one plaintiff was overcharged nearly $500, the 1st Circuit determined that this particular instance was an unconstitutional profit made from an otherwise constitutional ordinance stipulation. Therefore, the district court was affirmed in part and reversed and vacated in part. In their decision, the 1st Circuit heavily relied on precedents set within the 1st Circuit, Maine's protest ordinance law, and Supreme Court decisions outside of those included in this analysis.

Cases Involving General Protest Restrictions

Cases Involving General Protest Restrictions where Protesters Prevailed

Manner of Protest Contested. Regulations concerning anti-abortion protests have a long history in the circuits. Often, these cases are concerned with the manner of protest, including buffer zones and noise amplification. *New York ex rel. Spitzer v. Operation Rescue National* (2001) covers such concerns. The facts showed that a preliminary injunction was expanded and applied to a new group of anti-abortion protesters. Extensive anti-abortion protests in 1992, at clinics in Buffalo and

Rochester/Syracuse Region (RR), had prompted the establishment of a 15-foot buffer zone (by entrances and exits of places administering abortion care) but allowed two sidewalk counselors at a time to enter the buffer zone. However, within a few years, the anti-abortion protesters, under the organization Operation Rescue National, amped their protest tactics up (i.e., threatening violence and physically obstructing the clinic). In response, the district court issued a preliminary injunction in 2000, which enlarged the 15-foot buffer zone to cover all doorways, walkways, or street entrances for all reproductive clinics, eliminated the exception for sidewalk counselors to enter buffer zones, and banned the use of noise amplification devices.

The defendants in this case were two anti-abortion protesters who violated the Freedom of Access to Clinic Entrances Act (FACE), public trespassing, and public nuisance laws. The 2nd Circuit, while passively acknowledging the *Terminiello* (1949) decision that speech can be inflammatory, determined that the actions of Mary Melfi (one of the defendants) were sufficient to grant injunctive relief for her FACE violation. However, unlike Melfi, the court vacated and remanded the injunction against Melfi's codefendant as there was insufficient evidence to exercise injunctive relief. Additionally, the court noted that the nuisance and trespassing charges, which were used in the district court to further justify the injunction, could not provide a legitimate basis for Warren's injunction.

Concerning the constitutionality of the injunction itself, the 2nd Circuit cited *Hill* (2000) and *Madsen* (1994) in their determination that there were significant governmental interests, but noted that the significantly expanded buffer zones and the blanket ban on sound amplification were unconstitutionally broad. At the Buffalo clinic,

the new buffer zone blocked the surrounding 200 feet area, including public sidewalks and entrances to other businesses. Still, the court notes that there were adjustments that could make the buffer zone narrowly tailored. At the RR clinic, a buffer zone of over 100 feet was enforced, restricting protests to the other side of the road, resulting in multiple instances where traffic was interfered with. While the district court's opinion was partially affirmed, concerning Melfi's injunction, the overbroad restrictions on protester rights were reversed.

Preemptive Restriction Contested. Prior restraint of speech and expression is a concerning act of censorship. This form of preemptive restriction is examined in *U.S. v. Frandsen* (2000). The defendants were arrested and convicted on federal charges of protesting in a public park without a permit. The defendants argued that this permit requirement was facially unconstitutional as it was a prior restraint on expression and lacked adequate safeguards concerning discretion. The magistrate judge determined the park was not a public forum, as the government intended it to be used recreationally and the permit system was a reasonable content-neutral restriction. In appealing their conviction, the district court affirmed the decision of the magistrate judge. On appeal, the defendants allege that the regulation lacked critical protections from enabling prior restraint on speech, was overly broad and failed to provide a legitimate government interest, and gave the park superintendent unrestrained authority to deny permits.

The 11th Circuit concluded that the park was indeed a public forum and required specific requirements to be met when examining the constitutionality of prior restraint. The court determined that since the park granted the superintendent an unrestricted amount of time (i.e., without reasonable delay) to make a decision concerning the permit,

it is facially unconstitutional. Since the regulation was found to be facially unconstitutional, the court did not need to examine additional concerns about its constitutionality. Ultimately, in its reversal of the district court's decision, the court referenced precedents established in Supreme Court cases outside of this research, as well as those in the 8th, 9th, and prior 11th Circuit decisions.

Police Misconduct Contested. The power of a protest rests in its ability to express its message to its intended audience. When prevented from doing so, the protest remains pointless. In *Amnesty International v. Battle* (2009), the actions of police officers, which effectively restricted its message from being publicly seen, heard, or even accessible, were called into question. After obtaining a permit from the city's police department, protesters from Amnesty International were starting their demonstration at a public monument when the defendants ordered police to block off the area 50 to 75 feet surrounding the protesters and monument. Additionally, police were ordered not to let anyone into the area where the demonstration was being held. People who attempted to join the demonstration were prevented from doing so, Amnesty protesters attempting to distribute literature were prevented from doing so, and the police presence prevented others from seeing or hearing the protest. In the plaintiff's claim for compensatory and punitive damages and a declaratory judgment that the defendants knowingly violated clearly established First and Fourteenth Amendment rights. However, the district court granted the defendants' motion to dismiss the charges due to a lack of standing and protection under qualified immunity.

Upon review, the 11th Circuit Court of Appeals determined that the organization was able to establish standing for nominal damages on their own behalf (as an

organization) but not on the behalf of the organization's members as they failed to claim an injury-in-fact. Moreover, the actions of the police, which essentially rendered the protest to be meaningless and failed to present alternative channels of communication, were determined to be not protected under qualified immunity; not only was it not a reasonable time, place, or manner restriction, the police violated a clearly established right to assemble and to be heard while doing so. Ultimately, the decision of the district court was partially reversed and remanded and partially affirmed. The Supreme Court decisions in *Saia v. People of the State of N.Y.* (1948) and *Ward v. Rock Against Racism* (1989) and the 11th Circuit's decision in *Warner Cale Commc'ns, Inc. v. City of Niceville* (1990) were cited as establishing the right to be heard within the First Amendment.

Cases where the Government Prevailed

Place of Protest Contested. While public forums are traditionally spaces of protest, this accessibility is not indicative of an absolute right to public forums. This is especially true in situations where safety concerns exist. In *Elend v. Basham* (2006), plaintiffs were protesting a political rally that President Bush was attending. During their protest, they were approached by police, telling them they must go to the area designated for protest (dubbed the First Amendment zone). Protesters complained that this violated their rights, as supporters of the president were not asked to move to the First Amendment zone, which was a quarter of a mile away from the venue. When refusing to move, the protesters were arrested for trespassing after a warning, charges were ultimately dropped. After a series of arguments between the plaintiffs and defendants, the district court ultimately granted summary judgment for the defendants, they were acting on behalf of the state and no evidence was presented by the plaintiff proving

unconstitutionality. The plaintiffs appealed, naming the Secret Service as defendants. Concerning ripeness (i.e., potential harm) and standing, the protesters asserted that there was an actual threat of injury (e.g., arrest) in the immediate future because of their future intentions to protest at unspecified events where Secret Service maintained security.

The 11th Circuit affirmed, determining that the protesters' allegations were unfounded. Protesters were unable to establish the requirements for a real and immediate threat of injury (from the Secret Service's potential future actions). They lacked redressability (i.e., potential options in which the injury could be resolved or adequately addressed). In its decision, the 11th Circuit emphasized that the blanket threat of future injury, which lacked any grounding in an actual event, was insufficient evidence of injunctive and declaratory relief. Interestingly, the only Supreme Court case relevant to the current analysis was only a passive reference to *Police Dept. v. Mosley* (1972).

Predating the Supreme Court decision in *Woods, Pahls v. Thomas* (2013) similarly examined the Secret Service's relocation of protesters for the sake of presidential security. President George Bush was attending a fundraising event at the home of a Senator when two groups of demonstrators gathered. Bush's supporters, were allowed to stand on private property (as the property owner requested agents to) less than 15 feet from the road that the presidential motorcade would use. Other protesters challenging Bush's involvement in the Iraq War were significantly further from the roadway (about 300 yards away), moving multiple times under the direction of Secret Service agents. Due to the distance and location, the protesters and their signs were obstructed from the president's view (and vice versa). The protesters alleged that their constitutional rights were violated due to the seemingly content-based restriction enacted

by Secret Service members. The district court agreed with the protesters, denying the summary judgment requested by law enforcement, stating that a reasonable jury could conclude that the anti-Bush protesters were targeted. The Secret Service argued that their actions were based on security concerns and respect for property rights. Still, in addressing the law enforcement agents as a whole, the district court determined unconstitutional restrictions were enacted.

The 10th Circuit reversed the decision of the district court, determining that the requirements were not met for holding government officials personally liable. The court referenced 42 U.S.C. § 1983 (concerning liability for state officials) and *Bivens* (§ 1983's counterpart for federal officials). In determining that the plaintiffs did not successfully show that the anti-Bush sentiments caused each individual defendant to execute content-based discrimination, the court granted qualified immunity to the law enforcement officers. Interestingly, the court noted that even when assuming that law enforcement, as a whole, implemented content-based restrictions, the individual violations of the defendants remain unsubstantiated; they concluded, citing the decisions in *Madsen* (1994)*, Police Dep't of Chicago* (1972), and *Clark* (1984) that this differential restriction was a result of multiple content-neutral restrictions being carried out.

An emergency order, restricting access to downtown Seattle, with exceptions for participants in the World Trade Organization (WTO) conference, business owners and employees of the area in question, and health and safety personnel, was examined in *Menotti v. City of Seattle* (2005). A series of protests took place during the weeks leading up to the WTO conference. While the majority of protests were not violent, violent protests threatened public safety (e.g., lighting dumpsters on fire and protesters pulling

out a sanitation worker from his truck and assaulting him) and as did the police's response to protesters (i.e., use of chemical agents, rubber bullets, and beanbag guns on crowds, and failing to distinguish between nonviolent and violent protesters). During the largest protest, which police estimated to be over 40,000 participants, the Mayor of Seattle declared a state of emergency and the governor of Washington deployed the national guard. While implementing the zone of restriction decreased the violence, some protests and scattered violence persisted.

This case is the result of the consolidation of two separate lawsuits. The Hankin plaintiffs were arrested for trespassing in the restricted area after a group of protesters (outside of the restricted zone) headed toward a region in the restricted zone. As police surrounded the protesters, they sat, where (allegedly without warning) the police arrested the protesters. The Menotti plaintiffs were engaging in various activities in the protest zone, including an attendee of the WTO conference running from police after thinking police were trying to disperse the crowd of people around which he was standing. Others were distributing political cartoon flyers, attempting to leaflet, and picket.

The district court determined that the emergency order was a reasonable content-neutral restriction that served a significant governmental interest and allowed for alternative avenues of communication. Citing *Hill* (2000) and *Madsen*'s buffer zones, the 9th Circuit held that the emergency order was content-neutral, narrowly tailored to protect both attendees and the President from the (small number of) violent protesters. While acknowledging the importance of protest, even in contentious circumstances, Supreme Court precedents such as *Brandenburg* (1969) and *Shuttlesworth* (1969), the court largely affirmed the district court's decision.

Protesters could still conduct their protests within a visible and audible range of conference attendees. Additionally, the 9th Circuit ruled that the emergency order did not grant unrestricted discretionary power to the police (i.e., it did not permit content-based restrictions when enforcing who had access to the restriction zone). The court, however, reversed the summary judgment concerning Menotti's arrest under the First Amendment (i.e., that the city had a policy during the conference to suppress oppositional beliefs, even for people otherwise qualified to enter the restricted area). The district court's grant of qualified immunity for the warrantless seizure of a protester's sign was also reversed; however, the arrests of the other protesters and the facial constitutionality of the emergency order were affirmed.

Manner Contested. While the courts have tolerated anonymity in certain methods of speech (see Smith Ekstrand, 2013), the ability to protest anonymously does not enjoy legal protection. In *Gates v. Khokhar* (2018), the state law banning the use of face masks (i.e., facial coverings that obstruct the individual's identifiability) in public spaces was examined when protesters wore a "V for Vendetta" mask during a protest of the murder of Michael Brown. Police ordered the protesters, using a noise amplifier, to take the masks off multiple times, police also warned that those who did not comply would be arrested. The plaintiff, refusing to take the mask off, noted that the mask was supposed to represent the disapproval of the jury decision in Ferguson, Missouri (i.e., the officers involved in the shooting of Michael Brown were not indicted) and to remain anonymous. After, what Gates determined to be an unlawful and unnecessarily aggressive arrest, Gates sued the arresting officer, the defendant Officer Khokhar. The

district court denied Khokhar's motion to dismiss on the grounds of qualified immunity, despite the City's Office of Professional Standards deeming the arrest lawful).

The 11th Circuit, however, disagreed with the district court's decision, finding that the officer acted in good faith and that there was probable cause that Gates was violating the mask statute. The 11th Circuit repeatedly cited the Georgia Supreme Court, which had previously upheld the constitutionality of the mask ban to prevent the intimidation or terrorization of organizations such as the KKK. The Georgia Supreme Court, in *State v. Miller* (Ga. 1990) and *Daniels v. State* (Ga. 1994), held that convictions on this state law are only permissible when the government proves that the individual wore the mask knowingly to conceal their identity and that the mask will evoke reasonable apprehension, intimidation, or fear; therefore, the 11th Circuit found that the defendants had probable cause to arrest Gates. Furthermore, the court determined that the officers should be granted qualified immunity since no clearly established legal precedent followed this case's facts. Finally, the plaintiff was unable to prove that during the alleged aggressive arrest the officers acted maliciously or with the intent to harm Gates Interestingly, this case did not cite Supreme Court cases of interest to this research. The majority opinion largely relies on the 11th Circuit Court of Appeals and Georgia case law.

A group of Black college cheerleaders, inspired by Colin Kaepernick's series of protests against police brutality of Black Americans, began kneeling during the national anthem, sparking the events in *Dean v. Warren* (2021). After public backlash (including from the state legislator in charge of the public universities' budget) to the demonstrations, administrators from the university met and determined that counter to legal advice, the cheerleaders should be stopped from protesting. The university's athletic

director informed the cheerleading team that they would no longer be on the football field during the national anthem and would have to wait in the stadium's tunnel until it was completed. While the cheerleaders complied, only kneeling in the tunnel (following the threat of being removed from the team), fellow students, members of the public, and members of the Board of Regents expressed their support of the cheerleaders' protest. After one month, the university succumbed to public pressure, ending the restriction.

Thereafter, Dean, one of the cheerleaders who organized this series of protests, sued two groups of defendants for deprivation of constitutional rights. However, the current case only examined the suit involving the county's sheriff (who also expressed that the cheerleaders needed to stop their protests) and the state legislator who initiated the protest ban, Dean claimed they engaged in a conspiracy against her and her teammates because of their race and the content of their protest under 42 U.S.C. § 1985(3), i.e., the remaining protections from the Civil Rights Act of 1871. Dean claimed that there was a direct race-based animus, an indirect race-based animus, and a political class-based animus. The district court dismissed the suit, but the Eleventh Circuit granted de novo review.

First, the direct race-based animus claim was determined to be unsubstantiated. Affirming the district court, the court clarified that without facts, the most likely motivation for the alleged conspiracy was the content and nature of the protest, rather than the race of the protesters. Next, while the indirect race-based animus claim was factually supported, it was not legally supported. Citing the precedent established in *Bray* (1993), the court determined that the class in question, Black students protesting police brutality against Black Americans, was akin to the unpersuasive class of women seeking

abortions. The indirect race-based animus claim was diminished because Dean was unable to prove that the opposition to cheerleaders kneeling during the anthem can be reasonably assumed to be racially motivated or that class-based (racial) animus can be assumed by alleged discriminatory actions. Finally, also affirming the district court's decision, the political class animus claim (i.e., protesters of police brutality against Black Americans) could not be substantiated; citing *Bray* (1993), plaintiffs suing under § 1985(3) were unable to establish a conspiracy based on defendants opposing the conduct/message. Ultimately, Dean was unable to prove class-based animus and, therefore, the court affirmed the decision of the district court to grant a motion to dismiss.

Preemptive Restriction Contested. As evolved across American history, the right to protest does not guarantee protesters the right to protest in the exact time, place, or manner desired. Legitimate, content-neutral restrictions may necessitate alternative means of protest. In *United for Peace and Justice v. City of New York* (2003), plaintiffs alleged that the city abused its discretion in denying its permit to hold its anti-war protest. The district court determined that since the plaintiffs only submitted one route for approval, (i.e., in front of the headquarters of the United Nations), the city did not have enough time to coordinate security. Despite there being annual cultural parades, this proposed protest differed as it was regarded as a different manner of parade, requiring different planning compared to annual parades. Further, the alternative offered by police, to hold a stationary protest in front of the United Nations headquarters, was determined to be an adequate alternative means of communication and was narrowly tailored to the security concerns that were presented by the protester's march. Additionally, as the plaintiffs were determined to be unlikely to be successful in their argument, the court

denied the plaintiff's application for a preliminary injunction. Outside of a passing reference to the *Gregory* decision, the court's decision heavily relied on the precedents established by the 2nd Circuit precedents and Supreme Court cases outside of the current research.

Adequately preparing for a protest, especially with more contentious messages, is the norm and is expected of law enforcement; however, violent or illegal activity cannot be shielded under the protections of political protest. In *Cross v. Mokwa* (2008), a (violent) protest at a large agricultural conference was anticipated by local law enforcement. The Federal Bureau of Investigation, which had briefed local police on how to handle potentially violent demonstrations, noted that incoming (violent) protesters would likely illegally occupy abandoned or condemned buildings, which prompted increased surveillance on qualified buildings. A building, which had been condemned since 1999, was used by the defendants (with the permission of the owner, who had known since 2002 that any occupants would be arrested) who had planned on attending the protest. After officers were made aware of the plaintiffs' illegal occupancy, they went to the building and told the occupants that they must leave or face arrest. The occupants told police that they were not going to open the door. Police forcibly entered, where they found a slingshot, a banner that read "Kill Police," a bottle with a rag protruding, PVC pipes, a container of gasoline, and two (flammable) camper fuel cans.

When the occupants were arrested for illegally occupying the condemned building, the plaintiffs alleged that their arrests were an unconstitutional restriction on their right to protest. The district court granted the officers qualified immunity from the unlawful arrest allegations but refused to grant qualified immunity for the officers'

alleged warrantless entry, search, and seizure of the property. The 8th Circuit disagreed with the denial of qualified immunity concerning the entry, search, and seizure; the 8th Circuit ruled that while the plaintiffs had limited standing as occupants of the building, these did not outweigh the authority of the police to enter the property, in order to evict occupants of an unsafe building. The district court also denied qualified immunity to the police on the claims that the plan to enforce building code violations was a thinly devised plan to exert prior restraint on protest.

However, again, the 8th Circuit disagreed, explaining that the police did not respond disproportionately to the plaintiffs illegally occupying the building, as they had probable cause and were refused entry. Further, the 8th Circuit determined that the officers' actions were not an intentional prohibition of future protest activity. Despite this partial reversal of the district court's decision, the 8th Circuit affirmed the denial of a summary judgment for an alleged strip search of a female occupant. Additionally, the court affirmed the denial of qualified immunity, concerning a second building that officers entered without a warrant, searched, and seized property (that was believed to be tied with violent protest activity), as there was a factual dispute on whether the building qualified under the Condemned Building Order. Interestingly, in this case, the majority opinion does not reference any of the Supreme Court cases of interest; rather, it strongly relied on the precedent established in this circuit and Supreme Court cases outside of those included.

Law Enforcement Misconduct Contested. The sensitive topic of arrest and strip and body cavity search was addressed in *McCabe v. Parker* (2010). Members of the Linn County Democratic Party (LCDP) organized a protest against the Republic National

Committee's (RNC) campaign rally that was to be held at the park's pool house. Extra security measures were implemented as President Bush was scheduled to appear. Despite strict pedestrian regulations being implemented by the Secret Service, these regulations were not made known to the public. Unbeknownst to the plaintiffs, the LCDP had changed the location of the planned protest due to additional security measures implemented by the Secret Service. The plaintiffs were asked by law enforcement to move from the sidewalk to the street a few blocks away, which the plaintiffs refused. Despite the plaintiffs only being arrested on a misdemeanor trespassing charge, a female Deputy Sheriff conducted a full strip and body cavity search (in violation of jail policy) in a space that lacked privacy. Further, since the RNC never obtained permission for the exclusive use of the public streets and sidewalks, the trespass charges against the plaintiffs were dismissed.

In their suit, the plaintiffs alleged that their constitutional rights were violated numerous times in the process of their arrest and strip and cavity search. The plaintiffs also allege that the Bush administration was conspiring to squash dissent to its Iraq War policy, nationwide. The district court dismissed most of the claims before the trial, so the trial was focused on the constitutional violations that transpired during their unlawful arrests and damages concerning the strip and cavity search. The district court, after determining there was probable cause for the arrests, entered a directed verdict concerning the jailer's liability (i.e., a trial judge taking a case from a jury as the evidence presented can only support one reasonable verdict), with the jury determining the damages awarded to the plaintiffs (Garner, 2019c; *McCabe v. Parker*, 2010).

On appeal, the 8th Circuit determined that probable cause existed for the arrest of the plaintiffs on the grounds of disobeying the instructions of federal agents. Therefore, their arrests were not in violation of the First Amendment.

While the court noted that the district court did not abuse its discretion in granting a new trial and offering a remittitur (i.e., the court gives the plaintiff the option of the case being reheard or accepting a decreased amount in damages than awarded by the jury), the court ruled that the district court abused its discretion in remitting a combined award of $75,000, which was a 90% reduction of the jury award (Garner, 2019b; *McCabe v. Parker*, 2010). The reduced award was insufficient as it was based on the reasonable amount for one plaintiff in 1978; the award did not consider this case's multiple plaintiffs and failed to adjust for inflation. Moreover, as the plaintiffs are determined to be the prevailing party, they are entitled to recover attorney's fees during the second trial. Ultimately, the 8th Circuit Court of Appeals affirmed in part and reversed and remanded the case back to the district court's for a trial on damages. The court did not reference any Supreme Court case included in this analysis in its decision.

CHAPTER V

Conclusion

The First Amendment has had a profound impact on expression and allowing the people of America to share their voices. Throughout history, political protest has been a powerful tool to express discontent and urge for change. With the nation's maturation, legal restrictions on political protests in public forums have also evolved.

Since its incorporation to the states in 1937 by the *De Jonge* decision, the Supreme Court has interpreted First Amendment rights of political protest in public forums for protesters across the country. In the 27 U.S. Supreme Court cases from 1925 to 2014 examined in this thesis, content-neutral restrictions of political protest in public forums were examined. Generally, these cases covered a wide variety of topics of protest, including: issues surrounding partisanship (i.e., right-wing and left-wing sentiments), discontent with the nation's policy or president, homelessness, and the military (including anti-Vietnam War sentiments), anti-abortion, and civil rights. Among these topics, protests involving anti-abortion sentiments and civil rights were heavily represented.

U.S. Supreme Court Findings

An important aspect of constitutional regulation of political protest has been rooted in permits. While blanket bans of spaces and manner, within public forums, and unfettered discretion in authorizing protest permits, content-neutral restrictions, which are narrowly tailored, leave ample alternatives for communication/expression, serve a significant governmental interest, and use the least restrictive means are common. Acknowledging the existence of unconstitutional permit systems, the Court clarified that just because one suspects that a permit system, or ordinance regulating protests, is

unconstitutional does not grant protesters permission to knowingly violate these laws without first attempting legal redress. Moreover, regardless of obtaining a permit to protest, law enforcement has the right to intervene and uphold public safety where there is a significant, imminent threat or actuality of criminality, in response to or as a part of a political protest.

However, law enforcement may not intervene merely when speech annoys, angers, or causes controversy among listeners. This is precisely the type of speech that the First Amendment was aimed to protect. The Supreme Court, in its decisions, does not necessarily condone the messages of such protests. However, it emphasizes the necessity of such speech to exist in a free, democratic society. In the shadows of our colonial past, governmental censorship of its people is something largely not tolerated by the Court. Although exceptions, such as fighting words, exist, the Supreme Court has maintained that (most) speech is protected in public forums.

The precedent established by the Court concerning offense or annoyance was heavily discussed concerning the burning of American flags in protests. While often revered as a symbol of national unity, the United States flag is an object that is often utilized by protesters to express their frustrations with the state of the nation. Similar to other speech that may annoy or offend others, the First Amendment protection of burning an American flag during a protest dates back to 1969.

Finally, the Court's caution surrounding censorship does not permit protesters to create captive audience situations. While protests are often intentionally planned so that a large audience will be exposed to the message of the protesters, protesters cannot force their intended audience to listen to their message. The Court has interpreted and

developed its precedents concerning cordoning off entryways, sidewalk counselors breaking buffer limits, buffers for picketing funerals, among other topics. Related, the right of access to limited forums differs greatly to that of a public forum.

The precedents established in these cases by the Supreme Court have evolved over time. As the policies of the nation has changed, so has the nature of political protest. Long gone is the rudimentary permit systems and unchecked authority to prevent protests. Now, the government must bear the burden of proving that a protest restriction is constitutional. Acknowledging that while no system is perfect, the U.S. Supreme Court system has facilitated an improvement to the rights of protesters. These precedents have been closely followed and applied by the U.S. Circuit Courts of Appeals for the past 21 years.

U.S. Circuit Court of Appeals Findings

This thesis examined the applications of Supreme Court precedents by the 13 U.S. Circuit Courts of Appeals. Interestingly, of the 28 cases examined in this thesis, the vast majority of cases were based in the 8th and 11th Circuit Courts of Appeals. Further, no cases from the 4th, 5th, 6th, or 12th Circuit Courts of Appeals were directly examined in these cases.

Despite these Circuit Court of Appeals cases only examining cases from 2000 to 2021, there are many similarities to the topics of protest found in the Supreme Court cases. Anti-war (i.e., Operation Iraqi Freedom), civil rights, and anti-abortion protests were at the center of many of these protests. Other protests focused on topics such as animal rights, discontent with national policies or the president, left-wing, and right-wing sentiments.

Interestingly, there are a sizeable number of Circuit Court of Appeals cases that fail altogether to, or only passively, reference any of the Supreme Court precedents discussed in this thesis. A heavy emphasis is placed by these courts on Supreme Court cases outside of the scope of this thesis. Further, the precedent established within the particular circuit seems to also heavily influence the decision-making process of the U.S. Circuit Courts of Appeals. However, a few of the cases reference the decisions in other circuits in the majority opinion of the court. While a limited number, this persuasive authority of other circuits brings interesting insight to the decision-making process of the U.S. Circuit Courts of Appeals.

A sizeable portion of these Circuit Courts of Appeals cases is centered on cities implementing some form of a blanket ban on a place or manner of protest. While there are instances where a restriction, adjacent to a blanket protest, can be upheld (like the ban on masks in *Gates v. Khokhar,* 11th Cir. 2018), unsubstantiated claims and the lack of substantial government interest being served are concerning. A possible motive for this unconstitutional restriction may be that these cities have a particular type of protest they are targeting; instead of implementing a restriction that is more blatantly constitutional (in targeting this form of activity), plausible deniability may be argued under a blanket ban. Further, overly broad restrictions or ordinances are notable in these cases. While mostly constitutional, the cases in question often have included certain stipulations or definitions that can easily be cross-referenced, to previous court decisions, indicating it to be unconstitutional. The important role of the Circuit Courts of Appeals, in rectifying these unconstitutional restrictions, is highlighted.

Additionally, the prominance of protest ordinances and permits granting (largely) unfettered authority to deny or stop protests is concerning. Upon initial glance, these ordinances may seem constitutional, yet most lack adequate transparency concerning the decision-making process of law enforcement or other officials. While operationally there may be some informal process, the Circuit Courts of Appeals have found that these restrictions are overly broad, overburden protesters, and are, thus, unconstitutional.

Implications & Policy Suggestions

In almost all of the cases, law enforcement is involved in the enforcement of these restrictions. Moreover, law enforcement at the scene of these protests will arrest and charge protesters with a variety of charges including disorderly conduct, failure to disperse, trespassing, and failing to comply with orders from a law enforcement officer. While this, indeed, is an important role in the security and maintenance of order, law enforcement is also responsible for safely ensuring that protesters are able to exercise their constitutional rights. This is what makes the facts of *Snider v. City of Girardeau* (8th Cir. 2014) and *Amnesty International v. Battle* (11th Cir. 2009) disturbing and key learning points for law enforcement and other criminal justice actors.

Both numerous law enforcement officers and the prosecuting attorney in *Snider* were completely unaware of the precedent established by Supreme Court, well over 20 years prior in *U.S. v. Eichman* (1990). While the court determined that the officer was not eligible for qualified immunity, as this was a well-established precedent, the city was not held responsible for improperly training officers, as their training was conducted through the state. Further the court declared that the protester's claim against the prosecuting attorney moot. Additionally, in *Amnesty International v. Battle* (11th Cir. 2009), police

created a physical blockade around protesters, preventing other protesters from joining and essentially rendering the protest ineffective as the protesters were not audible or visible to their audience and news outlets. An essential aspect of political protest in public forums is the delivery of one's message, something that was directly inhibited by police. The negligence of both the prosecutor and police in these cases can be used as an example of why it is critical to be well informed on First Amendment rights of political protesters.

Regions that have a high number of protests should be diligent in maintaining proper education on the legal boundaries of political protest. The cases included can serve as important examples on the legal boundaries of political protest for criminal justice actors. For areas that regularly host to political protests, especially those that gather large crowds, mandatory training on their expectations as officers to protect and serve both protesters and the general public. This could include mandating officers to attend the Bureau of Justice's online First Amendment training for responding to First Amendment-protected events.

Further, organizations like the American Civil Liberties Union have pamphlets for protesters, informing them of their constitutional rights; this form of shorthand, easily accessible tool may be useful for law enforcement who are not used to enforcing and policing protests. While the Bureau of Justice has a reference card for "the role of state and local law enforcement at first amendment events," the details are overly broad (e.g., "officers will protect life and property") and could use an update (see "The role of state," n.d.).

However, the Bureau of Justice does have a document containing recommendations for state and local law enforcement for properly handling First Amendment-protected events ("Recommendations for First Amendment," 2011). This document includes recommendations for preparing for protests, during protests, and the aftermath of protests. While a decade old, the document does hold important guidelines, based on Supreme Court precedents, which can be useful for law enforcement in the administration or leadership sects. This document should also be updated (as it is a decade old) to reflect the most relevant precedent concerning First Amendment rights concerning political protest.

The protests during the aftermath of the murder of George Floyd exemplify the unpreparedness of law enforcement to constitutionally police protests. Law enforcement often are lacking detailed training on First Amendment rights; New York Police Department's police academy training altogether lacked even basic instruction on policing protests ("Investigation into NYPD," 2020; Speri & Bolger, 2021). Resources, such as the ones previously mentioned, could have been incredibly useful in informing law enforcement of their expectations. Further, in response to the horrendous responses to Black Lives Matter protesters in 2020, the Major Cities Chiefs Association produced a report on the best practices and tactics for responding to political protests. In this report emphasized the need for increased training on responding to political protests, the importance of engaging with protest organizers/leaders, and maintaining communication among officers and the district attorney, among other recommendations ("Law enforcement response," 2021).

Additionally, defense attorneys and prosecutors should also have some additional expectations to maintain their knowledge of constitutional law. After police, prosecutors are the next step in the criminal justice system which can filter out improper restrictions on protest. As witnessed in *Snider*, the familiarity and reliance on criminal law during their daily tasks may fog prosecutors' proficiency in constitutional law. Coordination with law enforcement and courses focused on refamiliarizing attorneys with these important precedents could be impactful.

Limitations

This thesis is the first of its kind in creating a comprehensive analysis of First Amendment protections of political protest in public forums. Both the U.S. Supreme Court and the U.S. Circuit Courts of Appeals were examined using restricted search guidelines on WestLawNEXT and inductive, doctrinal legal research. While this thesis is filling a major gap in literature, especially criminal justice literature, there are some notable limitations.

Concerning the initial case collection, the use of WestLawNEXT has limitations. The cases included in the U.S. Supreme Court case analysis range from 1925 to 2014; thus, the most recent U.S. Supreme Court case decision is eight years old. Also, the search parameters for the U.S. Circuit Courts of Appeals cases had to be modified from what was used for the U.S. Supreme Court. After restricting the results to cases from the year 2000 onward, the same search terms that were used to find the Supreme Court cases were searched. This search produced over 10,000 cases. In an effort to narrow the scope of the search, the search parameters included in the methodology was used, reducing the search results to only 432 cases. While this modified search was useful to narrow the

scope of the search, other important cases may have been excluded from the search results.

Additionally, as noted by Bhagwat (2016), for more than 30 years, legal discourse surrounding the First Amendment has almost exclusively focused on free speech, rather than the Assembly Clause. Essentially, in the eyes of the Court, free speech absorbed the cases surrounding public gatherings (Bhagwat, 2016). Therefore, the timely research on political protest used in this thesis is largely centered on assembly under the umbrella of free speech. Thus, case interpretations and discussions have relied on the combined resources of modern free speech and earlier assembly resources.

Finally, this thesis focuses on political protests in public forums as it is the historical and traditional place of political protest. However, this excludes cases concerning protests in nonpublic and limited public forums. Outside of brief references in the included cases, an in-depth analysis of these forums and political protests would be interesting.

Recommendations for Future Research

Among future research endeavors, the inclusion of nonpublic and limited public forums could enrich the current literature. Further, concerning the confines of the search parameters used in this thesis, future research can also include unreported cases in the analysis. Additionally, the impact of labor protests on modern political protests could be further researched to expand the historical analysis of protests.

In the aftermath of 2020, an influx in state laws restricting protests has been passed (Quinton, 2021). Future research can examine the constitutionality of these new laws, their impact on protests, and their potential to chill speech. Additionally,

considering the recent leak of the majority opinion draft of the U.S. Supreme Court, concerning *Roe v. Wade,* the upcoming decisions of the Supreme Court should be paid close attention to. This leaked draft foreshadows potential changes to well-established constitutional rights, that possibly includes First Amendment rights.

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VITA

Allison G. Kondrat

Curriculum vitae

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EDUCATION

2020- Present	**Master of Arts, *Criminal Justice and Criminology*** (Expected 2022) Sam Houston State University, Huntsville, Texas *Thesis*: "Good Trouble:" First Amendment Protections of Political Protest in Public Forums. *Committee*: Dr. Michael Vaughn (chair); Dr. Stuti Kokkalera; Dr. Miltonette Craig
2020	**Bachelor of Arts, *Sociology (Criminology)*** Minor: *Political Science* University of Portland, Portland, Oregon *Cum Laude*

Non-degree seeking student at: Sam Houston State University, Huntsville, TX (2018), Temple College, Temple, TX (2017), Greystone Preparatory School at Schreiner University, Kerrville, TX (2016-2017).

PROFESSIONAL EXPERIENCE

2022-Present	*Graduate Assistant* Sam Houston State University- Department of Criminal Justice and Criminology Dr. Ling Ren, Dr. Jonathan Reid & Dr. Solomon Zhao
2021	*Graduate Assistant* Sam Houston State University- Department of Criminal Justice and Criminology Dr. Ling Ren & Dr. Jonathan Reid
Summer 2021	*Graduate Student Summer Research Fellowship* Sam Houston State University- Department of Criminal Justice and Criminology Fellowship Advisor: Dr. Eric Connolly
2020-2021	*Graduate Assistant* Sam Houston State University- Department of Criminal Justice and Criminology Dr. Travis Franklin & Dr. Steven Cuvelier
2020	*Undergraduate Teaching Assistant* University of Portland- Department of Sociology Mapping Social Problems Dr. Bryan Rookey

RESEARCH INTERESTS

Racial and ethnic disparities in criminal justice; Domestic terrorism; Crime legislation; Public perceptions of crime; Substance use disorders.

CERTIFICATIONS/ TRAINING/ WEBINARS

2022	Unconscious Bias Training (SHSU Inclusion Diversity Equity and Access Institute)
2022	Haven 101: LGBTQ+ Allyship Training (SHSU Inclusion Diversity Equity and Access Institute)
2022	JCOIN Certificate: Public Health Staff Undertaking Skills to Advance Innovation (SUSTAIN)
2022	JCOIN Certificate: Addressing the Stigma Around Substance Use
2021	Race, Police, and Power in Small-Town America (webinar)
2021	Professional Development Certificate (Graduate Student Organization: *Department of Criminal Justice and Criminology*)

CONFERENCE PRESENTATIONS

2022	**Kondrat, A.**, Ren, L., & Fleming, J. (2022, March 16). *Police Attitudes Toward Opioid Overdose Prevention During the COVID-19 Pandemic: An Exploratory Study in Texas* [Citizen and Police Attitudes- The Criminal Justice System: Police/Police Attitudes/Community Relations Paper Session) Academy of Criminal Justice Sciences, Las Vegas, Nevada, United States. **Panel Chair**.
2020	Kondrat, A. (2020, March 27). *A Content Analysis of Anti-Human Trafficking Efforts in the Lone Star State* [Undergraduate Roundtable Session]. The Pacific Sociological Association Conference, Eugene, Oregon, United States. (Conference Canceled Due to COVID-19).

PUBLICATIONS

Kondrat, A., & Connolly, E. J. (2022) The role of mistreatment by others on the longitudinal association between anger, alcohol use, and antisocial behavior: A partial test of GST. *Crime & Delinquency*. https://doi.org/10.1177/00111287221087947

Kondrat, A., Ren, L., & Fleming, J. Police Attitudes Towards Individuals with Opioid Use Disorder. (**Manuscript In Progress**).

TECHNICAL REPORTS & RESEARCH BRIEFS

Ren, L., Fleming, J., & **Kondrat, A.** (2021) *Police investigation of opioid overdoses: Effects of a training program on knowledge and attitudes*. Research brief submitted to Montgomery County Sheriff's Department Narcotics Enforcement Team. Submitted October 2021. **Honorably mentioned in Houston HIDTA's** "*2021 Update on Overdose Trends and the Threat Response in the Houston Metropolitan Area*."

AWARDS, HONORS, & SCHOLARSHIPS

2020	Peer-nominated: Kay Toran Award for Service to the Community
2016- 2020	Dean's List
2019- Present	Member, Alpha Kappa Delta International Sociology Society
2018-2020	University Transfer Merit Scholarship, University of Portland
2017- Present	Member, Pi Theta Kappa Honor Society
2016- Present	Member, Alpha Lambda Delta Honor Society

PROFESSIONAL AFFILIATIONS

Pacific Sociological Association

American Society of Criminology
- Division of Convict Criminology
- Division of Critical Criminology & Social Justice
- Division of Terrorism & Bias Crime

Academy of Criminal Justice Sciences

SERVICE

2021- Present	Social Committee Member, *Department of Criminal Justice & Criminology*, Sam Houston State University
2021- Present	Peer Mentor, *Department of Criminal Justice & Criminology*, Sam Houston State University
2020- Present	Service Committee Member, *Department of Criminal Justice & Criminology*, Sam Houston State University
2019	Attendee: Global Perspectives on Environmental and Indigenous Leadership, New Zealand, University of Portland
2019	Volunteer, Friends of Trees, University of Portland
2018	Volunteer, Night Strike, University of Portland
2017- Present	Volunteer, Warm Up America
2017	Class Secretary, Greystone Preparatory School at Schreiner University
2016- 2017	Mentor, Tom Daniels Elementary School, Kerrville, Texas