THE RETURN OF SEDITIOUS LIBEL

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Does the First Amendment protect a speaker's interest in reaching a particular audience if the expressive activity occurs in a traditional public forum? The intuitive answer to this question might be "yes" or "usually," but the federal courts have taken a decidedly different approach—at least when the intended speech is political protest and the intended audience includes high-ranking government officials or political party leaders. Indeed, so long as government efforts to squelch political dissent invoke the talisman of "security" and are facially content and viewpoint neutral, the Speech and Assembly Clauses of the First Amendment have proven remarkably ineffective at protecting an individual's right to protest in a location physically proximate to incumbent government officials—even in a traditional public forum.

This Article questions whether genuine security concerns actually motivate the censoring of political dissent. It posits instead that judges have wrongly permitted local, state, and federal officials to equate the government's dignity interests with its national security interests. In short, avoiding embarrassment as a result of media coverage, as much as genuine concern about public safety, undergirds decisions to squelch dissent proximate to the venues in which major political theater occurs. This practice of censoring core political speech to avoid embarrassing incumbent politicians constitutes a limited return of the doctrine of seditious libel, which also equated the embarrassment of government officials with harm to national security.

Consistent with the oft-forgotten Petition Clause of the First Amendment, which proclaims "the right of the people . . . to petition the Government for a redress of grievances," this Article argues that citizens should have a right to bring

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grievances to the personal attention of their ostensibly democratically accountable government. As an historical matter, the First Amendment right of petition carried with it absolute immunity from prosecution for seditious libel: Citizens could bring complaints, both in person and in groups, to government officials to seek a redress of grievances without fear of reprisal. In the early years of the Republic, however, the Petition Clause fell into desuetude because abolitionists engaged in what pro-slavery members of Congress characterized as "abusive" petitioning of the federal government to abolish the practice of human slavery. The Petition Clause has never recovered from this most odious legal and political banishment. This Article argues that federal courts should restore the relevance of the Petition Clause by using it to establish a qualified right to demonstrate in public forums within the sight and hearing of government officials and party leaders.

INTRODUCTION

In anticipation of hosting the 2004 Democratic National Convention (DNC), then only days away, the city of Boston erected a temporary structure nicknamed "the DZ." Disquieting, yet oddly fitting, the moniker was short for "designated demonstration zone"—the area set aside as the only lawful place proximate to the Fleet Center (site of the DNC) for groups larger than twenty to engage in political protest speech.[1] Judge Douglas P. Woodlock, the Massachusetts district court judge who heard the First Amendment challenge to this speech restriction, described the DZ as follows:

> A written description cannot begin to convey the ambience of the DZ site . . . . Most—at least two-thirds—of the DZ lies under unused Green Line tracks. The tracks create a space redolent of the sensibility conveyed in Piranesi's etchings published as *Fanciful Images of Prisons*. It is a grim, mean, and oppressive space whose ominous roof is supported by a forest of girders that obstruct sight lines throughout . . . .
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> The DZ is surrounded by two rows of concrete jersey barriers. Atop each of the jersey barriers is an eight foot high chain link fence. A tightly woven mesh fabric, designed to prevent liquids and objects from being thrown through the fence, covers the outer fence, limiting but not eliminating visibility. From the top of the outer fence to the train tracks overhead, at an angle of approximately forty-five degrees to horizontal, is a looser mesh netting, designed to prevent objects from being thrown at the delegates.

1. Coal. to Protest the Democratic Nat'l Convention v. City of Boston, 327 F. Supp. 2d 61, 61–64 (D. Mass. 2004), *aff'd sub nom.* Bl(a)ck Tea Soc'y v. City of Boston, 378 F.3d 8 (1st Cir. 2004).

> On the overhead Green Line tracks themselves is looped razor wire, designed to prevent persons from climbing onto the tracks where armed police and National Guardsman [sic] will be located.[2]

As if there could be any mistake, Judge Woodlock added, "Let me be clear: the design of the DZ is an offense to the spirit of the First Amendment."[3]

He then upheld the city's use of the DZ.[4]

Several days later, the First Circuit affirmed.[5]

What can explain the bizarre circumstance of a speech regulation that is simultaneously both constitutional and "an offense to the spirit of the First Amendment"? Facially, the city of Boston claimed, and the courts accepted, the proposition that bona fide security needs justified the remarkably broad restrictions on protests conducted physically proximate to the 2004 DNC. Even though "[s]ecurity is not a talisman," the First Circuit ruled that "a per se rule barring the government from using past experience to plan for future events is [not] consistent with the approach adopted in the [Supreme] Court's time-place-manner jurisprudence."[6] Despite the lack of any concrete evidence that those seeking to protest at the 2004 DNC would engage in any unlawful activity, the courts endorsed forcing would-be protestors to remain in a cage of chain-link fencing topped with razor wire, separated from the delegates by an opaque mesh wall, as a reasonable time, place, and manner restriction on speech because other protestors in other cities seeking to advance other causes had previously engaged in unlawful behavior.[7]

In some respects, it is unfortunate that during the American civil rights movement Governors George C. Wallace of Alabama, Orval Faubus of Arkansas, and Eugene Talmadge of Georgia did not have the benefit of the current First Circuit as their local federal judges: On the very same logic, the mass protests of the civil rights movement could have been shut down

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2. *Id.* at 67.

3. *Id.* at 76. The court continued, "[i]t is a brutish and potentially unsafe place for citizens who wish to exercise their First Amendment rights." *Id.* The court also compared the appearance of the DZ to "that of an internment camp," described the situation as "irretrievably sad," and stated that "the DZ conveys the symbolic sense of a holding pen where potentially dangerous persons are separated from others. Indeed, one cannot conceive of what other design elements could be put into a space to create more of a symbolic affront to the role of free expression." *Id.* at 74–75, 77.

4. *Id.* at 76.

5. *Bl(a)ck Tea Soc'y*, 378 F.3d at 15. The First Circuit did not dispute the district court's factual assessment of the shocking character of the DZ, but nevertheless affirmed the district court's legal conclusion that the DZ was constitutional. *Id.*; *see also infra* Part I.C.1 (discussing *Bl(a)ck Tea Society*).

6. *Bl(a)ck Tea Soc'y*, 378 F.3d at 13.

7. *Id.* at 13–14 (noting that "[t]he appellant points out, correctly, that there is no evidence in the record that the City had information indicating that [these] demonstrators intended to use [unlawful] tactics at the Convention").

or entirely marginalized on the theory that the protests or some number of the protestors might break the law.[8] The actions of the radical few, such as the Black Panther Party, could have been taxed against the nonviolent many in a form of mindless guilt by association.[9] Yet the First Circuit is hardly alone in permitting local governments to engage in broad-based guilt by association. The Ninth Circuit followed the same logic to sustain a virtual ban on all protests proximate to a World Trade Organization (WTO) meeting in Seattle, regardless of whether any credible evidence existed to support the notion that a particular group of protestors would engage in unlawful conduct. Remarkably, the Ninth Circuit even seemed to endorse the city's concerns that the protests might adversely affect the positive public relations benefits that might otherwise be garnered from hosting such a prestigious international group.[10]

Even though the U.S. Supreme Court has not itself directly addressed the issue, the verdict from the lower federal courts is clear: Local governments may adopt draconian speech restrictions to ensure that mass political meetings do not result in mixed messages to the media.[11] If a city wishes to

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8. *Cf.* Williams v. Wallace, 240 F. Supp. 100, 105–06, 108–09 (M.D. Ala. 1965) (issuing an injunction to facilitate the famous Selma-to-Montgomery civil rights protest march, even though a march of this scale and scope would create serious security risks and disruptions for persons seeking to use the U.S. highway between Selma and Montgomery for its more usual purpose of intercity travel). For a discussion and defense of how Judge Frank Johnson, Jr. deployed creative legal reasoning in *Williams* in aid of the right to petition for a redress of grievances, see Ronald J. Krotoszynski, Jr., *Celebrating Selma: The Importance of Context in Public Forum Analysis*, 104 YALE L.J. 1411, 1420–32 (1995).

9. *Cf.* Schneider v. State, 308 U.S. 147, 162 (1939) (holding that the government may not ban leafleting, even though some persons who receive leaflets choose to litter the streets with them, because permitting the government to punish the speaker for the bad behavior of others would essentially permit a hostile mob to silence core political speech with the government's active assistance).

10. Menotti v. City of Seattle, 409 F.3d 1113, 1131–32 (9th Cir. 2005) ("The City also had an interest in seeing that the [World Trade Organization (WTO)] delegates had the opportunity to conduct their business at the chosen venue for the conference; a city that failed to achieve this interest would not soon have the chance to host another important international meeting."); *see infra* note 135.

11. *Cf.* OFFICE OF PRESIDENTIAL ADVANCE, PRESIDENTIAL ADVANCE MANUAL 34 (2002) (instructing those responsible for preparing a site for a presidential appearance to have the U.S. Secret Service "ask the local police department to designate a protest area where demonstrators can be placed, preferably not in view of the event site or motorcade route"), *available at* http://www.aclu.org/pdfs/freespeech/presidential_advance_manual.pdf. Another tactic for "dealing with demonstrators" advocated in the recently released (and heavily redacted) Presidential Advance Manual is the formation of "rally squads," small groups of presidential supporters who "spread favorable messages using large hand held signs, placards, or perhaps a long sheet banner." *Id.* The rally squads "should be instructed always to look for demonstrators. The rally squad's task is to use their signs and banners as shields *between the demonstrators and the main press platform*. If the demonstrators are yelling, rally squads can begin and lead supportive chants to drown out the

silence those opposed to the official meeting sponsors it may do so, provided that it banishes all speakers. These decisions concretely demonstrate the abject failure of the Supreme Court's traditional First Amendment time, place, and manner jurisprudence to protect core political speech of a dissenting cast.

Moreover, although it is rare indeed that the scholarly community speaks in such a clear, unified voice, the commentators addressing these decisions to date have unanimously deplored them.[12] Yet, the lower federal courts continue to issue decisions permitting abstract, entirely hypothetical security concerns to justify what Judge Woodlock described as "a space redolent of the sensibility conveyed in Piranesi's etchings published as *Fanciful Images of Prisons*."[13]

We believe that the scholarly pleas for federal courts to enforce the Supreme Court's traditional reasonable, content-neutral time, place, and manner regime are doomed to failure.[14] Experience teaches that federal

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protestors (USA!, USA!, USA!)." *Id.* (emphasis added). Elsewhere, the Manual instructs that "[i]f it is determined that the media will not see or hear [the demonstrators] and that they pose no potential disruption to the event, they can be ignored." *Id.* at 35.

12. *See generally* Mary Cheh, *Demonstrations, Security Zones, and First Amendment Protection of Special Places*, 8 D.C. L. REV. 53 (2004); Thomas P. Crocker, *Displacing Dissent: The Role of "Place" in First Amendment Jurisprudence*, 75 FORDHAM L. REV. 2587 (2007); Joseph Herrold, *Capturing the Dialogue: Free Speech Zones and the "Cage" of First Amendment Rights*, 54 DRAKE L. REV. 949 (2005); James J. Knicely & John W. Whitehead, *The Caging of Free Speech in America*, 14 TEMP. POL. & CIV. RTS. L. REV. 455 (2004); Aaron Perrine, *The First Amendment Versus the World Trade Organization: Emergency Powers and the Battle in Seattle*, 76 WASH. L. REV. 635 (2001); Timothy Zick, *Space, Place, and Speech: The Expressive Topography*, 74 GEO. WASH. L. REV. 439 (2006) [hereinafter Zick, *Space, Place, and Speech*]; Timothy Zick, *Speech and Spatial Tactics*, 84 TEX. L. REV. 581 (2006) [hereinafter Zick, *Speech and Spatial Tactics*]; *see also* Michael J. Hampson, Note, *Protesting the President: Free Speech Zones and the First Amendment*, 58 RUTGERS L. REV. 245 (2005); Susan Rachel Nanes, Comment, *"The Constitutional Infringement Zone": Protest Pens and Demonstration Zones at the 2004 National Political Conventions*, 66 LA. L. REV. 189, 215–18 (2005); Nick Suplina, Note, *Crowd Control: The Troubling Mix of First Amendment Law, Political Demonstrations, and Terrorism*, 73 GEO. WASH. L. REV. 395, 402 (2005); Nicole C. Winnett, Note, *Don't Fence Us In: First Amendment Right to Freedom of Assembly and Speech*, 3 First Amendment L. Rev. 465 (2004).

13. Coal. to Protest the Democratic Nat'l Convention v. City of Boston, 327 F. Supp. 61, 67 (D. Mass. 2004), *aff'd sub nom.* Bl(a)ck Tea Soc'y v. City of Boston, 378 F.3d 8 (1st Cir. 2004).

14. In *Ward v. Rock Against Racism*, 491 U.S. 781 (1989), the Supreme Court held that time, place, and manner restrictions on speech are consistent with the Free Speech and Free Assembly Clauses of the First Amendment if the regulations "are justified without reference to the content of the regulated speech," are "narrowly tailored to serve a significant governmental interest," and "leave open ample alternative channels for communication of the information." *Id.* at 791. Security of government officials and others attending mass political meetings and conventions clearly satisfies the "significant government interest" aspect of the test's second prong. And, in practice, the content-neutrality prong merely requires that the speech restriction banish all potential speakers (even though those supporting the Democratic Party are not likely to protest their own

judges, faced with the abstract claim that failure to endorse cages guarded by razor wire will lead to public chaos, are simply not going to apply the narrow tailoring requirement strictly or demand a higher degree of equivalence with respect to "ample alternative channels of communication."[15] Instead, if core political speech proximate to public officials and senior political party officials is to survive, more than mere doctrinal tinkering around the edges is needed. Simply put, the playing field must be reset to resemble something closer to level.

We believe that the best means of reorienting the decisional logic of the lower federal courts is to relocate the right to protest at events featuring government officials and senior party leaders from the Speech and Assembly Clauses to the Petition Clause.[16] The Petition Clause, it is true, has become something of a constitutional appendix; standard casebooks on the First Amendment do not even bother to provide the Petition Clause with any independent coverage,[17] and the main constitutional law treatises treat the

convention). The hardest part of the test for the government to meet should be the "ample alternative channels of communication prong," though in reality even this is but a speed bump: "[A]lthough the opportunity to interact directly with the body of delegates by, say, moving among them and distributing literature, would doubtless have facilitated the demonstrators' ability to reach their intended audience, there is no constitutional requirement that demonstrators be granted that sort of particularized access." *Bl(a)ck Tea Soc'y*, 378 F.3d at 14.

15. For a psychological explanation of this and similar judicial phenomena, see generally Christina E. Wells, *Fear and Loathing in Constitutional Decision-Making*, 2005 WIS. L. REV. 115 (explaining how the psychology of threat perception and risk assessment affects judicial decisionmaking). *See also* Vincent Blasi, *The Pathological Perspective and the First Amendment*, 85 COLUM. L. REV. 449 (1985) (arguing that federal courts should be most vigilant in protecting speech rights in times of national emergency because it is at such times that the political process is likely to overreact to perceived threats and to adopt measures that have the effect of silencing public discourse, and it is at such times that full and robust public debate is most essential to wise policymaking).

16. *See* U.S. CONST. amend. I ("Congress shall make no law . . . abridging . . . the right of the people . . . to petition the Government for a redress of grievances.").

17. *See, e.g.*, ARNOLD H. LOWEY, THE FIRST AMENDMENT: CASES AND MATERIALS, at vii–xvii, 1291–92 (1999) (omitting coverage of the Petition Clause from the table of contents and the index, and omitting McDonald v. Smith, 472 U.S. 479 (1985), the Supreme Court's most recent general Petition Clause decision, from both the table of contents, the index, and the table of cases); KATHLEEN M. SULLIVAN & GERALD GUNTHER, FIRST AMENDMENT LAW, at v–v, xvi, I-2 (3d ed. 2007) (same); EUGENE VOLOKH, THE FIRST AMENDMENT AND RELATED STATUTES: PROBLEMS, CASES AND POLICY ARGUMENTS, at xiii–xxxii, xxxvi 1036 (2d ed. 2005) (same). *But see, e.g.*, STEVEN H. SHIFFRIN & JESSE H. CHOPER, THE FIRST AMENDMENT: CASES—COMMENTS—QUESTIONS, at vii–xiii, 54, 699–701 (4th ed. 2006) (citing *McDonald* in the context of a discussion of group libel); GEOFFREY R. STONE ET AL., THE FIRST AMENDMENT, at ix–xix, 149–50, 647 (2d ed. 2003) (citing *McDonald* in the context of a discussion of *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), but not otherwise mentioning the Petition Clause). Note, however, that a single citation to *McDonald* arguably proves rather than refutes the point that the Petition Clause receives short shrift in contemporary First Amendment casebooks.

Petition Clause as a dead letter.[18] But there is no reason why this should be so. Just as each and every part of the Fifth Amendment and the Fourteenth Amendment enjoys individualized exegeses, independent clauses of the First Amendment, including the Petition Clause, should command the same respect.

In Anglo-American legal history, the right of petition encompassed, literally, the right of the people to lay complaints "at the feet of the sovereign."[19] In other words, at its core, the right of petition protects a personal right to bring complaints about public policy directly to officers of the government, up to and including the king himself. Moreover, petition was an exception to the doctrine of seditious libel: One could not be convicted of seditious libel based on the content of a petition. In fact, during the first Adams Administration, when the Sedition Act of 1798[20] was being used to systematically silence prominent political opponents of the president and his party, petitions to Congress remained the only available avenue for expressing dissent without risking a criminal conviction and imprisonment.[21] Thus, the Petition Clause, as a matter of original understanding and Anglo-American legal history, provides an excellent independent source of protection for the right to protest up close and personal to high-ranking government officers and those who control the means of selecting them. Moreover, strong normative reasons exist for breathing new life into the Petition Clause as a means of reinvigorating the process of democratic self-government.[22]

Another parallelism exists between the treatment of protestors at presidential appearances and national nominating conventions and the history of the Petition Clause. As a historical matter, seditious libel doctrine was grounded in national security concerns: If the government was not protected from false accusations of corruption or incompetence it might not be able to effectively conduct the affairs of state. The efficacy of the government, the argument runs, requires that the dignity of the government be

18. *See, e.g.*, ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES, at xvi–xvii, 748–961, 1091 (1997) (omitting any reference to the Petition Clause or the cases arising under it); LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW, at xxii–xxiv, 866 n.31, 1770, 1773 (2d ed. 1988) (omitting any general coverage of the Petition Clause, and providing only a single reference to *McDonald* in a footnote, in the section addressing *New York Times Co. v. Sullivan*, which is remarkably paltry coverage in the most comprehensive, and most cited treatise in the field).

19. *See infra* text accompanying notes 267–282.

20. Sedition Act of 1798, ch. 74, 1 Stat. 596 (expired 1801).

21. *See infra* text accompanying notes 222–245.

22. *See infra* text accompanying notes 359–364.

protected. Indeed, the Federalist Party even argued, in defense of the Sedition Act of 1798, that criminal proscription of seditious libel enhanced the democratic legitimacy of government by creating the conditions necessary for democratically elected officials to implement the will of the people.[23] Thus, the advancement of security concerns represents the very heart of the seditious libel doctrine. And, although cloaked in the nomenclature of security, incumbent politicians essentially create two material equivalencies that are remarkably self-serving: The first is between security and the dignity of the government, and the second is between the dignity of the government and the dignity of those holding public office. Hence, in practice, seditious libel worked to protect the dignitarian interests of incumbent politicians, ostensibly to enhance the security of the government and to ensure that elected officers could implement the people's will.

The recent growth in outrageous limits on public dissent proximate to public officers rests on precisely the same footing, and, we believe, represents the return of seditious libel (albeit in a substantially weaker form). This new seditious libel is neither as far-reaching nor as all-encompassing as its older, more robust cousin; the new seditious libel works merely to marginalize, rather than absolutely banish, speech, yet it does so for the same reason (security) and has the same ancillary effect of protecting politicians from facing the calamity of having television cameras misappropriated by those seeking to oppose them and their policies. Of course, it is true that under the modern variant of seditious libel, protestors will not face imprisonment for the content of their speech. In fact, as between making martyrs of political opponents, as the first Adams Administration did in the late eighteenth century, and simply rendering political opponents effectively invisible (and thereby irrelevant), "sedition lite" has much to recommend it over the use of traditional seditious libel. But by marginalizing protestors' ability to share the media spotlight generated by those holding public office, the net effect on the marketplace of ideas is really not much different.

Governments at all levels—local, state, and federal—are invoking security concerns as part of a concerted effort to marginalize, if not silence, political dissent. Moreover, contrary to the First Circuit's protestations,

23. *See* Thomas F. Carroll, *Freedom of Speech and of the Press in the Federalist Period: The Sedition Act*, 18 MICH. L. REV. 615, 636–37 (1920); Edward S. Corwin, *Freedom of Speech and Press Under the First Amendment: A Resumé*, 30 YALE L.J. 48, 48–49, 54–55 (1920); *see also* Judith Schenck Koffler & Bennett L. Gershman, *The New Seditious Libel*, 69 CORNELL L. REV. 816, 822–23 (1984) (discussing the theoretical underpinnings of seditious libel, which relate to concerns that "political protest and criticism of officials undermined the basic safety of the government [and] . . . . threatened the legitimacy of power").

in the post-9/11 world, security is a talismanic governmental interest. Federal judges will naturally rue the possibility of rejecting speech restrictions grounded in security concerns because doing so would require them to take responsibility for the consequences if the government's fears prove true.[24]

In Part I, we examine the formal doctrines that ostensibly work to prevent the use of government power to squelch dissent based on content and viewpoint, as well as the general rule against prior restraints on speech. We conclude that, at least in the context of protest physically proximate to government and party officials, these doctrines are incapable of securing more than a modicum of protection for those seeking to petition the government for a redress of grievances. In Part II, we consider the plausibility of the security rationale for banning speech physically proximate to government officials, both in general and as a de facto proxy for the protection of the government's dignity. Part III then considers the history of seditious libel doctrine and its relationship to the modern trend of adopting draconian speech regulations that banish speech in the name of security.

Finally, in Part IV, we examine the history and practice of petitioning the government—from its origins in medieval England to the Framers' era and the early Republic. This history strongly supports the contemporary use of the Petition Clause to protect a right of access both to government officials and to those who control the means of obtaining public office. This Part also considers the Supreme Court's unfortunate and highly circumscribed jurisprudence surrounding the Clause, which has largely failed to give it any independent legal significance.[25] We argue that the Petition Clause should convey a general right to express grievances within the sight and hearing of elected officials, even if this right has the effect of spoiling a nicely staged photo opportunity or results in the media reporting more than one point of view regarding the underlying substantive policies at issue.

Petitioning once had coequal status with voting as a fundamental means for citizens to secure accountability from government officials—starting with British monarchs and running forward through history to thin-skinned Federalist presidents. We have lost this tradition and must reclaim it. Petitioning for a redress of grievances, up close and personal, is a central bulwark of ensuring that, in a representative democracy, the rulers actually know what the citizenry thinks about particular questions of public policy.

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24. *See* Wells, *supra* note 15, at 201–02.

25. *See, e.g.*, McDonald v. Smith, 472 U.S. 479, 482 (1985) (holding that the Petition Clause does not create any greater right of public comment that contains false factual assertions than do the Free Speech or Free Press Clauses because the Petition Clause is "cut from the same cloth" as these parallel rights).

In a nation in which Senator Hillary Clinton unselfconsciously opines that "lobbyists are Americans too"[26] and the reputations of multiple members of Congress have recently been tarnished in the wake of the Jack Abramoff scandal,[27] the need to secure average citizens' meaningful access to government officials is more acute than ever. Clearly, the average citizen cannot demand a personal audience with members of Congress or the President and expect to meet with much success; the price of access is usually a substantial campaign contribution—something beyond the means of most Americans working to make ends meet. If, however, the president or other high-ranking public officials choose to travel the public streets or to attend meetings held in public buildings and facilities, average citizens should have a presumptive right to present their concerns through protest activity—to petition for a redress of grievances. And for this protest activity to be meaningful, it must be within the sight and the hearing of those government officials.

When government officials, with the blessing of the federal courts, come to view average citizens seeking to petition the government for policy changes as presumptive terrorist threats and, as a consequence, banish these citizens to remotely located cages and pens that are little more than jails, the notion of democratic self-governance is utterly and completely betrayed. The Petition Clause offers a new way of thinking about the question of citizen access to government officials and an important means for renewing and enhancing American democracy.

I. THE PROBLEM DEFINED: FEDERAL COURTS UPHOLD BROAD BANS ON CORE POLITICAL SPEECH

In theory, the First Amendment to the U.S. Constitution provides remarkably broad protection for core political speech[28]—even speech of a

26. *See* Adam Nagourney, *Appearing Now on a TV Near You: Surely a Presidential Debate*, N.Y. TIMES, Aug. 11, 2007, at A9 (reporting Senator Clinton's plea that "[a] lot of those lobbyists, whether you like it or not, represent real Americans," and noting that the senator's "remark had her own supporters grimacing and girding for its possible use in rivals' campaign advertisements").

27. *See* Ruth Marcus, *Delay Exits, Stage (Hard) Right*, WASH. POST, June 12, 2006, at A21 (reporting the resignation of House Majority Leader Tom Delay because of ties to disgraced lobbyist Jack Abramoff who used outright bribes to secure legislative favors from various members of Congress).

28. *See* RONALD J. KROTOSZYNSKI, JR., THE FIRST AMENDMENT IN CROSS-CULTURAL PERSPECTIVE: A COMPARATIVE LEGAL ANALYSIS OF THE FREEDOM OF SPEECH 12–18, 23–25 (2006) (discussing competing theories of the Free Speech Clause and the notion that core political speech should enjoy the broadest protection); *see also* STEVEN H. SHIFFRIN, DISSENT, INJUSTICE, AND THE MEANINGS OF AMERICA 24–31, 57–67 (1999) (arguing that core speech includes political

strongly dissenting cast[29]—and to some extent this proposition does hold true. Thus, in the era following the Supreme Court's 1969 decision in *Brandenburg v. Ohio*,[30] as a general proposition, one may advocate the violent overthrow of the government without facing criminal sanctions.[31] But protecting meaningless abstract advocacy does not go very far in protecting speech when the government thinks that the speech might actually have some serious effect on shaping or moving public opinion. Permitting a racist group to inveigh against the government on a remote suburban Cincinnati, Ohio farm (as in *Brandenburg*) is one thing; protecting speech that contradicts the president's message of the day is quite another. The lower federal courts have not proven to be consistent allies of those engaged in dissenting speech, at least in contexts in which dissent might prove embarrassing to the government (whether local, state, or federal).[32]

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dissent by members of minority groups). The notion of core political speech relates to the idea that the First Amendment's principal purpose is to facilitate the process of democratic deliberation. *See* KROTOSZYNSKI, *supra*, at 15–18; *see also* ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT (1948); Alexander Meiklejohn, *The First Amendment Is an Absolute*, 1961 SUP. CT. REV. 245.

29. *See* SHIFFRIN, *supra* note 28, at 24–31, 57–67.

30. 395 U.S. 444 (1969).

31. *See id.* at 447–49 (holding that the advocacy of violent overthrow of the government is protected unless the government establishes, by clear and convincing evidence, a clear and present danger of "imminent lawless action"); *see also* Hustler Magazine v. Falwell, 485 U.S. 46, 53 (1988) ("[I]n the world of debate about public affairs, many things done with motives that are less than admirable are protected by the First Amendment . . . . [Although] such a bad motive may be deemed controlling for purposes of tort liability in other areas of the law, . . . the First Amendment prohibits such a result in the area of public debate about public figures."); Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983) ("In places which by long tradition or by government fiat have been devoted to assembly and debate, the rights of the State to limit expressive activity are sharply circumscribed . . . . In these quintessential public forums, the government may not prohibit all communicative activity."); FCC v. Pacifica Found., 438 U.S. 726, 746 (1978) ("If there were any reason to believe that the [Federal Communications] Commission's characterization of the [speech] as offensive could be traced to its political content . . . . First Amendment protection might be required."); N.Y. Times Co. v. Sullivan, 376 U.S. 254, 270 (1964) ("[We] consider this case against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials."); De Jonge v. Oregon, 299 U.S. 353, 365 (1937) ("[I]mperative is the need to preserve inviolate the constitutional rights of free speech, free press and free assembly in order to maintain the opportunity for free political discussion . . . . Therein lies the security of the Republic, the very foundation of constitutional government."); Whitney v. California, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring) ("Those who won our independence . . . . believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth; . . . . that public discussion is a political duty; and that this should be a fundamental principle of the American government.").

32. *See, e.g.*, Citizens for Peace in Space v. City of Colorado Springs, 477 F.3d 1212, 1219–21 (10th Cir. 2007); Menotti v. City of Seattle, 409 F.3d 1311, 1123–25 (9th Cir. 2005).

The resulting free speech jurisprudence features a very wide gap between the theoretical commitment to protecting all political speech and the real-world commitment to protecting dissent in certain contexts. This Part explores both sides of the equation: the formal, theoretical commitment to protecting political speech on the broadest possible basis, and the countervailing de facto regime of suppression that exists in some important contexts. To be clear, we do not insist on a particular normative outcome with respect to the toleration of speech that imposes (or might impose) high social costs. We do think, however, that it is reasonable to ask for a jurisprudence that treats risk in a consistent fashion: If average citizens must tolerate the social risks associated with the public dissemination of racist, sexist, homophobic, and religiously bigoted speech, public officials should have to tolerate the social risks resulting from dissenting political speech.[33]

A. The Promise: Free Speech for All Without Regard to Viewpoint or Content

Since its 1969 decision in *Brandenburg*,[34] the Supreme Court has generally disallowed the regulation of core political speech that poses risks to peace, good order, and security. The pre-*Brandenburg* free speech jurisprudence, represented by decisions like *Dennis v. United States*,[35] permitted the government to regulate speech based on the possibility that it might have bad tendencies.[36] The bad tendencies doctrine tracks the intellectual foundations of the doctrine of seditious libel, which was a form of constructive treason—constructive because the speaker or writer might not have directly called for the overthrow of the government, but instead engaged in speech activity that the government feared might increase the possibility of such an outcome.[37] *Brandenburg*, however, put to rest the idea that the

33. *See* Richard Delgado, *Words That Wound: A Tort Action for Racial Insults, Epithets, and Name Calling*, 17 HARV. C.R.-C.L. L. REV. 133, 177–78 (1982); Charles R. Lawrence, III, *If He Hollers Let Him Go: Regulating Racist Speech on Campus*, 1990 DUKE L.J. 431, 452–57; Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320, 2356–58 (1989).

34. Or, perhaps, since *New York Times Co. v. Sullivan* in 1964. *See* N.Y. Times Co. v. Sullivan, 376 U.S. at 270 (recognizing "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open"); *see also* Harry Kalven, Jr., *The New York Times Case: A Note on "The Central Meaning of the First Amendment,"* 1964 SUP. CT. REV. 191, 204–06, 209–10.

35. 341 U.S. 494 (1951).

36. *Id.* at 498–501; *id.* at 533–34, 543–45 (Frankfurter, J., concurring); *see also* VICTOR S. NAVASKY, NAMING NAMES 27–37 (1980) (discussing *Dennis*, 341 U.S. 494).

37. *See* William T. Mayton, *Seditious Libel and the Lost Guarantee of a Freedom of Expression*, 84 COLUM. L. REV. 91, 97–98, 102–08, 123–27 (1984); *see also infra* text accompanying notes 201–252.

government could squelch speech if the risk of harm, however remote, was of a sufficiently grave character.[38]

1. The Rules Against Viewpoint and Content Discrimination

The Supreme Court has built two central pillars to ensure that the government does not regulate or suppress speech on a merely pretextual basis. The first, and most absolute, is a rule against government regulations based on the viewpoint of the speaker.[39] Thus, government may not permit pro-choice speakers to hold a rally in the public square while denying pro-life advocates access to the same public space for a rally advocating their position on abortion.

The second, somewhat less categorical pillar on which modern free speech doctrine rests, is the rule against content discrimination. As a general matter, the government may not exclude particular subjects or topics (regardless of the speaker's viewpoint) from the marketplace of ideas.[40] Thus,

38. The bad tendencies test under *Dennis* reflected and incorporated Judge Learned Hand's formulation of free speech protection, which permitted the government to regulate speech based on a sliding scale that incorporated the nature of the harm to be prevented as well as the probability of the harm coming to pass. *See* Dennis v. United States, 183 F.2d 201, 212–13 (2d Cir. 1950), *aff'd*, 341 U.S. 494 (1951). For some minor harms, such as jaywalking, the probability of the speech causing the harm would have to be very high, perhaps even reaching the point of certainty, before the government could act to suppress or to punish the speech. For more serious harms, like violent overthrow of the government, the probability of the harm coming to pass could be much lower, and the government would still have a legitimate claim to regulate or to ban the speech. Thus, the gravity of the potential harm, as much if not more than the risk of its occurrence, prefigured the ability of the government to regulate or suppress the speech. *Brandenburg* rejected this approach and required a high probability of the risk coming to fruition as a precondition to government regulation or suppression, regardless of the gravity of the risk. Jonathan S. Masur, *Probability Thresholds*, 92 IOWA L. REV. 1293, 1310–12 (2007); *see* Richard A. Posner, *The Learned Hand Biography and the Question of Judicial Greatness*, 104 YALE L.J. 511, 518 (1994) ("Elegant and eloquent as it is, Hand's opinion in *Dennis* was a period piece and it was not the best period for freedom of thought and expression. *Brandenburg* . . . certainly repudiated *Dennis*."). *But see* Martin H. Redish, *Unlawful Advocacy and Free Speech Theory: Rethinking the Lessons of the McCarthy Era*, 73 U. CIN. L. REV. 9, 62–65 (2004) (arguing that *Brandenburg* and *Dennis* are not entirely unreconcilable and that the *Brandenburg* Court plainly did not wish to overrule *Dennis*).

39. As Professor Cass Sunstein has explained, "[w]hen government regulates on the basis of viewpoint, it will frequently be acting for objectionable reasons." CASS R. SUNSTEIN, DEMOCRACY AND THE PROBLEM OF FREE SPEECH 169 (1993); *accord*. Texas v. Johnson, 491 U.S. 397, 414 (1989) ("If there is a bedrock principal underlying the First Amendment, it is that the Government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."); Perry Educ. Ass'n v. Perry Local Educator's Ass'n, 460 U.S. 37, 57 (1983) (Brennan, J., dissenting) ("The First Amendment's prohibition against government discrimination among viewpoints on particular issues falling within the realm of protected speech has been noted extensively in the opinions of this Court.").

40. *See, e.g.*, *Perry*, 460 U.S. at 59–61 (Brennan, J., dissenting) ("There is another line of cases, closely related to the prohibition against viewpoint discrimination, that have addressed the

the government could not prohibit all discussion of immigration issues in the public square simply because it feared that any discussion of immigration policy might lead to trouble.

What do these doctrines mean for the dignity of public officials and officers? At least in theory, Supreme Court precedents stand for the proposition that government cannot suppress speech based on its content, even if that content is highly offensive and constitutes a targeted insult of a government officer.[41] The dignity of the government and its minions must give way to the paramount value of full and free political expression.[42] Hence, the First Amendment affords constitutional protection to call a police officer a "motherfucking fascist pig cop"[43] or to use the phrase "mother fucker" at a public school board meeting.[44] Or, as Dr. Ben Marble did post-Hurricane Katrina in Long Beach, Mississippi, tell the vice president of the United States to "go fuck" himself.[45]

Why should such uncivil public discourse enjoy constitutional protection? Because the motivation to ban the speech relates directly to its viewpoint and its content; the motivation to punish comes from the dissenting character of the speech, and the content of the speech, the use of vulgar idiom, leads to selective punishment (often under generic laws

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First Amendment principle of subject-matter or content-neutrality. Generally, the concept of content-neutrality prohibits the government from choosing the subjects that are appropriate for public discussion."); Geoffrey R. Stone, *Restrictions of Speech Because of Its Content: The Peculiar Case of Subject-Matter Restrictions*, 46 U. CHI. L. REV. 81 (1978).

41. *See, e.g.*, Brandenburg v. Ohio, 395 U.S. 444 (1969) (per curiam); Hess v. Indiana, 414 U.S. 105 (1973) (per curiam); Gooding v. Wilson, 405 U.S. 518 (1972).

42. *See generally* Hustler Magazine v. Falwell, 485 U.S. 46, 51–53 (1988) (holding protected, on free speech grounds, an intentionally malicious parody of a public figure because constitutionally protected criticism of public officials and public figures "inevitably, will not always be reasoned or moderate; public figures as well as public officials will be subject to vehement, caustic, and sometimes unpleasantly sharp attacks").

43. Rosenfeld v. New Jersey, 408 U.S. 901, 911 (1972) (Rehnquist, J., dissenting).

44. *Id.* at 902; *see also id.* at 905 (Powell, J., dissenting) (describing the exact words used by the speaker at the school board meeting, to wit, "the adjective m[other] f[ucking] on four occasions, to describe the teachers, the school board, the town and his own country").

45. *See* Justin Hooks, *Overnight Celebrity Reaps Benefits*, SUN HERALD, March 16, 2007, at A2 (recounting Dr. Marble's famous encounter with Vice President Cheney outside Marble's wrecked Gulfport home on September 8, 2005); *see also* The Guy That Said "Go Fuck Yourself, Mr. Cheney!!", YouTube, http://www.youtube.com/watch?v=wwNiVZWuQpE (last visited Mar. 5, 2008) (providing a video of the entire encounter, in which Dr. Marble yells, "Go fuck yourself, Mr. Cheney! Go fuck yourself!" and explains, after the encounter, that "that's what he tells everybody in Congress, so I figured if he can do it, so can I"). *See generally* Julian Borger, *Cheney Vents F-Fury at Senator*, THE GUARDIAN (London), June 26, 2004, at 14 (reporting and quoting Vice President Cheney's suggestion to Senator Patrick Leahy (D-VT), offered on the floor of the U.S. Senate, that Leahy "go fuck [him]self").

against disturbing the peace).[46] Core principles of U.S. free speech doctrine preclude the government from restricting or banning speech because of antipathy toward its viewpoint or its content. And, in most cases involving average citizens or low-level government functionaries, these commitments hold firm. The application of these doctrines in cases like *Brandenburg*, *Cohen v. California*,[47] and *Hustler v. Falwell*[48] has left very little room for the State to attempt to protect the dignity of public officials or public figures in overt or direct ways.

Beyond this, these doctrines work to protect low-value, high-risk speech, such as advocacy of race wars or the extermination of particular minority groups. Since the 1950s, the Supreme Court has essentially told minority groups to meet hate speech with counterspeech, rather than to seek government proscriptions against generic threats that lack an imminent risk of producing harm.[49] Federal courts have been consistent and vigilant in disallowing laws aimed at protecting minorities from offense based on the viewpoint or content of speech.[50]

Thus, at a formal level of abstraction, the Free Speech Clause privileges speech both over the dignity interests of public officials and public figures and over the security interests of minority groups. The nation's commitment to an "uninhibited, robust, and wide open"[51] public debate requires that high-ranking government officers and average citizens alike pay the social cost of highly offensive speech activity, even activity overtly designed to cause offense.

2. The Rule Against Prior Restraints

Although related to the rules against viewpoint and content discrimination, a separate legal doctrine generally disallows the use of prior restraints on speech. This rule holds that government cannot ban speech before the fact, even for good reasons, like national security. Indeed, prior restraints

46. *See* Cohen v. California, 403 U.S. 15, 15–19 (1971).

47. *Id.* at 22–26. For a discussion of *Cohen*, see Ronald J. Krotoszynski, Jr., Cohen v. California: *"Inconsequential" Cases and Larger Principles*, 74 TEX. L. REV. 1251 (1996).

48. 485 U.S. 46, 51–53 (1988).

49. *See* Beauharnais v. Illinois, 343 U.S. 250, 261–64 (1952); Dennis v. United States, 341 U.S. 494, 501–09 (1951).

50. *See, e.g.*, American Booksellers Ass'n, Inc. v. Hudnut, 771 F.2d 323 (7th Cir. 1985), *summarily aff'd*, 475 U.S. 1001 (1986); Collin v. Smith, 578 F.2d 1197 (7th Cir. 1978).

51. N.Y. Times Co. v. Sullivan, 376 U.S. 254, 270 (1964).

are presumptively void.[52] The proscription against prior restraints has a long and deep history, going back to Blackstone's conception of "the" freedom of speech, which was limited to a categorical ban on prior restraints and a rule against licensure of the press.[53]

As other legal commentators have noted,[54] however, the rule against prior restraints is less absolute in actual contemporary practice than it is in theory. The Supreme Court's doctrine regarding reasonable, content-neutral time, place, and manner restrictions permits a great deal of prior restraint. In other words, to say that government can restrict speech activity before the fact incident to regulations of the time, place, and manner of speech is to say that government may enact prior restraints on speech that fails to meet the requirements of the regulations. The Supreme Court has never explained why reasonable time, place, and manner restrictions do not constitute a form of prior restraint, but has instead simply argued from necessity that civic life could hardly exist without some reasonable limits on the use of public spaces for expressive activity.[55]

But the aggressive use of time, place, and manner restrictions can do more than simply regulate speech—the doctrine opens up the possibility of actually banishing speech from venues that are inconvenient for the government and moving it to more convenient venues. The problem, of course, is that the convenience of a venue might reflect censorial motives as much as legitimate regulatory concerns about, for example, maintaining traffic flow or preserving a public park as a place of peace, quiet, and rest. The only protection against the use of time, place, and manner restrictions as a means of silencing unpopular speakers is the requirement of content neutrality of the restriction. Yet, the federal courts, including the Supreme

52. *See* N.Y. Times Co. v. United States, 403 U.S. 713, 714 (1971); *see also* Hague v. Comm. for Indus. Reorganization, 307 U.S. 496, 515–18 (1939); Lovell v. City of Griffin, 303 U.S. 444, 451–53 (1938); Near v. Minnesota *ex rel.* Olson, 283 U.S. 697, 712–15 (1931).

53. WILLIAM BLACKSTONE, 4 COMMENTARIES *150–52.

54. *See* Thomas I. Emerson, *The Doctrine of Prior Restraint*, 20 LAW & CONTEMP. PROBS. 648 (1955); John Calvin Jeffries, Jr., *Rethinking Prior Restraints*, 92 YALE L.J. 409 (1984); Martin H. Redish, *The Proper Role of the Prior Restraint Doctrine in First Amendment Theory*, 70 VA. L. REV. 53 (1984); Christina E. Wells, *Bringing Structure to the Law of Injunctions Against Expression*, 51 CASE W. RES. L .REV. 1 (2000).

55. *See, e.g.*, United States Postal Serv. v. Council of Greenburgh Civic Ass'ns, 453 U.S. 114, 132 (1981); Consol. Edison Co. v. Pub. Serv. Comm'n, 447 U.S. 530, 535–36 (1980). Time, place, and manner regulations advance "legitimate interests in regulating traffic, securing public order, and insuring that simultaneous [uses of public property for speech activity do] not prevent all speakers from being heard." *Id.* at 535–36. "Thus, the essence of the time, place, or manner regulation lies in the recognition that various methods of speech, regardless of their content, may frustrate legitimate governmental goals." *Id.* at 536.

Court, have routinely required only facial, or superficial, content neutrality in order to find this requirement satisfied.

For example, pro-choice abortion advocates, as an historical fact, have not picketed abortion clinics as a means of disseminating their message of support for abortion rights. In contrast, pro-life opponents of abortion have, as a standard tactic, engaged in counseling protests targeting abortion service providers. These pickets have dual purposes: They seek to change public opinion regarding the merits of a policy of on-demand abortion and they also seek to dissuade individual women from electing abortion over childbirth. Given that only persons holding anti-abortion views picket abortion clinics, it is simply nonsensical to say that a blanket ban on protest activity within so many feet of an abortion clinic is actually content neutral. The rule is only superficially so; in reality, the government officials responsible for the speech ban know that it will have the effect of silencing one side of the abortion debate and not the other. Indeed, application of the rule is not only content based (restricting speech about abortion, whether pro or con, on public property), it is also viewpoint based: The rule has the purpose and effect of silencing only anti-abortion protestors, not those who support the availability of abortion services.[56]

3. Sweeping Protection for the Freedom of Speech: A Requirement of Democracy

The cumulative effect of the doctrines against content discrimination, viewpoint discrimination, and prior restraints has led the Supreme Court to categorically reject the notion that speech critical of the government can be punished because it has the effect of undermining public confidence in either the government or its officers. An essential premise of the Court's opinion in *New York Times v. Sullivan* was the notion that criticism of public officials could not be discouraged by direct proscriptions against seditious libel or by proxies for such proscriptions (such as the common law of defamation).[57] Similarly, *Hustler v. Falwell* extended the reasoning of *New York Times* to encompass speech designed to "assassinate" the character of public figures (including public officials).[58] Even speech containing factual

56. *See infra* text accompanying notes 81–87.

57. N.Y. Times Co. v. Sullivan, 376 U.S. 254, 269–71, 275–76 (1964); *see also* Kalven, *supra* note 34, at 204–10.

58. Hustler Magazine v. Falwell, 485 U.S. 46, 51–53 (1988).

errors may enjoy constitutional protection so that, in Justice Brennan's words, "debate on public issues [may] be uninhibited, robust, and wide open."[59]

The motivating theory behind such a sweeping protection of speech, including the protection of falsehoods not asserted with actual malice, reflects the notion that democratic self-government simply is not possible without an open and unregulated marketplace of political ideas. This theory seems entirely plausible; after all, how can elections be meaningful if the citizenry cannot openly debate the merits and shortcomings of the candidates and the policies they support or oppose? The legitimacy of the electoral process would require a commitment to free speech even in the complete absence of a constitutional guarantee safeguarding the right.[60] It is not enough, however, to simply protect speech but not to protect the ability to disseminate it to its intended audience. The right to inveigh against the heavens in an empty field is meaningless because it cannot contribute to the formation of collective public opinion.

B. The Reality: Significant Limits on Core Speech Activity in Traditional Public Forums

Owen Fiss has written persuasively on the problem of the shrinking space available for average citizens to engage in protected speech activity.[61] Professor Fiss argues that a meaningful free speech doctrine must not only protect the content of speech, but also must address the question of the adequacy of alternative channels of communication. If average citizens no longer possess an effective means of communicating with each other, then freedom of speech cannot contribute to the creation of a democratic consensus. And, Fiss warns, government increasingly attempts to close off access to common spaces in the name of aesthetics, maintaining order, and

59. *Sullivan*, 376 U.S. at 270.

60. The Supreme Court of Australia used precisely this reasoning to find an implied right of free speech in the Constitution of Australia. The Justices concluded that the Constitution created a democratic form of government and that such government was simply not possible without significant protection for the freedom of speech. *See* Austl. Capital Television Pty. Ltd. v. Commonwealth (1992) 108 A.L.R. 577 (Austl.) (finding an implied right of free speech as an incident of Australia's commitment to democratic self-government, and invalidating a ban on broadcasting political advertisements under this implied right). For a critical analysis of the case, see Gerald R. Rosenburg & John M. Williams, *Do Not Go Gently Into That Good Night: The First Amendment in the High Court of Australia*, 1997 SUP. CT. REV. 439.

61. OWEN M. FISS, THE IRONY OF FREE SPEECH (1996); OWEN M. FISS, LIBERALISM DIVIDED: FREEDOM OF SPEECH AND THE MANY USES OF STATE POWER (1996).

ensuring that public property is available for its primary intended use.[62] To this list one should add a new and important addition: security.

1. The Infernal Logic of the Security Rationale

Increasingly, security serves as the justification for the marginalization of those seeking to use public space to communicate a message to fellow citizens. Moreover, because most judges come from a common culture, watch the same news programs, and read the same newspapers, they are no less susceptible to mass hysteria and panic than are other citizens.[63] Time and again, judges have simply credited governments' arguments that enjoyed social currency as justifications for restrictions on speech, rather than pressing the government to prove the truth of those assertions.[64] Security rates as an important government interest even more so than aesthetics, traffic flow, or quiet enjoyment of a park,[65] and its promiscuous invocation therefore represents a clear and present danger to any meaningful access to public space for individual and collective speech activity. It is far too easy to equate dissent with disloyalty and to label the dissenter a potential terrorist or purveyor of violence. Once one successfully defines political dissent as a marker for political violence, the government's interest in regulating, if not entirely suppressing, dissent becomes compelling.

The problem with this logic is that political dissent is not a marker for political violence: Most dissenters are peaceful, and those who are not can themselves be punished for actually committing criminal acts. The security argument seduces the judicial mind and raises the horrifying prospect of a judicial order leading to mass injuries or death. When weighing human life against the right to protest, it is not difficult to predict the outcome of the balance. When a government official invokes security—whether of a public official, like the vice president, or of a group, such as delegates to a North

62. *See* Owen M. Fiss, *Silence on the Street Corner*, 26 SUFFOLK U. L. REV. 1 (1992) [hereinafter Fiss, *Silence*]; *see also* Owen M. Fiss, *Free Speech and Social Structure*, 71 IOWA L. REV. 1405, 1410–21 (1986) [hereinafter Fiss, *Free Speech and Social Structure*].

63. Wells, *supra* note 15, at 202–04.

64. *See* Blasi, *supra* note 15, at 466–76 (1985) (arguing that judges should define "the freedom of speech" narrowly, but should protect speech coming within that definition in near absolute terms during times of crisis or unrest in order to facilitate meaningful democratic discourse at times when such discourse is most crucial).

65. *See* Members of the City Council v. Taxpayers for Vincent, 466 U.S. 789, 805–08 (1984) (aesthetics); Kovacs v. Cooper, 336 U.S. 77, 97 (1949) (Jackson, J., concurring) (quiet enjoyment of a park); Cox v. New Hampshire, 312 U.S. 569, 573–76 (1941) (traffic flow); *see also* Consol. Edison Co. v. Pub. Serv. Comm'n, 447 U.S. 530, 535–36 (1980) (discussing in general terms possible permissible justifications for content-neutral time, place, and manner restrictions).

Atlantic Treaty Organization (NATO) meeting—any appreciable risk of harm seems too great to tolerate. As a consequence, judges accept government decisions to close off large swaths of public space in order to ensure that there is no trouble.

The rules against content and viewpoint discrimination do not serve as a meaningful brake on such actions because the regulations the government employs are, at least facially, content and viewpoint neutral. Even if the genesis of the restrictions relates to a particular planned protest by, for example, persons opposed to the Iraq War, the regulations on their face close the space to all would be protestors. Similarly, the rule against prior restraints simply does not apply to reasonable, content-neutral time, place, and manner restrictions. Temporary regulations enacted in the name of security are the real-world equivalents of get-out-of-jail-free cards for governments seeking to restrict protest.

The problem runs deep, for it is doubtful that academic admonitions to apply the free speech rules more aggressively[66] will make much headway against the reflexive deference that judges provide the government when security concerns are invoked. Thus, tinkering with the existing doctrinal structure is unlikely to lead to any real improvement in access to public spaces to protest specific policies or officials. Instead, the solution requires the creation of an entirely new doctrinal fix, one that makes it much more difficult for a judge to fold immediately after the government plays the security card. We believe that the Petition Clause might provide the textual, theoretical, and doctrinal basis for protecting a right to protest in a meaningful place and at a meaningful time.[67]

2. The Standards Governing Time, Place, and Manner Restrictions

As set forth in *Ward v. Rock Against Racism*, the time, place, and manner doctrine is as follows:

> [E]ven in a public forum the government may impose reasonable restrictions on the time, place, or manner of protected speech, provided the restrictions "are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a

66. *See, e.g.*, Cheh, *supra* note 12; Crocker, *supra* note 12; Zick, *Space, Place, and Speech*, *supra* note 12; Zick, *Speech and Spatial Tactics*, *supra* note 12.

67. *See infra* text accompanying notes 323–364.

> significant government interest, and that they leave open ample alternative channels for communication of the information."[68]

On its face, the time, place, and manner doctrine appears at least fairly solicitous of free speech: A standard of review that is, in essence, intermediate scrutiny presents a high bar indeed. As the doctrine has evolved over time, however, the criteria set forth by the Supreme Court often present the government with only minor impediments—mere speed bumps along the path to suppression of even core political speech.[69] "[W]hat once were rules to protect speech [have] now become rules to restrict it."[70]

There are two principal ways in which the time, place, and manner doctrine is less protective of speech than initially appears. The first is in the requirement of narrow tailoring.[71] As the Court explained in *Ward*, in the context of time, place, and manner restrictions, "narrowly tailored" is not synonymous with "least restrictive means:"[72]

> Rather, the requirement of narrow tailoring is satisfied "so long as [the] regulation promotes a substantial government interest that would be achieved less effectively absent the regulation." . . . So long as the means chosen are not substantially broader than necessary to achieve the government's interest . . . the regulation will not be invalid simply because a court concludes that the government's interest could be adequately served by some less-speech-restrictive alternative.[73]

Redefining "narrow" to mean "not substantially broader than necessary" clearly weakens the facially stringent requirement of narrow tailoring, but that is not the end of the story. According to the *Ward* Court, lower courts must give deference to the government's own "reasonable determination" of

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

69. *See* Fiss, *Silence*, *supra* note 62, at 3–18 (describing the evolution of the Supreme Court's test for time, place, and manner restrictions).

70. Hill v. Colorado, 530 U.S. 730, 765 (2000) (Kennedy, J., dissenting).

71. *See* Zick, *Space, Place, and Speech*, *supra* note 12, at 453, 458–59; Zick, *Speech and Spatial Tactics*, *supra* note 12, at 634; *see also* Nanes, *supra* note 12, 215–18; Suplina, *supra* note 12, at 402.

72. *See Ward*, 491 U.S. at 797–800 (discussing the narrow tailoring requirement). In contrast, a court considering a content-based regulation must "assume[ ] that certain protected speech may be regulated, and then ask[ ] what is the least restrictive alternative that can be used to achieve that goal." Ashcroft v. ACLU, 542 U.S. 656, 666 (2004).

73. *Ward*, 491 U.S. at 799–800 (citations omitted). In *Hill v. Colorado*, the Court articulated an even broader view of narrow tailoring, stating that "when a content-neutral regulation does not entirely foreclose any means of communication, it may satisfy the tailoring requirement even though it is not the least restrictive or least intrusive means of serving the statutory goal." *Hill*, 530 U.S. at 726.

how its interest will best be achieved.[74] The practical effect of these principles on the requirement of narrow tailoring was aptly summarized by Justice Marshall, writing in dissent in *Ward*:

> The majority thus instructs courts to refrain from examining how much speech may be restricted to serve an asserted interest and how that level of restriction is to be achieved. If a court cannot engage in such inquiries, I am at a loss to understand how a court can ascertain whether the government has adopted a regulation that burdens substantially more speech than is necessary.[75]

Perhaps even more invidious than the substantial weakening of the narrow tailoring requirement is the Supreme Court's unusual application of the rule against content (and viewpoint) discrimination.[76] The strictness with which the Court polices this rule is vital to the protection of speech activity because the presence or absence of content neutrality determines the level of scrutiny to which a speech restriction will be subjected.[77] Regrettably, the Court's application of the neutrality requirement reflects a pattern of willful blindness.[78] The "fundamental principle" underlying the neutrality requirement appears highly protective of speech: The "government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views."[79] Yet despite the seemingly strict requirement of neutrality, a speech regulation may be found content neutral regardless of its real-world discriminatory effects or the government's discriminatory intent in enacting it.[80]

For example, in *Hill v. Colorado*, the Court considered a Colorado statute that made it a misdemeanor for a person to "knowingly approach another person within eight feet of such person . . . for the purpose of passing a leaflet or handbill to, displaying a sign to, or engaging in oral protest, education, or counseling with such other person . . . within a radius of one hundred feet

74. *See Ward*, 491 U.S. at 800 ("The Court of Appeals erred in failing to defer to the city's reasonable determination [of how] its interest . . . would be best served . . . ."); *see also* Turner Broad. Sys., Inc. v. FCC, 520 U.S. 180, 195–96 (1997) (discussing the "substantial deference" owed to Congress' judgments as to the existence of a harm and the best means of alleviating it).

75. *Ward*, 491 U.S. at 807 (Marshall, J., dissenting).

76. The requirement of ample alternative channels of communication is also subject to manipulation. *See, e.g.*, *infra* Part I.C.1–I.C.2 (discussing cases in the federal circuit courts applying the time, place, and manner doctrine).

77. *See* Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 642 (1994) (citing Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 293 (1984)); Boos v. Barry, 485 U.S. 312, 321 (1988).

78. *See, e.g.*, *infra* text accompanying 81–98 (discussing the Court's neutrality inquiries in *Hill* and *Turner*).

79. City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 48–49 (1986).

80. *See Ward*, 491 U.S. at 791.

from any entrance door to a health care facility."[81] Applying the *Ward* standard, the majority held that the statute was content neutral (and therefore subject only to intermediate scrutiny) for two principal reasons.[82] First, the majority relied on the Colorado courts' construction of the statute and interpretation of the legislative history to conclude that the statute "was not adopted 'because of disagreement with the message it conveys.'"[83] Second, and most importantly, the majority argued that "the State's interests in protecting access [to the facilities] and [patients'] privacy, and providing the police with clear guidelines, are unrelated to the content of the demonstrators' speech."[84] The majority then went on to apply intermediate scrutiny, upholding the statute as narrowly tailored to serve a significant government interest and leaving open ample alternative channels of communication.[85]

Only on a purely theoretical level, however, can one say that a ban on healthcare facility picketing is content and viewpoint neutral. True, if a pro-choice group wished to picket a women's health clinic to support abortion rights, such a picket would fall within the proscription; yet, as mentioned earlier, pro-choice groups simply do not picket women's health clinics. To call the Colorado statute "content neutral" requires willful blindness of a sort not used in other areas of the law, such as equal protection, in which the Court routinely looks behind the face of the law to seek out discriminatory intent: Where discriminatory intent motivates a law with discriminatory effects, the law is subject to heightened judicial scrutiny, even if it is otherwise facially neutral.[86] In contrast, the Court's formulaic application of the content neutrality requirement ignores both the intent of the enactors and the real-world effects of the law.

This practice, if not gutting the content-neutrality requirement, surely undermines it significantly. Is it plausible to think that if a school board under a desegregation order simply voted to close the public schools (denying children of all races access to public educational facilities) that the Supreme Court would not look behind the face of the decision to the intent of the

81. Hill v. Colorado, 530 U.S. 703, 707 n.1 (2000) (quoting COLO. REV. STAT. § 18-9-122(3) (1999)).

82. *Id.* at 719–20. Without elaboration, the Court also made a head-scratch-inducing third argument that the statute was content neutral because it was not a regulation of speech at all, but "[r]ather, it [was] a regulation of the places where some speech may occur." *Id.* at 719. Though it would no doubt come as a surprise to the authors of the Court's previous decisions on time, place, and manner regulations, apparently such regulations are, by definition, content neutral.

83. *Id.*

84. *Id.* at 719–20.

85. *See id.* at 725–30.

86. *See, e.g.*, Yick Wo v. Hopkins, 118 U.S. 356, 369–74 (1886); Hunter v. Underwood, 471 U.S. 222, 229–32 (1985).

board and the effect of the policy? We need not engage in mere speculation to answer this question—the Court would not hesitate to disallow such a change in policy.[87]

Turner Broadcasting System, Inc. v. FCC[88] provides another example of the Court's willful blindness toward content discrimination. *Turner* concerned Sections 4 and 5 of the Cable Television Consumer Protection and Competition Act of 1992,[89] which Congress enacted in response to the concern that cable television was "endangering the ability of over-the-air broadcast television stations to compete for a viewing audience and thus for necessary operating revenues."[90] Among other things, the Act required cable systems to set aside up to one-third of their channels to carry any local broadcast television stations requesting carriage.[91] Justice O'Connor, in dissent, succinctly summarized the issue:

> There are only so many channels that any cable system can carry. If there are fewer channels than programmers who want to use the system, some programmers will have to be dropped. In the must-carry provisions of the Cable Television Consumer Protection and Competition Act of 1992, Congress made a choice: By reserving a little over one-third of the channels on a cable system for broadcasters, it ensured that in most cases it will be a cable programmer who is dropped and a broadcaster who is retained. The question presented in this case is whether this choice comports with the commands of the First Amendment.[92]

As in *Hill*, the resolution to *Turner*'s First Amendment question turned on whether the provisions were content neutral and therefore subject to only intermediate scrutiny. The majority reasoned that "[n]othing in the Act imposes a restriction, penalty, or burden by reason of the views, programs, or stations the cable operator has selected," and that the burden imposed on cable programmers by virtue of the reduction in the number of available cable channels "is unrelated to content, for it extends to all cable programmers irrespective of the programming they choose to offer viewers."[93] As a result, the majority held that "the must-carry rules, *on their face*, impose burdens and

87. *See* Griffin v. County Sch. Bd., 377 U.S. 218, 221–22 (1964) (invalidating a scheme to avoid desegregation of the county public schools by simply closing them); *see also* BOB SMITH, THEY CLOSED THEIR SCHOOLS: PRINCE EDWARD COUNTY, VIRGINIA, 1951–1964 (1965).

88. Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622 (1994).

89. 47 U.S.C. §§ 534–535 (2000).

90. *Turner*, 512 U.S. at 633.

91. *Id.* at 630 (internal citations omitted).

92. *Id.* at 674–75 (O'Connor, J., concurring in part and dissenting in part).

93. *Id.* at 644–45.

confer benefits without reference to the content of speech" and are therefore subject only to intermediate scrutiny.[94]

Once again, the Court's finding of content neutrality flew in the face of reality. After reciting the laundry list of justifications for the Act, as stated in the Act itself, Justice O'Connor concluded in dissent:

> Preferences for diversity of viewpoints, for localism, for educational programming, and for news and public affairs all make reference to content. They may not reflect hostility to particular points of view, or a desire to suppress certain subjects because they are controversial or offensive. . . . But benign motivation, we have consistently held, is not enough to avoid the need for strict scrutiny of content-based justifications. . . .
>
> . . . The interest in ensuring access to a multiplicity of diverse and antagonistic sources of information, no matter how praiseworthy, is directly tied to the content of what the speakers will likely say.[95]

Even if the majority correctly construed Sections 4 and 5 as facially content neutral, a dubious proposition to begin with, Congress' findings, codified as part of the Act itself, made clear that the intent and likely actual effects of the Act were not only content based, but they were also viewpoint based, in that they preferred local points of view over national ones.

To its credit, the majority in *Turner* did acknowledge that "even a regulation neutral on its face may be content based if its manifest purpose is to regulate speech because of the message it conveys."[96] After unpersuasively attempting to distinguish the congressional findings, however, the majority found no such manifest purpose in the challenged regulations.[97] Thus, they were subjected to only intermediate scrutiny, despite Congress' clearly discriminatory intent and the benefit conferred on one group of speakers (local broadcasters) at the expense of others (cable programmers).[98]

In short, between the relaxed application of the narrow tailoring requirement and the "wink-wink nudge-nudge, know what I mean?" application of the content-neutrality requirement, the Supreme Court has greatly eroded the time, place, and manner doctrine's bulwark against government regulation of disfavored or unpopular speech. As the cases discussed below demonstrate, with respect to at least one form of core political expression, the dam has now

94. *Id.* at 643 (emphasis added).

95. *Id.* at 677–78 (O'Connor, J., concurring in part and dissenting in part). Joining Justice O'Connor's opinion was the unusual combination of Justices Ginsburg, Scalia, and Thomas. *Id.* at 674.

96. *Id.* at 645 (citing United States v. Eichman, 496 U.S. 310, 315 (1990)).

97. *See id.* at 646–48.

98. *See id.*

burst under the added weight of the post-9/11 government's heightened interest in security. The result has been not only government regulation, but also criminalization of disfavored speech in what is, in effect, a qualified return to the law of seditious libel.

C. Free Speech as Hostage to Security Concerns

Dissenting in *Hill*, Justice Scalia was of the opinion that the majority's exceptionally weak application of the time, place, and manner doctrine was more a result-oriented product of the pro-abortion-rights views of the majority than a principled attempt to correctly apply First Amendment doctrine.[99] As he boldly asserted, "I have no doubt that this regulation would be deemed content based *in an instant* if the case before us involved antiwar protestors . . . ."[100] The Supreme Court has yet to test Justice Scalia's hypothesis, but if the decisions of the federal courts of appeals are any indication, he was woefully mistaken. Indeed, nowhere have the weaknesses of the time, place, and manner doctrine been exploited in a more striking or troubling fashion than in recent courts of appeals decisions upholding total bans on protest activity of *all* stripes proximate to national and international political events.

Such bans on protest speech take the form of "no-protest zones" or "free-speech zones" and occur at large-scale political events, such as presidential appearances and the Democratic and Republican National Conventions.[101] Orchestrated by local law enforcement, often with the participation or at the direction of the U.S. Secret Service,[102] no-protest and

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99. *See* Hill v. Colorado, 530 U.S. 703, 742, 764 (2000); *see also* Ronald J. Krotoszynski, Jr., *Dissent, Free Speech, and the Continuing Search for the "Central Meaning" of the First Amendment*, 98 MICH. L. REV. 1613, 1667 & n.178 (2000). The Court's pro-abortion-rights Justices, however, are not alone in their willingness to subvert First Amendment values in favor of their views on abortion. In *Rust v. Sullivan*, 500 U.S. 173 (1991), for example, Justices Scalia and Kennedy, who both dissented vociferously in *Hill*, joined the majority in upholding a regulation prohibiting physicians from even mentioning the availability of abortion to women who participated in a government-sponsored family planning program. *Id.* at 176. The majority's credulity-stretching argument was, in essence, that "neither the physician nor the patient had any free speech interest in speech related to abortion in a government-sponsored family planning clinic." *See* KROTOSZYNSKI, *supra* note 28, at 200–09 (comparing *Rust* with *Hill* and arguing that "[f]ree speech principles were simply collateral damage in [cases] perceived as part of the overall battle over the scope and meaning of *Roe v. Wade*").

100. *Hill*, 530 U.S. at 742 (Scalia, J., dissenting).

101. *See generally infra* text accompanying notes 110–177.

102. *See* Suplina, *supra* note 12, at 395–96 (describing the free-speech zones established at presidential appearances and at the 2004 Democratic and Republican National Conventions); United States Secret Service, National Special Security Events, http://www.secretservice.gov/nsse.shtml (last visited July 31, 2007) (describing the underlying law and the process and significance of designating an event a "National Special Security Event").

free-speech zones are fairly recent phenomena, appearing to date back to the 1988 DNC in Atlanta.[103] Sometimes these zones are simply designated areas that otherwise appear completely open; at their worst, they are virtual cages, like the designated protest zone in *Bl(a)ck Tea Society*.[104]

Protest activity within a no-protest zone or outside a free-speech zone is forbidden and subjects violators to criminal sanctions. Although these speech restrictions are ostensibly content neutral, the evidence is virtually indisputable that they are often used to marginalize political protest speech by physically moving protestors away from an event.[105] This suppression of dissent is, however, decidedly nonpartisan[106] and is invariably justified by reference to the government's undeniably strong interest in the security of these large-scale, national and international political events.[107]

Given the weakness of the Supreme Court's application of the time, place, and manner doctrine, protestors seeking to challenge the use of no-protest and free-speech zones have always been at a disadvantage in the courts. However, since the 1999 riots at the WTO conference in Seattle, and especially since the 9/11 terrorist attacks in 2001, the governmental interest in security has been a virtual blank check for the imposition of total

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103. *See* Andrew Blake, *Atlanta's Steamy Heat Cools Protests: More Than 25 Groups Rally in Demonstration Area*, BOSTON GLOBE, July 20, 1988, at 12 (describing the demonstration area established by Atlanta's mayor, termed a "free-speech cage" by one of the protestors).

104. *See* Bl(a)ck Tea Soc'y v. City of Boston, 378 F.3d 8, 11 (2004) (describing the enclosed free-speech zone at the 2004 DNC, which was located under elevated railroad tracks bordered by "coiled razor wire"). For a satirical take on this phenomenon, see *Arrested Development: Whistler's Mother* (Fox television broadcast Apr. 11, 2004), in which one of the main characters, Lindsay Bluth, attempts to protest the Iraq War outside a military base, but is foiled by the military's use of a free-speech cage. As a soldier directs Lindsay and her fellow protestors into the chain-link pen in the middle of nowhere, she asks, "Free-speech zone? This is where we're protesting? This isn't right. Where are the cameras?" Unmoved, the soldier replies drily, "They're in the free-press zone. And if you could save your comments until you're completely loaded into the cage." After closing the gate behind them, the soldier half-heartedly quips, "Okay, have fun, enjoy your right to free speech." *Id.*

105. *See* OFFICE OF PRESIDENTIAL ADVANCE, *supra* note 11, at 34–35 (describing White House procedures for keeping protestors away from the president and the press at presidential appearances); *see also* Hampson, *supra* note 12, at 257; Suplina, *supra* note 12, at 396.

106. *Compare* Rick Klein, *Convention Plan Puts Protesters Blocks Away*, BOSTON GLOBE, Feb. 20, 2004, at A1 (2004 DNC), Mitchell Locin & John O'Brien, *For Convention Protests, This Time It's the Pits*, CHI. TRIB., Apr. 2, 1996, at 1 (1996 DNC), *and* Nicholas Riccardi, *Convention Planners Wary of a New Style of Protest*, L.A. TIMES, June 23, 2000, at 1 (2000 DNC), *with* Diane Cardwell, *The Contest of Liberties and Security*, N.Y. TIMES, July 26, 2004, at B1 (2004 RNC), Thomas Ginsberg, *Convention Pact Gives GOP Control of Center City Sites*, PHILA. INQUIRER, Mar. 24, 2000, at A01 (2000 RNC), *and* Tony Perry, *Protestors Toe the Line for GOP Convention*, L.A. TIMES, June 23, 1996, at 3 (1996 RNC).

107. *See* Nanes, *supra* note 12, at 209; Suplina, *supra* note 12, at 396–97; *infra* Part I.C.1–I.C.2 (discussing cases involving challenges to no-protest and free-speech zones).

speech bans and the use of degrading limits on legitimate protest activity.[108] As applied by lower courts in recent years, the already watered-down requirements of content neutrality and narrow tailoring have been strained to the point of breaking under the weight of the government's post-Seattle, post-9/11 security interest. Although protestor-plaintiffs have occasionally succeeded at the trial level,[109] the federal appellate courts have been unanimous in upholding even the most egregious uses of no-protest and free-speech zones as reasonable time, place, and manner regulations, as illustrated by the cases discussed below.

1. *Bl(a)ck Tea Society v. City of Boston*

In 2004, the First Circuit decided *Bl(a)ck Tea Society v. City of Boston*, which arose out of the "designated protest zone" created for the 2004 DNC.[110] Although the "DZ" was, as the Massachusetts district court stated, "an offense to the spirit of the First Amendment,"[111] the district court had nonetheless upheld Boston's use of the DZ, denying the plaintiff's request for an injunction, and the First Circuit affirmed.[112]

In assessing the validity of the DZ as a time, place, and manner regulation, the court of appeals quickly dispensed with the requirements of content neutrality, stating without elaboration that "the challenged security precautions are plainly content-neutral and there can be no doubting the substantial government interest in the maintenance of security at

108. *See* Hampson, *supra* note 12, at 253–59 (describing numerous instances of government suppression of political dissent since 9/11); Suplina, *supra* note 12, at 396 ("[W]hen the state raises powerful antiterrorism concerns within the weak First Amendment time, place, manner framework it will almost always prevail.").

109. *See* Blair v. City of Evansville, Ind., 361 F. Supp. 2d 846, 859 (S.D. Ind. 2005) ("Defendants' creation of a large no-protest zone, and the creation of a designated protest zone 500 feet or more away from Blair's targeted audience violated Blair's First Amendment Rights."); Stauber v. City of N.Y., No. 03 Civ. 9162 (RWS), 2004 WL 1593870, at *29 (S.D.N.Y. July 19, 2004) (finding that the city's use of free speech "pens" was not narrowly tailored due to the extreme limitations on entry to and exit from the pens); Serv. Employee Int'l Union v. City of L.A., 114 F. Supp. 2d 966, 975 (C.D. Cal. 2000) ("[T]he Court finds that the proposed 'secured zone' . . . is not narrowly tailored to serve that interest [in security] because it burdens more speech than is necessary. The Court further finds that defendants' proposed 'Demonstration Site' is not an adequate alternative for communication to the delegates and Democratic Party officials . . . .").

110. Bl(a)ck Tea Soc'y v. City of Boston, 378 F.3d 8, 10 (1st Cir. 2004). The appalling character of the "DZ" was detailed in the Introduction to this Article. *See supra* text accompanying notes 1–4 (describing the district court's assessment of the DZ).

111. Coal. to Protest the Democratic Nat'l Convention v. City of Boston, 327 F. Supp. 2d 61, 76 (2004), *aff'd sub nom. Bl(a)ck Tea Soc'y*, 378 F.3d. 8.

112. *Bl(a)ck Tea Soc'y*, 378 F.3d at 10.

political conventions."[113] The court did not address the practical reality that the DZ would house far more anti-Democrat demonstrators than pro-Democrat demonstrators.[114]

Proceeding to the narrow tailoring requirement, the court acknowledged that the DZ "dramatically limited the possibilities for communicative intercourse between the demonstrators and the delegates."[115] And even though the court noted that "[s]ecurity is not a talisman that the government may invoke to justify *any* burden on speech (no matter how oppressive)," it nevertheless affirmed the district court's determination that the DZ was narrowly tailored.[116]

Having satisfied itself as to narrow tailoring, the court then turned to the appellant's contention that there were no alternative channels of communication "within sight and sound of the delegates assembled at the [site of the convention]."[117] The court addressed this issue only indirectly, first noting (without citing any authority) that "there is no constitutional requirement" that demonstrators be granted direct access to the delegates "by, say, moving among them and distributing literature."[118] Even if true, however, this response ignores the vast middle ground of possibilities that lie between the "brutish"[119] DZ and unrestrained, one-on-one physical access to convention delegates.

The court's only other answer to the appellant's alternative channels claim was the observation that it "greatly underestimates the nature of modern communications."[120] As the court explained, "At a high-profile event, such as the Convention, messages expressed beyond the first-hand sight and sound of the delegates nonetheless have a propensity to reach the delegates through television, radio, the press, the internet, and other outlets."[121] Finding the ample alternative channels requirement satisfied,

113. *Id.* at 12.

114. *See* Nanes, *supra* note 12, at 209 ("Although the Boston demonstration zone could theoretically have been filled by pro-Kerry demonstrators and the protest pens outside [the RNC] in New York City could have housed pro-Bush demonstrators, common sense argues this would not be the case.").

115. *Bl(a)ck Tea Soc'y*, 378 F.3d at 13. In addition, the district court's opinion makes clear that, at most, only half of the delegates would have been able to even see the DZ on their way into the convention. *See Coal. to Protest*, 327 F. Supp. 2d at 67–68 (describing, in relation to the DZ site, the configuration of the bus terminal where delegates would arrive and depart).

116. *Bl(a)ck Tea Soc'y*, 378 F.3d at 13–14.

117. *Id.* at 14.

118. *Id.*

119. *Coal. to Protest*, 327 F. Supp. 2d at 76.

120. *Bl(a)ck Tea Soc'y*, 378 F.3d at 14.

121. *Id. But see infra* notes 137–138 (discussing the Ninth Circuit's view of this approach to the ample alternative channels of communication requirement).

and the DZ therefore a reasonable time, place, and manner regulation, the court affirmed the district court's denial of an injunction.[122]

2. *Menotti v. City of Seattle*

Although the vast majority of the protest activity during the 1999 WTO Conference in Seattle was peaceful,[123] violence had broken out as early as three weeks prior to the start of the conference, beginning with a Molotov cocktail attack on a clothing store in downtown Seattle.[124] Violent protest activity continued intermittently until the opening of the conference, at which point it intensified. "The disruption of normal city life was so extreme in some locations that it bordered on chaos."[125]

In response, the mayor of Seattle declared a civil emergency and signed Local Proclamation of Civil Emergency Order Number 3 (Order No. 3),[126] the effect of which was that "all persons, subject to limited exceptions, were prohibited from entering the portion of downtown Seattle" surrounding the conference.[127] Within this "restricted zone," which comprised twenty-five square blocks,[128] were the conference sites and the hotels where WTO delegates were staying.[129] Exceptions to the prohibition on entering the restricted zone were granted for WTO delegates and personnel, employees and owners of businesses within the restricted area, public safety personnel, city staff, and members of the press.[130] The practical effect of these exceptions, as well as the manner in which the restriction was enforced by the police, was that only protestors were prevented from entering the restricted zone.[131]

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122. *Id.* at 15.

123. Menotti v. City of Seattle, 409 F.3d 1113, 1123 (9th Cir. 2005) (citing a Seattle report indicating that "violent protestors were less than one percent of the total protestors").

124. *Id.* at 1120.

125. *Id.* at 1121.

126. *Id.* at 1124.

127. *Id.* at 1125.

128. *Id.* at 1159 (Paez, J., dissenting).

129. *Id.* at 1125.

130. *Id.* at 1125 & n.16.

131. *See id.* at 1125–28 (describing the exceptions to the Order and the police implementation of it); *see also id.* at 1159 (Paez, J., dissenting) ("While the text of Order No. 3 may be content neutral, the City's policy was to apply the law selectively such that it was not narrowly tailored to serve its asserted non-speech-related interest of preserving safety and order."). Judge Richard Paez, writing in dissent, explained the city's policy as follows:

> Notably, the Order allowed anyone who did not visibly display opposition to the WTO to enter the zone, without regard to dangerousness or likelihood of violence. While the police scoured for "No WTO" signs and buttons, there was no evidence that officers checked bags for crowbars, weapons, or bombs. . . .

In *Menotti v. City of Seattle*, persons who had been arrested for violating the restricted zone sought "damages for the constitutional rights that were alleged to [have been] violated by the emergency order."[132] The district court had granted the defendants' motion for summary judgment, and the Ninth Circuit affirmed, upholding Order No. 3 as a constitutional time, place, and manner restriction on speech.[133] To do so, the Ninth Circuit first needed to find that the order was content neutral. Because the *Ward* test requires only facial neutrality, it had little difficulty.[134]

The court then considered whether Order No. 3 was narrowly tailored to serve a significant government interest. The focus of the court's inquiry was on the city's clearly significant interest in maintaining safety and public order.[135] Most of the court's discussion focused on the expansive size of the

. . . .

> Even those who should have been granted access to the zone according to the plain terms of the Order, such as people who lived or worked in the zone, were denied entry if they wore "No WTO" stickers or carried protest signs.

Id. at 1162–63 (Paez, J., dissenting).

132. *Id.* at 1117–18.

133. *Id.* at 1118.

134. *Id.* at 1129 (citing City of L.A. v. Alameda Books, Inc., 535 U.S. 425, 448 (2002) (Kennedy, J., concurring); Ctr. for Fair Pub. Policy v. Maricopa County, 336 F.3d 1153, 1164 (9th Cir. 2003)).

135. *See Menotti*, 409 F.3d at 1131. Several times in its opinion, however, the court also argued that the city had a significant interest in attracting the future business of international conferences, stating at one point that "[t]he City also had an interest in seeing that the WTO delegates had the opportunity to conduct their business at the chosen venue for the conference; a city that failed to achieve this interest would not soon have the chance to host another important international meeting." *Id.* at 1131–32; *see also id.* at 1141 ("If the City had permitted chaos and violence to continue unabated, it would . . . lose its standing as a host city for international conferences . . . ."); *id.* at 1155 ("When a city is charged with the critically important responsibility of hosting a convention of world leaders, a setting in which the eyes of the world are on the city and our country, and our nation's reputation is at stake as well, the city must have the power to maintain civic order . . . ."). To suggest that such an interest is significant is to suggest that it has the potential to outweigh First Amendment speech rights, and one has to wonder whether an interest in attracting occasional convention business can ever carry such weight. *See id.* at 1168 n.8 (Paez, J., dissenting) ("I am not convinced that a city's interest in hosting such an event is 'significant' for purposes of this analysis."); *cf. id.* at 1167 n.6 (Paez, J., dissenting) ("[T]he city did not have a constitutionally significant interest in sheltering delegates from the unpleasantness or inconvenience of a large demonstration."). As one commentator has explained:

> [T]he assumed neutrality of . . . pen and zone schemes should be questioned more thoroughly, particularly because these schemes [are] devised by authorities having a far greater interest in avoiding protest speech than in reasonably accommodating it. A large motive in luring the national political conventions, indeed, any major convention or significant event like the Olympics or the Super Bowl, is for a host city to attract the spending power of delegates and to put on a great show for those delegates and for the national media. Convention boosters recruit business communities with promises of boom days. Host city mayors become deeply involved in bidding for conventions and great effort is taken to resolve labor disputes and other such sticking points that might mar the presentation.

no-protest zone, which was justified, according to the court, by the large area in which the WTO delegates were housed, and, more importantly, the fact that the Order arose in response to pervasive violence that had already occurred.[136]

Finally, much as in *Bl(a)ck Tea Society*, the court gave short shrift to the ample alternative channels of communication requirement. At best, the evidence supporting a finding that the peaceful protestors' ability to communicate effectively was not threatened was unclear.[137] Nevertheless, the court found that this requirement was satisfied and upheld Order No. 3 as a reasonable time, place, and manner regulation.[138]

3. *Citizens for Peace in Space v. City of Colorado Springs*

As the saying goes, "bad facts make bad law," which may explain, at least to some extent, the outcomes in *Bl(a)ck Tea Society* and *Menotti*. Unlike most situations in which no-protest and free-speech zones are used, the no-protest zone in *Menotti* was established in response to violence that had already begun and was ongoing. Even if Seattle overreached in its

> Those representing the city, then, are motivated to keep the peace largely by keeping noisy and irate demonstrators far away from delegates and other visitors.
>
> National political party personnel are equally interested in smooth sailing. . . .
>
> . . . At the 2004 conventions, the pens and zones would most likely be filled by protestors expressing views that did not fit well into the upbeat and urbane images the Boston and New York City authorities wished to project. If so, the assumed content neutrality of the pens and zones should not be so easily accepted.

Nanes, *supra* note 12, at 208–09 (footnotes omitted). This asserted significant interest in attracting convention business also highlights a larger issue: whether government may legitimately serve as the midwife to North Korean–style political theater.

136. *Menotti*, 409 F.3d at 1132–37. *But cf. id.* at 1169 (Paez, J., dissenting) ("Order No. 3 banned peaceful expressive activity without regard to the City's stated safety-related goals . . . . The majority would allow the police to search people they suspected of carrying stickers and handbills, but concludes that it 'would not have been practical' for police to search for crowbars or spray paint.").

137. *Compare id.* at 1138–41, 1141 n.54 (arguing that, despite the no-protest zone, protestors retained the "ability to communicate directly across the street from most WTO venues"), *with id.* at 1173 & n.16 (Paez, J., dissenting) (stating that Order No. 3 "confined all demonstrations to outside areas where the message the protestors sought to convey may never have reached the intended audience," and disputing the majority's assertions to the contrary).

138. *See id.* at 1141–42. In a footnote, the court also acknowledged, but did not evaluate, the First Circuit's argument in *Bl(a)ck Tea Society* that the ample alternative channels requirement may be satisfied by messages that, although not expressed within sight and sound of the intended hearer, may be picked up the media. *See id.* at 1139 n.49 (citing Bl(a)ck Tea Soc'y v. City of Boston, 378 F.3d 8, 14 (1st Cir. 2004)). Judge Paez, however, was not satisfied by this approach, arguing that the court "should dispel any notion that media interest in an event can be a substitute for constitutionally-required alternative avenues of communication. As the Seventh Circuit stated in *Hodgkins* [*v. Peterson*], 'there is no internet connection, no telephone call, no television coverage that can compare to attending a political rally in person . . . .'" *Id.* at 1174 (Paez, J., dissenting) (quoting Hodgkins v. Peterson, 355 F.3d 1048, 1063 (7th Cir. 2004)).

reaction to the violence, it is perhaps somewhat understandable if the Ninth Circuit was inclined to be forgiving, given the extent of the chaos facing the city. In *Bl(a)ck Tea Society*, both the district and circuit courts faced very real time limitations: Because the plaintiffs did not file suit seeking an injunction until July 21, with the DNC scheduled to begin on July 26, the case was both tried and appealed in the space of only five days.[139] The effect of this time limitation was addressed in both the district and circuit court opinions and was at least partially responsible for the extraordinary deference accorded to the city.[140]

The 2007 case *Citizens for Peace in Space v. City of Colorado Springs*,[141] however, presented neither of these disabilities, making it an ideal test case for the application of the time, place, and manner doctrine to security-justified speech restrictions. It is therefore all the more surprising that the Tenth Circuit's decision is the most egregious example yet of a court essentially rolling over for an asserted security interest, applying a virtually nonexistent level of scrutiny to a no-protest zone.

The First Amendment claim in *Citizens for Peace in Space* arose out of an international conference hosted by then-Secretary of Defense Donald Rumsfeld at the famous Broadmoor Hotel in Colorado Springs.[142] Invited to the conference were the defense ministers of nineteen member nations of NATO, as well as those of nine invitee nations.[143] Among the security preparations for the conference was the creation of a large "security zone" that "surrounded the Broadmoor and extended across public and private property for several blocks in all directions."[144] Only persons affiliated with

139. *See Bl(a)ck Tea Soc'y*, 378 F.3d at 10–11 (describing the procedural history of the case).

140. *See id.* at 15 ("With the Convention looming and with few options at its disposal, we think the district court's resolution of the preliminary injunction request was fully supportable."); Coal. to Protest the Democratic Nat'l Convention v. City of Boston, 327 F. Supp. 2d 61, 77 (D. Mass 2004), *aff'd sub nom. Bl(a)ck Tea* Soc'y, 378 F.3d 8 ("[T]he City of Boston . . . has provided protestors with an inadequate space. Unfortunately, . . . there is little time, and no practical means, available for significant modifications to the secured environment."). In his concurrence, Judge Kermit Lipez strongly emphasized timing:

> Time constraints shadowed every aspect of this case. In the future, if the representatives of demonstrators ask the courts to modify security measures developed over many months of planning for an event of this magnitude, they should come to court when there is enough time for the courts to assess fully the impact that modifications will have on the security concerns advanced. . . .
>
> . . . Adequate time means months or at least weeks to address the issues. It does not mean five days before the event begins.

Bl(a)ck Tea Soc'y, 378 F.3d at 16 (Lipez, J., concurring).

141. 477 F.3d 1212 (10th Cir. 2007).

142. *Id.* at 1217.

143. *Id.*

144. *Id.*

the conference or the Broadmoor, accredited media, and persons residing in the security zone and their guests were allowed inside the zone, and all such persons were subjected to screening at security checkpoints on the perimeter of the zone.[145]

The Citizens for Peace in Space (Citizens) are peace activists whose principal concerns are the militarization of space and the prevention of war. They sought to hold a six-person, one-hour protest vigil across the street from the main conference center.[146] After the City denied their request, the Citizens filed suit, alleging that the prohibition on protesting in a public forum violated their First Amendment rights. The district court found in favor of the City, and the Tenth Circuit affirmed, upholding the security zone as a reasonable restriction on the time, place, and manner of speech.[147]

Because the Citizens conceded that the City's use of the security zone was content neutral and that its interest in security was significant, the court addressed those factors only briefly. The court found that the "primary security concern was the threat of a terrorist attack utilizing explosives" and so "the breadth of the security zone ensured that the blast from any such detonation would not get close enough to the Broadmoor to endanger any of the delegates."[148] The court also credited a secondary security interest based on "the threat posed by disorderly and violent protestors."[149]

Before proceeding to the narrow tailoring requirement, however, the court stated a principle that had been percolating in decisions such as *Bl(a)ck Tea Society* and *Menotti*, but which no court—certainly not the Supreme Court—had yet been bold enough to make explicit: "[T]he City's security interest is of the highest order and *guides our determination* of whether the security plan was narrowly tailored and whether there were ample alternative channels of communication."[150] Thus, in the court's view, the security zone

145. *Id.* at 1217–18.
146. *Id.* at 1218–19.
147. *Id.* at 1226.
148. *Id.* at 1217.
149. *Id.* at 1220.
150. *Id.* (emphasis added). Later in its opinion, the court reiterated this principle in perhaps even more startling language, arguing that "[w]hile an extremely important government interest does not dictate the result in time, place, and manner cases, the significance of the government interest bears an inverse relationship to the *rigor* of the narrowly tailored analysis." *Id.* at 1221 (emphasis added). The court cited no authority for its first statement, but for this latter statement, the court cited as authority the narrow tailoring standard of *Board of Trustees, SUNY v. Fox*, 492 U.S. 469, 480 (1989), a commercial speech case that the Supreme Court has only applied to other commercial speech cases. *See, e.g.*, 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484 (1996).

was narrowly tailored simply because it worked.[151] Although the court acknowledged the Supreme Court's statement in *Ward* that "[g]overnment may not regulate expression in such a manner that a substantial portion of the burden on speech does not serve to advance its goals,"[152] its application of that principle completely ignored the previous sentence of *Ward*, which forbids regulations that "burden substantially more speech than is necessary to further the government's legitimate interests."[153] Instead, the court selectively cited Supreme Court precedent to, in effect, suggest that time, place, and manner regulations are *presumptively* narrowly tailored: "[A] restriction 'may not be sustained if it provides only ineffective or remote support for the government's purpose.'"[154] From this skewed perspective, a speech restriction is narrowly tailored if it merely accomplishes the government's goals, regardless of how much speech is suppressed in the process.[155]

True to its word, the court also allowed the city's interest in security to guide its "determination with respect to the requirement of ample alternative channels of communication."[156] Relying on *Menotti*, the court brushed aside the clear inadequacy of the alternative of protesting at a great distance from the conference center, delegates, and media representatives, stating:

> The ample alternative channels analysis cannot be conducted in an objective vacuum . . . . Thus, we must ask whether, given the particular security threat posed, the geography of the area regulated, and the type of speech desired, there were ample alternative channels of communication. To treat the ample alternative channels analysis as wholly independent disconnects it from reality and diminishes the emphasis courts have traditionally placed on the importance of the government interest.[157]

Under this formulation of the ample alternative channels requirement, it was inevitable that the court would find the requirement satisfied, given that "the

151. *See Citizens for Peace in Space*, 477 F.3d at 1220 ("[T]he City's security plan was narrowly tailored to advance its significant security interest because the security zone . . . directly and effectively protected the conference from the threat of terrorism, explosives, and violent protests.").

152. *Id.* (quoting Ward v. Rock Against Racism, 491 U.S. 781, 799 (1989)).

153. Ward v. Rock Against Racism, 491 U.S. 781, 799 (1989).

154. *Citizens for Peace in Space*, 477 F.3d at 1220 (quoting Edenfield v. Fane, 507 U.S. 761, 770 (1993)).

155. The court did eventually address the "burden substantially more speech than [ ] necessary" statement from *Ward*, as well as other arguments that conflicted with the court's presumption of narrow tailoring. *See id.* at 1222–25. However, the court reached the "obvious conclusion" that the security zone was narrowly tailored before it considered these contrary arguments in a portion of the opinion that the court clearly regarded as dicta. *See id.* at 1222.

156. *Id.* at 1220.

157. *Id.* at 1226.

City's security interest [was] of the highest order."[158] Because the Tenth Circuit viewed the security zone as narrowly tailored and leaving open ample alternative channels of communication, it upheld the zone as a reasonable time, place, and manner regulation.

II. SECURITY AS A CELLOPHANE WRAPPER FOR CONTENT AND VIEWPOINT DISCRIMINATION

The government's invocation of security as a justification for restrictions on core political speech surely possesses more than a little merit. After all, threatening the life of the president could be characterized as political speech, but no serious person would argue that a true threat ought to receive First Amendment protection.[159] We certainly would not argue that the government cannot take reasonable steps to secure venues, such as convention halls and public arenas, used for mass political gatherings. If the government may search all passengers seeking to enter the secure zone of an airport, by parity of logic the government may take similar steps to prevent the presence of guns or explosives in the venues used for contemporary political theater.

Indeed, we would go even further to accept the proposition that politicians and party officials have a right to prescreen audiences and to banish viewpoints that they dislike from the actual venues in which political leaders speak or conduct rallies. The Supreme Court has thus far been willing to accept limits on protest activities when they advance concerns based on privacy[160] and aesthetics.[161] Moreover, the Court has held, quite rightly, that the rights to free speech and assembly must encompass some ability to

158. *Id.* at 1220.

159. *See* 18 U.S.C. § 871 (2000); Watts v. United States, 394 U.S. 705, 707 (1969) ("The Nation undoubtedly has a valid, even an overwhelming, interest in protecting the safety of its Chief Executive and in allowing him to perform his duties without interference from threats of physical violence."); *see also* S. Elizabeth Wilborn Malloy & Ronald J. Krotoszynski, Jr., *Recalibrating the Cost of Harm Advocacy: Getting Beyond* Brandenburg, 41 WM. & MARY L. REV. 1159, 1180–85 (2000) (noting that the Supreme Court has upheld significant limits on free speech when justified by overriding governmental objectives).

160. *See* Frisby v. Schultz, 487 U.S. 474, 486 (1988) (upholding a town ordinance that banned targeted picketing of private residences because such picketing "inherently and offensively intrudes on residential privacy").

161. *See* Members of the City Council v. Taxpayers for Vincent, 466 U.S. 789 (1984) (upholding a ban on the placement of political campaign signs on public property, including objects adjacent to the streets, and on city-owned utility poles based on the city's legitimate interest in promoting aesthetics by avoiding unsightly visual clutter).

pick and choose one's fellow political travelers.[162] Free speech and assembly principles would be inhibited, not enhanced, if the federal courts required government officials and political parties to make major events free-for-alls in which the organizers could not effectively control the messages being advanced.

Even making both concessions, however, the fact remains that the limits adopted in places like Boston, Colorado Springs, and Seattle go well beyond the scope that legitimate concerns about security or message control would or could justify. Permitting a pedestrian in downtown Seattle wearing a pro-WTO button to enter the secure zone, but not permitting entry of a person wearing a button emblazoned with "WTO" crossed out with a red slash mark cannot be justified by reference to either the security of WTO meeting delegates or the ability of the WTO to decide precisely who to permit at its business meetings and conferences. Similarly, permitting one person to carry a "No Cutting and Running" sign outside a venue where President Bush will be speaking but not permitting another to carry an "End the War Now!" sign cannot be justified in terms of either security or privacy concerns. Moreover, the Secret Service's position that persons openly opposed to the president's policies present more of a security risk than those purporting to support the president's policies makes absolutely no sense at all; it seems highly unlikely that a person who wished to harm the president would take any steps to attract attention to himself. A person picketing a presidential event invites precisely the kind of intense public scrutiny that a Lee Harvey Oswald or a John Wilkes Booth would certainly seek to avoid.

This Part considers the odd-feigned guilelessness with which reviewing courts have accepted draconian speech restrictions justified in the name of security. Simply put, why have the lower federal courts essentially refused to engage in a meaningful review of speech bans proximate to government officials? We believe that below the surface, federal judges find the kind of direct, confrontational tactics that the would-be demonstrator-plaintiffs seek to pursue distasteful and insulting to the dignity interests of the officials in question, who at some level represent the State itself. Thus, in a powerful

162. *See, e.g.*, Boy Scouts of Am. v. Dale, 530 U.S. 640, 659 (2000) (upholding a free association claim that the Boy Scouts could exclude openly gay scouts and scoutmasters because imposing a state nondiscrimination policy on the Boy Scouts "would significantly burden the organization's right to oppose or disfavor homosexual conduct"); Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, 515 U.S. 557, 581 (1995) (upholding a free association claim by the sponsors of a St. Patrick's Day parade in Boston that inclusion of an openly gay and lesbian parade unit would constitute an unwanted, forced association and would compromise the sponsors' free speech rights because the government lacks power "to compel the speaker to alter [its] message by including one more acceptable to others").

sense, protest of events like nominating conventions and presidential appearances represents an attack on the dignity of the State itself.[163]

In a word, these demonstrations are rude; and, although average citizens must accept impolite behavior as a cost of free speech, politicians need not be made to suffer in the same way because the dignity of the politician is ultimately the dignity of the government itself (notably including the courts). Judges, who themselves would not tolerate noisy protestation in or around their chambers or courtroom, react sympathetically to efforts to silence or marginalize unruly protestors largely drawn from the counterculture.

A. The Security Rationale in Other First Amendment Contexts

The Supreme Court consistently has refused to allow local government to invoke security concerns to silence the speech of racist and anti-Semitic protestors.[164] Instead, the Court repeatedly has held that the problem of the "heckler's veto" requires the government to shoulder extraordinary burdens to facilitate speech activity by unpopular protestors.[165] In other words, when the object of protest is not a carefully orchestrated photo opportunity for government officeholders, the courts have generally required the government to undertake all reasonable efforts to facilitate speech activity, even when real concerns exist about a hostile community reaction to the protestors.[166]

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163. It is not so implausible to imagine a legal regime that sought to protect national symbols and figures from disparagement. *See* Douglas Frantz, *As Former Leader Faces Jail, Turks Rethink Limits on Speech*, N.Y. TIMES, July 11, 2000, at A3 (describing a prison sentence for a Turkish politician who publicly criticized a government policy as anti-Islamic); Mar Roman, *Spanish Journal's Royal Cartoon Stirs Fuss*, SEATTLE TIMES, July 21, 2007, at A11 (reporting that "[a] judge ordered copies of a satirical magazine confiscated . . . for publishing a . . . cartoon of Spain's Crown Prince Felipe in an intimate bedroom scene with his wife" because the cartoon constituted "[l]ibeling the crown," a crime punishable with up to "a two-year prison sentence"); Jeffrey Simpson, *For Turkey's Sake, Stop Snowing Orhan Pamuk*, GLOBE & MAIL (Canada), Jan. 21, 2006, at A23 (reporting on the criminal prosecution of Nobel Laureate and author Orhan Pamuk for writing novels that violate the criminal proscription against "anti-Turkishness"); Christopher Torchia, *Punk Band's Protest Song Lands Members a Trial Date*, SEATTLE POST-INTELLIGENCER, July 16, 2007, at A4 (reporting on the criminal prosecution of a Turkish band, whose song mocks the local SAT test, because the song defames the State).

164. Forsyth County v. Nationalist Movement, 505 U.S. 123, 134–35 (1992).

165. *Id.* at 134–36 (noting that the "[l]isteners' reaction to speech is not a content-neutral basis for regulation," collecting relevant case citations, and concluding that "[t]his Court has held time and again [that] [r]egulations which permit the Government to discriminate on the basis of the content of the message cannot be tolerated under the First Amendment" (internal citations and quotations omitted)).

166. *See* Terminiello v. City of Chicago, 337 U.S. 1, 4–5 (1949); Murdock v. Pennsylvania, 319 U.S. 105, 115–17 (1943); *see also* Fiss, *Free Speech and Social Structure*, *supra* note 62, at 1416–18 (noting the reasons supporting the "heckler's veto" doctrine and its well-established status in free speech jurisprudence); Geoffrey R. Stone, *Content Regulation and the First Amendment*, 25 WM. &

Moreover, concerns about, for example, unfavorable press coverage of the community, do not serve as adequate counterweights to the would-be demonstrators' constitutional right to engage in nonviolent protest activity. This robustly speech-centric approach constitutes part of the project against viewpoint and content discrimination: Any less protective regime would facilitate the invocation of security concerns as a kind of cellophane wrapper,[167] or, mere pretext, for viewpoint and content discrimination. Instead, local governments must accept the substantial risks to peace and order that inevitably attend mass public marches by the Ku Klux Klan, the American Nazi Party, and similar organizations.[168]

Moreover, the Supreme Court has largely disallowed preemptive government efforts to avoid social unrest by silencing speakers. In *Hess v. Indiana*, for example, Hess, an anti-war demonstrator, vowed that he and his comrades would "take back the fucking streets" even as the local police and sheriff's departments were attempting to restore order to the streets of Bloomington, Indiana.[169] The Supreme Court reversed a demonstrator's criminal conviction on these facts because local law enforcement failed to show a high probability (an "imminent threat") of other demonstrators acting on Hess' admonition to retake the streets for protest purposes.[170] In other words, local police had to assume some risk of disorder and disruption in order to facilitate a wide margin of appreciation for the freedom of expression.

In this context of a large, unauthorized protest of the Vietnam War on and around the main campus of Indiana University, the question of security was more than merely speculative; the risk of violent disorder was both real and palpable. Nevertheless, the First Amendment required that the citizens of Bloomington incur the risk of disruption as the price of free speech. Under the logic of the modern designated-speech-zone cases, the city of Bloomington should simply have established a free-speech zone on the edge of town, built cages or pens to hold the protestors, and arrested anyone who

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MARY L. REV. 189, 214–16 (1983) (noting the rule that government may not proscribe speech because of an audience's hostile reaction to its content).

167. *Cf.* United States v. Kahriger, 345 U.S. 22, 38 (1953) (Frankfurter, J., dissenting) ("[W]hen oblique use is made of the taxing power as to matters which substantively are not within the powers delegated to Congress, the Court cannot shut its eyes to what is obviously, because designedly, an attempt to control conduct which the Constitution left to the responsibility of the States, merely because Congress wrapped the legislation in the verbal cellophane of a revenue measure.").

168. *See* Collin v. Smith, 578 F.2d 1197 (7th Cir. 1978), *cert. denied*, 439 U.S. 916 (1978).

169. Hess v. Indiana, 414 U.S. 105, 106–07 (1973).

170. *Id.* at 107–08.

attempted to use a street or sidewalk near Indiana University's main entrance for political demonstrations against the Vietnam War. The business of the community could then have gone on undisturbed by the noise, chaos, and tumult of student protestors.

Along similar lines, in *NAACP v. Claiborne Hardware Co.*, the Supreme Court held as protected violent threats issued to help enforce a boycott of local merchants in Port Gibson, Mississippi.[171] In order to induce local citizens to cease patronizing stores that enforced racially discriminatory policies, picket organizers threatened that "'[i]f we catch any of you going in any of them racist stores, we're gonna break your damn neck,'" and "[t]he names of persons who violated the boycott were read at meetings of the Claiborne County NAACP [and those persons] 'were branded as traitors to the black cause, called demeaning names and socially ostracized for merely trading with whites.'"[172] Even though the free speech value of such threats of violence is not particularly self-evident,[173] the Supreme Court held that "[m]ere *advocacy* of the use of force or violence does not remove speech from the protection of the First Amendment."[174] Both the merchants and their would-be customers had to endure threats of violence in order to protect hyperbolic, emotionally charged expression directly related to a matter of public concern.

Again, speech of the sort at issue in *Claiborne Hardware* presents more than a merely hypothetical threat to peace and order, yet the speech nevertheless enjoys broad protection and the community must assume the risk of disorder as the price of securing an "uninhibited, robust, and wide open" public discourse.[175] Could the local sheriff have won the case simply by establishing a designated picket zone, removed a mile or two from the store entrances? Would the federal courts have accepted a limitation on

171. *See* NAACP v. Claiborne Hardware Co., 458 U.S. 886, 927–29 (1982).

172. *Id.* at 903–04.

173. Interestingly, the Supreme Court of Canada has defined free speech very expansively, up to and including threats of violence. *See* Irwin Toy Ltd. v. Quebec (Attorney Gen.), [1989] 1 S.C.R. 927, 970–71 (Can.). In Canada, the Charter of Rights and Freedoms, Constitution Act, 1982, Part I, § 2(b), Canada Act 1982, ch. 11, sched. B (U.K.), which is similar to the U.S. Bill of Rights, protects any human activity reasonably intended to convey a message or meaning. Prominent Canadian legal scholars, such as Richard Moon, have questioned the wisdom of abjuring a purposive definition of protected expression. *See* RICHARD MOON, THE CONSTITUTIONAL PROTECTION OF FREEDOM OF EXPRESSION 65–75 (2000). For a general overview of free speech principles in Canada, see KROTOSZYNSKI, *supra* note 28, at 26–92.

174. *Claiborne Hardware Co.*, 458 U.S. at 927.

175. N.Y. Times Co. v. Sullivan, 376 U.S. 254, 270 (1964) (noting that the First Amendment's protections reflect "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open").

the physical proximity of the pickets to the stores in the name of maintaining the peace? Surely the facts of *Claiborne Hardware* presented a more realistic threat of imminent violence than those of *Bl(a)ck Tea Society*, yet Claiborne County, Mississippi was without constitutional power to either restrict or punish the speech in order to promote civic peace.

Finally, even when the risk to security and order is plainly real and pressing, the Supreme Court has required local governments to take extraordinary steps to protect unpopular speakers from being denied access to public spaces for expressive activity. Thus, in *Forsyth County v. Nationalist Movement*,[176] the Supreme Court prohibited the adoption of scaled permitting fees for protest activity on local streets and sidewalks, even if public antipathy toward certain protestors would require the expenditure of significant public monies to pay for extra police protection.[177] Why? Because to sustain differential fees for parades or pickets based on public hostility to a speaker or a group effectively punishes unpopular viewpoints. Would Forsyth County, Georgia have fared better in the Supreme Court if, rather than charging a different permit fee for the racist group's protest march, it had instead closed the downtown area to all protest activity, establishing a no-protest zone and required the march to take place in some other, less inconvenient area (where fewer bystanders might see the protest, hear the racist messages, and take umbrage)?

That said, given the choice of either paying a differential permitting fee and being allowed to march through the center of town or being charged no fee for a permit but being required to remain in a cage located some distance from the town square, most demonstrators would gladly pay the fee in exchange for more meaningful access to their target audience. Designated protest zones are far more effective at squelching and marginalizing speech than is the adoption of differential, cost-based permitting schemes;[178] yet, the lower federal courts have routinely sustained protest

176. 505 U.S. 123 (1992).

177. *See id.* at 134–36.

178. Conditioning expressive activity on the payment of a fee constitutes a lesser burden on would-be protestors' ability to communicate a message than a flat ban on all expressive activity on particular public property otherwise appropriate for expressive activities. *See generally* McConnell v. Fed. Election Comm'n, 540 U.S. 93, 316 (2003) (Kennedy, J., concurring in part and dissenting in part) ("Nor is § 323(d) narrowly tailored . . . . It is a complete ban on this category of speech. To prevent circumvention of contribution limits by imposing a complete ban on contributions is to burden the circumventing conduct more severely than the underlying suspect conduct could be burdened."); Ward v. Rock Against Racism, 491 U.S. 781, 799–800 (1989) ("'A complete ban [on speech activity in a public forum] can be narrowly tailored, but only if each activity within the proscription's scope is an appropriately targeted evil.'") (quoting Frisby v. Schultz, 487 U.S. 474, 485 (1988)).

zones on the theory that federal judges are ill-equipped to second guess the necessity of security requirements.[179]

B. What Values Does Lenient Application of the Time, Place, and Manner Doctrine Actually Advance?

If the legitimate security concerns of the government could be met by quite obvious, more narrowly tailored means—such as limiting the size of demonstrations or carefully screening demonstrators protesting near meeting venues—the question must be asked, what is really driving the efforts of local governments to ban or to marginalize dissenting speech proximate to major political gatherings? At least arguably, the real purpose of these restrictions is to protect the dignity and sensibilities of the public officials attending the meetings. When, for example, the president or a national political party takes the time and trouble to prepare a major event, it seems unsportsmanlike to attempt to spoil the press coverage by disseminating a conflicting message using the very cameras and reporters generated by virtue of the president's or the delegates' presence. From the perspective of the event organizers, a nearby protest is a kind of attempted public relations larceny. Thus, it is not at all surprising that persons planning such events would seek to monopolize all media coverage and would work diligently to avoid having the media presence used to promote the opposition's message and viewpoints. Yet in a nation dedicated to a free and open marketplace of ideas, government officials and political parties should be protected from negative or adverse publicity no more than Carl's Jr./Hardee's should be protected from Jack in the Box's mocking ads claiming Carl's Jr. hamburgers are made with the most undesirable parts of the cow imaginable.[180]

Security provides a trump card that organizers can deploy to minimize, if not eliminate, the possibility that media coverage of a staged political event will be redirected against those putting on the show. In fact, the current White House guidebook on presidential appearances, while not advocating a complete ban on protest activity incident to presidential appearances, squarely insists that the demonstrators must not be within eyesight of the president.[181] This blanket ban on protest activity

179. *See supra* text accompanying notes 1–13, 99–163.

180. *See generally, e.g.*, Jennifer Davies, *Jack in the Box Rival Has a Beef Over Ads on TV*, SAN DIEGO UNION-TRIB., May 26, 2007, at C-1 (describing the offensive advertisements and Carl's Jr.'s lawsuit over Jack in the Box ads).

181. *See* Peter Baker, *White House Guidebook on Protestors*, SEATTLE TIMES, Aug. 23, 2007, at A11 (noting that the official Presidential Advance Manual instructs those organizing and supervising

within eyesight of the president plainly has little to do with security and much to do with preventing dissemination of viewpoints inconsistent with those of the president. Security, properly defined, means protection from a viable threat; here, the threat is not one of violence or physical harm, but rather of political or ideological harm.

The dignity of public officials, which one could view as coextensive with the dignity of the State itself, demands that official events, whether dedications, rallies of the partisan faithful, or retreats to vacation homes, do not become a kind of bizarre political circus. If the ability of the government to disseminate a message without the threat of immediate and vociferous contradiction counts as a security interest, then the recent use of no-protest zones, cages, and barbed wire makes a great deal of sense. "Security" then includes the ability of those in power to speak directly to the citizenry without the threat of immediate contradiction. And as such, neither the Free Speech Clause nor the Free Assembly Clause, at least according to the U.S. Courts of Appeals for the First, Ninth, and Tenth Circuits, protects any right of protest proximate to those holding political power. Instead, the people must rely on less direct methods of sharing their views with public officials, such as Internet postings and letters to the editor.

C. The Dignity of the State as a Rationale for Restricting Speech: A Comparative Law Approach

Could a free speech doctrine recognizing the importance of the dignity of the State represent a plausible conception of the right? Or, is any concern for the government's dignity necessarily inconsistent with a meaningful commitment to free expression? A comparative perspective suggests that, in fact, one could posit a human rights regime equally committed to the protection of free expression and to ensuring the survival of the institutions of government (if not the political survival of those currently staffing those institutions). The Federal Republic of Germany provides an example of just this approach. Germany is a "militant democracy" and expressly withdraws constitutional protection from speech aimed at the "overthrow of the existing

presidential events to banish protestors to areas that are not within eyesight or earshot of the president, and quoting the guidebook as stating that "'[i]f it is determined that the media will not see or hear [the protestors] and that they pose no potential disruption to the event, [then] they can be ignored'" quoting OFFICE OF PRESIDENTIAL ADVANCE, *supra* note 11, at 35).

democratic order."[182] The Basic Law, Germany's constitution, repeatedly limits the scope of constitutionally protected free expression to exclude speech aimed at destroying democratic self-governance.[183]

To be sure, Germany's protection of the State itself does not rest on dignitarian concerns. The Federal Constitutional Court has repeatedly emphasized that the State does not possess a constitutionally cognizable interest in dignity (unlike all human beings, including persons holding government office).[184] Even so, the State has a duty and a responsibility to ensure that public support for the institutions of government does not fall to a level that would create a risk to the survival of those institutions. Hence, although the Basic Law's free speech guarantee privileges defacing a German flag or parodying the national anthem, a point exists at which calling the symbols of the nation into scorn or contempt might run up against the Basic Law's commitment to preserving the project of democratic self-government. When and if expressive activity reaches that point, the Federal Constitutional Court will withdraw constitutional protection from the speech in order to safeguard the institutions of democracy.

This notion of militant democracy has little salience in the pages of cases in the *U.S. Reports*. On the contrary, many aspects of contemporary U.S. free speech doctrine expressly reject the notion of militant democracy, proudly proclaiming that the First Amendment protects even speech advocating violent proletarian revolution, unless there is a clear and present danger that the advocacy will bring the harm about in an imminent fashion.[185] Thus, current free speech law in the United States does not take seriously the notion that speech may be censored in order to safeguard the viability of the democratic state. This makes reliance on the dignity of the State, at least as the idea has developed in Germany, an implausible basis for defending the use of speech bans proximate to national political leaders and party gatherings.

Moreover, the German conception of constitutionally protected dignity does not purport to insulate government leaders from public criticism of their

182. *See Lüth*, 7 BverfGE 198, 208 (1958); *see also* DAVID P. CURRIE, THE CONSTITUTION OF THE FEDERAL REPUBLIC OF GERMANY 175 (1994); KROTOSZYNSKI, *supra* note 28, at 118–20, 123–30; Edward J. Eberle, *Public Discourse in Contemporary Germany*, 47 CASE W. RES. L. REV. 797, 825 (1997).

183. Grundgesetz [Basic Law], arts. 5(3), 8(2), 18, 20(4), 21(2) (F.R.G.) [hereinafter Basic Law]; *see also* KROTOSZYNSKI, *supra* note 28, at 96–102.

184. *See, e.g.*, *German National Anthem Case*, BverfGE 81, 298, *reprinted in*, 2 DECISIONS OF THE FEDERAL CONSTITUTIONAL COURT 450 (1992); *Flag Desecration Case*, BverfGE 81, 278, *reprinted in*, 2 DECISIONS OF THE FEDERAL CONSTITUTIONAL COURT 437 (1992). *See generally* KROTOSZYNSKI, *supra* note 28, at 117–18.

185. Brandenburg v. Ohio, 395 U.S. 444, 447–49 (1969).

policies; the dignity of the State does not require that citizens be sheep. Rather, the doctrine restricts speech that advocates not the change or reform in a particular government policy or program, but rather the destruction of the government and its institutions. Even the protection of human dignity, the paramount right that the Basic Law protects, does not save politicians from public disagreement with their policies and platforms. Instead, it justifies restrictions on political speech aimed at dehumanizing and degrading the government officials as human beings.[186]

Thus, although one could imagine a free speech jurisprudence that takes seriously the need to limit speech both to protect the survival of the government and also to ensure a modicum of respect for the intrinsic value and dignity of all persons, the German approach would not justify the results in the recent national convention, presidential appearance, and international meeting cases. The cases limiting protest do so in order to fence out fair criticism of government and party policy, not to prevent protests aimed at facilitating a coup or denying the humanity of government officials. The restrictions have much more in common with free speech protections in contemporary China and Russia than with those of Germany—that is to say, the attempts to silence or marginalize speech have more to do with suppressing legitimate dissent than with upholding more transcendent human rights values or preserving the institutions necessary to secure human rights for all.

D. The Low Tolerance for High Risk Speech Approach

Another approach to justify the use of speech free zones and protest pens might incorporate Judge Learned Hand's theory of free speech, which progressively reduces the protection afforded free speech as the nature of the risk involved increases.[187] Under the Hand formula, for example, speech that advocates the deployment of a dirty nuclear bomb in a major U.S. city

186. *See* KROTOSZYNSKI, *supra* note 28, at 114–18, 136–37.

187. United States v. Dennis, 183 F.2d 201, 212–13 (2d Cir. 1950) ("In each case [courts] must ask whether the gravity of the 'evil,' discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger."), *aff'd*, 341 U.S. 494 (1951); *see* WILLIAM W. VAN ALSTYNE, FIRST AMENDMENT CASES AND MATERIALS 140–42 (1st ed. 1991) (describing the operation of Judge Hand's *Dennis* test); Gerald Gunther, *Learned Hand and the Origins of Modern First Amendment Doctrine: Some Fragments of History*, 27 STAN. L. REV. 719 (1975) (providing a comprehensive overview of Judge Hand's First Amendment jurisprudence, including his *Dennis* sliding scale of risk approach to permitting government to proscribe or punish speech); *cf.* Masses Pub. Co. v. Patten, 244 F. 535 (S.D.N.Y. 1917) (featuring Judge Hand propounding a different test that relies on whether the words directly and plainly advocate unlawful conduct, rather than on the probable effects of the words at issue), *rev'd*, 246 F. 24 (2d Cir. 1917).

would be regulable (or even proscribable) on a lower showing of risk than speech advocating the flat tax. Why? Because the social cost of a nuclear bomb exploding in a major population center is sufficiently grave to warrant extraordinary vigilance on the part of the government. Thus, under the Hand formula, one might imagine a regime in which government may regulate speech based on its content with a much freer hand than the *Brandenburg* formulation presently allows.[188]

But this approach would help to justify or to explain the growing use of protest-free zones only if evidence existed on the record that the particular would-be demonstrators were likely to engage in serious criminal conduct. In fact, in none of the reported cases did the government have any credible evidence that the particular groups seeking to protest adjacent to event venues intended to engage in any illegal conduct whatsoever.[189] The security concerns were no more choate than those proffered by the Nixon Administration in *New York Times Co. v. United States* as justification for suspending publication of the classified Pentagon Papers.[190] To the extent evidence existed in those three cases, it related almost exclusively to the riots at the 1999 WTO meeting in Seattle and to more generalized concerns about security in the wake of the 9/11 attacks in New York City and Washington, D.C.[191] Even under the Hand formula, this evidence would be insufficient to justify banning speech from an otherwise appropriate public forum, like a sidewalk, street, or public park.

To put the matter in perspective, if persons seeking to advocate political assassination as a legitimate means of changing the national leadership

188. Under *Brandenburg*, regardless of the precise nature of the risk, government may regulate only if a clear and present danger of imminent lawlessness exists. Brandenburg v. Ohio, 395 U.S. 444, 447–49 (1969); *see* Malloy & Krotoszynski, *supra* note 159, at 1192–97. Hence, *Brandenburg* prohibits government proscription of speech advocating the necessity of exploding a nuclear bomb in a population center just as it prohibits proscription of speech advocating income tax avoidance or speech advocating recoining parking meters. The government's ability to regulate is entirely based on a realistic probability that the speech will cause the harm to be avoided.

189. The government did not, in any of the cases, proffer any specific evidence showing that the would-be protestor-plaintiffs had ever engaged in—or even threatened to engage in—violence or made efforts to disrupt the meetings; instead, misconduct by some anti-WTO protestors, in Seattle in 1999, served to establish the universal plausibility of the government's security concerns. *See* Citizens for Peace in Space v. City of Colorado Springs, 477 F.3d 1212, 1220–21, 1226 (10th Cir. 2007); Menotti v. City of Seattle, 409 F.3d 1113, 1122–23, 1133–35, 1137 (9th Cir. 2005); Bl(a)ck Tea Soc'y v. City of Boston, 378 F.3d 8, 13–14 (1st Cir. 2004). As the First Circuit put the matter, "[w]e do not believe a per se rule barring the government from using past experience to plan for future events is consistent with the approach adopted in the [Supreme] Court's time-place-manner jurisprudence" even when "there is no evidence in the record . . . indicating that demonstrators intended to use such tactics at the Convention." *Id.* at 13.

190. N.Y. Times Co. v. United States, 403 U.S. 713 (1971).

191. See *supra* Part I.C.

wished to protest next to a presidential event, the Hand formula would justify either banning the protest entirely or relocating it to a venue far removed from the president. In other words, even though the Hand formula would permit the government to adopt a hair trigger to suppress certain kinds of advocacy, the recent protest cases do not present facts involving efforts to advocate grossly antisocial criminal acts. Instead, the cases uniformly involve persons sincerely opposed to the policies supported by those appearing before or attending a major government or political event. To state the matter plainly, Judge Hand never suggested that the government could ban speech to avoid political embarrassment or mere inconvenience because of a protest seeking to advance an opposing point of view.

Moreover, even if one views the question through the prism of the Hand formula, this use of the time, place, and manner doctrine to limit (or squelch) embarrassing dissenting speech cannot be reconciled with the Supreme Court's refusal to permit legislation aimed at protecting minorities from threats or targeted insults. For example, in *Brandenburg*, the participants in a Ku Klux Klan rally in suburban Cincinnati, Ohio called for a race war.[192] Under the Hand formula, such advocacy should constitute the kind of extraordinary threat that would justify the use of state power to suppress the speech. Indeed, it is far from clear precisely why advocacy of violence directed on the basis of race, sex, religion, or sexual orientation should enjoy serious free speech protection under any purposive theory of freedom of speech.[193]

192. *Brandenburg*, 395 U.S. at 444–47.

193. Under a true marketplace theory of free speech, any speech would enjoy protection on the theory that government must be barred from attempting to control access to the market. The problem, of course, is that the Supreme Court has not generally been willing to commit itself to a true marketplace approach, permitting selective regulation of speech based on content thought to be of low value, such as obscenity and child pornography. *See, e.g.*, Osborne v. Ohio, 495 U.S. 103 (1990) (holding that the First Amendment privilege to possess obscene materials in the home, under *Starkey v. Georgia*, 394 U.S. 557 (1969), does not apply to child pornography); New York v. Ferber, 458 U.S. 747 (1982) (holding child pornography, and perhaps any nude picture of an actual child, as wholly outside the First Amendment's protection); Miller v. California, 413 U.S. 15 (1973) (declaring that sexually explicit materials fall outside the scope of First Amendment protection if the materials, taken as a whole, lack serious artistic, literary, or scientific value; if the materials appeal to the prurient intellect; and if, applying contemporary community standards, the materials are patently offensive); *cf.* Irwin Toy, Ltd. v. Quebec (Attorney Gen.), [1989] 1 S.C.R. 927, 968–70 (Can.) (holding that any human activity designed to communicate a message, excluding only acts (and perhaps threats) of violence, comes within the ambit of Canada's analogue to the First Amendment's Free Speech Clause); R. v. Sharpe, [2001] 1 S.C.R. 45, 62, 66–68 (Can.) (citing Canadian decisions defining the freedom of speech very broadly, and applying those decisions to hold that child pornography comes within the definition of protected expression under section 2(b) of the Charter, but also noting that government may limit protected expression to advance other important interests, such as the prevention of social harm to others).

In fact, even the German approach to freedom of expression would not tolerate targeted racial threats, on the theory that such threats deny equal dignity to those victimized by them.[194] Likewise, Canada has defined free speech rights to exclude the right to incite others to racial or religious hatred, based on the notion that the government could reasonably seek to advance equality and multiculturalism at the expense of speech, at least in this limited context.[195]

In other words, viewed from a broader theoretical or global perspective, the result in *Brandenburg* is far from self-evidently correct. One could easily imagine a regime in which public calls for the extermination of racial minorities might lead to criminal sanctions, on the premise that no matter how remote the risk, the potential social harm of the speech far outweighs whatever meager contribution it might make to the marketplace of ideas. Similarly, a serious commitment to political and social equality or to cultural pluralism might also preclude endorsement of the *Brandenburg* approach. *Brandenburg* essentially instructs us that because of the crucial relationship of free expression to the project of democratic self-government, members of minority groups (however defined or constituted) must accept the fear and worry that accompany public dissemination of hate speech.

To be clear, we do not suggest that *Brandenburg* does not present a perfectly plausible theory of free speech. If government censorship of speech represents the gravest possible threat to the functioning of democratic self-government, nearly absolute protection of political speech would be a logical response to the threat. Nor do we doubt that a censorial government, armed with the power to selectively silence speech, would deploy that power in ways that directly and indirectly advance the interests of those holding power. One need look no further than the example of the Sedition Act of 1798, which the Adams Administration and the Federalist Party used to systematically silence the opposition press in an ultimately unavailing effort to hold the reigns of federal power.[196]

In a truly unregulated marketplace, sexually explicit materials would have the right to compete for attention against position papers arguing for their suppression and would be subject to no more regulatory burdens than would core political speech. *See* KROTOSZYNSKI, *supra* note 28, at 24 ("Under a pure market-based approach . . . speech should be treated the same regardless of its content. Its success or failure [in the market] would be a function of its ability to persuade.").

194. KROTOSZYNSKI, *supra* note 28, at 102–04, 126–30.

195. *Id.* at 51–72, 90–92.

196. William T. Mayton, *Seditious Libel and the Lost Guarantee of a Freedom of Expression*, 84 COLUM. L. REV. 91, 123–24 (1984). Professor Mayton observes that the Sedition Act "could hardly have been a starker instance of self-serving politics." *Id.* at 123. For a discussion of the Sedition Act's effect on the opposition press, see David A. Anderson, *The Origins of the Press Clause*, 30 UCLA L. REV. 455, 515–16 (1983); David Yassky, *Eras of the First Amendment*, 91 COLUM. L. REV. 1699, 1710–12 (1991).

The problem, it seems, is understanding why politicians may be protected from offensive or intentionally insulting speech when average citizens may not enjoy such protection. Indeed, in the early 1970s, the Supreme Court effectively eviscerated the fighting words doctrine, which, based on security concerns, sustained limits on offensive speech activity in public.[197] If politicians have a legitimate interest in personal security that causes collateral damage to speech activity, the question that immediately presents itself should be, why do minority groups not have a similar interest in being free from threatening speech? And, more generally, why should society have to tolerate speech that might cause trouble—do not all citizens have an interest in security that would be furthered by sustaining reasonable civility norms whenever the problem of a captive audience presents itself?

One way of solving the dilemma would be to restore the fighting words doctrine of *Beauharnais v. Illinois*[198] and *Chaplinsky v. New Hampshire*.[199] In other words, the inconsistency could be resolved by crediting, more generally, plausible safety concerns. Rather than bringing politicians and party leaders down to the level of the average citizens who are unprotected by *Brandenburg*, we could level average citizens up by embracing a free speech doctrine that more resembles the Hand formula (or that incorporates German dignitarian or Canadian equalitarian concerns).

Such an approach should be rejected, however, because it would eviscerate the viewpoint- and content-neutrality project. *Beauharnais* and *Chaplinsky* fell into desuetude precisely because the Justices (correctly) feared that permitting safety justifications to sustain broad-based content bans on speech would inevitably lead to targeted enforcement, giving rise to serious viewpoint discrimination problems. Thus, when Dr. Ben Marble tells Vice President Cheney to "go fuck [him]self" in a fit of post-Katrina pique, a prosecution might well result, but when the vice president deploys identical language against a member of the U.S. Senate, a prosecution would never ensue.[200] This pattern of highly selective enforcement does in fact exist in places like Canada that maintain content-based limits

197. *See* Gooding v. Wilson, 405 U.S. 518, 528 (1972) (protecting threats directed to a police officer, including "white son of a bitch, I'll kill you"); Rosenfeld v. New Jersey, 408 U.S. 901, 901, 904 (1972) (holding protected the use of the phrase mother fucking at a public school board meeting "on four occasions, to describe the teachers, the school board, the town, and his own country"); Cohen v. California, 403 U.S. 15, 22–23 (1971) (holding protected the wearing of a jacket emblazoned with "Fuck the Draft" in a Los Angeles courthouse).

198. 343 U.S. 250 (1952).

199. 315 U.S. 568 (1942).

200. *See generally supra* note 45.

on speech in order to promote other constitutional values (in Canada's case, equality and multiculturalism).[201]

The answer, then, would not be to bring everyone up to the level of the president or party bigwigs attending the national nominating convention (we could call this the censorship for all approach). Simply put, reversing the Court's precedents establishing a strong bulwark against viewpoint and content discrimination would not lead to normatively better results. The better approach would be to apply the time, place, and manner doctrine in a fashion that advances, rather than eviscerates, the Warren Court's project of debarring government efforts to silence speech based on either its viewpoint or its content. Yet, for the reasons previously discussed, the lower federal courts have been rather reluctant to take this course of action.[202]

The problem remains, however, of theoretically grounding the lower federal courts' time, place, and manner decisions that permit the government to ban or marginalize dissent proximate to government officials. The Hand formula certainly does not support this jurisprudence, any more than do the other approaches considered in this Part. We believe that there is a theory that would justify the results in cases like *Bl(a)ck Tea Society*, one with ancient roots and a distinguished historical pedigree in the United States: the doctrine of seditious libel, which neatly marries the dignity interests of incumbent politicians with the security interests of the State.

III. PROTECTING THE DIGNITY OF POLITICIANS: THE LIMITED RETURN OF SEDITIOUS LIBEL

If protecting the institutions of government or securing everyone's equal share in humanity cannot justify the draconian restrictions placed on demonstrators seeking to oppose government or party policies, and if the Hand formula is equally unavailing as a theoretical justification for these tactics, what (if any) theoretical construction of free expression undergirds the recent lower court cases sustaining the forced use of free-speech cages and pens? Is there any basis, beyond a naked effort to suppress disagreeable viewpoints, that justifies the use of time, place, and manner restrictions to banish dissent? In fact there is: the doctrine of seditious libel.

Succinctly put, "[s]editious libel is the crime of criticizing the government,"[203] a crime that has its origins in the crime of treason. In the early

201. KROTOSZYNSKI, *supra* note 28, at 82–89 (discussing the inconsistent enforcement of hate speech regulations in Canada).

202. *See supra* text accompanying notes 159–179.

203. Koffler & Gershman, *supra* note 23, at 816.

seventeenth century, the British monarchy grappled with the fact that the treason laws, which were intended to deter armed rebellion, were "too cumbersome" to be used against dissenting speech.[204] Therefore, to deal with dangerous and troublesome critics, the Stuarts came to rely upon the crime of seditious libel, "which prohibited the publishing of scandalous or discordant opinions about the crown, its policies, or its officers."[205] The crown punished seditious libelers with whipping, branding, and mutilation.[206]

In the eighteenth century, as Parliament replaced the monarchy in matters of the state, criminal prosecutions for seditious libel continued in order to force public compliance with its agenda.[207] Seditious libel soon became the government's primary means of regulating the press, replacing the controversial and cumbersome licensing scheme.[208] As a result, it is estimated that hundreds were convicted of seditious libel in seventeenth- and eighteenth-century England.[209]

Lord Chief Justice Holt declared the state of the law in the case of John Tutchin, who was prosecuted for seditious libel when he accused government officials of bribery and corruption:

> To say that corrupt officers are appointed to administer affairs, is certainly a reflection on the government. If people should not be called to account for possessing the people with an ill opinion of the government, no government can subsist. For it is very necessary for all governments that the people should have a good opinion of it.[210]

Thus, speech against the government was punishable even though true, as long as it tended to undermine government authority.[211] As Blackstone said, "'[i]t is immaterial with respect to the essence of a libel, whether the matter of it be true or false; since the provocation, and not the falsity, is the thing to be punished criminally . . . .'"[212]

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204. *Id.* at 819.

205. *Id.*; *see also* Alan J. Koshner, *The Founding Fathers and Political Speech: The First Amendment, the Press and the Sedition Act of 1798*, 6 ST. LOUIS U. PUB. L. REV. 395, 400–404 (1987); Mayton, *supra* note 37, at 97–108.

206. Koffler & Gershman, *supra* note 23, at 820.

207. *Id.* at 822.

208. David Jenkins, *The Sedition Act of 1798 and the Incorporation of Seditious Libel Into First Amendment Jurisprudence*, 45 AM. J. LEGAL HIST. 154, 160 (2001).

209. LEONARD LEVY, FREEDOM OF SPEECH AND PRESS IN EARLY AMERICAN HISTORY: LEGACY OF SUPPRESSION 11 (1963).

210. Koffler & Gershman, *supra* note 23, at 822 (quoting Trial of John Tutchen, 14 How. St. Tr. 1095, 1128 (1704)).

211. Jenkins, *supra* note 208, at 162–63.

212. *Id.* at 162.

Although seditious libel prosecutions were commonplace in Britain, in colonial America they were relatively rare: Some estimate there were fewer than a dozen.[213] But in those few instances in which the law of seditious libel was enforced, it was done primarily by the provincial legislatures, then by executive officers, and lastly by the common law courts.[214] The first prosecution for seditious libel was in 1690 in Pennsylvania,[215] and the most famous of these prosecutions was that of John Zenger in 1735.[216] But both of these cases and many like them resulted in acquittals when juries refused to return guilty verdicts;[217] and court trials for seditious libel ceased to be a serious threat to colonial publishers after Zenger was acquitted.[218] In fact, there was only one successful prosecution before the Zenger case, and none after it.[219]

But as revolution neared, politicians grew more fearful and the Continental Congress urged the states to enact laws "to prevent people from being 'deceived and drawn into erroneous opinion.'"[220] By 1778, every state had passed such legislation. During the revolution, penalties in the states ranged from heavy fines or imprisonment to death for the simple statement of opinion denying the independent authority of the American states and asserting the authority of the British sovereign.[221]

In the early years of the new republic, the crisis with France and the vocal domestic political opposition convinced the Federalists to pass the Sedition Act in 1798.[222] The Act basically codified the common law crime of seditious libel;[223] however, the Act, at least on paper, differed from the common law in a few ways. First, it limited the maximum penalty to two years' imprisonment and a $2000 fine, which significantly reduced the legal consequences of a conviction. In addition, although truth was no defense under the common law rule, the Act allowed the accused to submit proof

213. LEVY, *supra* note 209, at 19 (estimating "probably not more than half a dozen" prosecutions); *see also* Harold L. Nelson, *Seditious Libel in Colonial America*, 3 AM. J. LEGAL HIST. 160, 165–70 (1959) (finding only nine prosecutions brought against publishers during the colonial period).

214. LEVY, *supra* note 209, at 20.

215. Anderson, *supra* note 196, at 510.

216. Nelson, *supra* note 213, at 160.

217. *Id.* at 510–11.

218. Koshner, *supra* note 205, at 404.

219. Nelson, *supra* note 213, at 170.

220. LEVY, *supra* note 209, at 181 (internal citation omitted).

221. *Id.* at 181–82 (quoting Willard Hurst, *Treason in the United States*, 58 HARV. L. REV. 266 (1944)).

222. Jenkins, *supra* note 208, at 164.

223. *Id.* at 165.

of the truth of his statements and gave the jury the power to determine whether the accused had acted with malicious intent.[224] But these efforts to make the statutory version of seditious libel less draconian than its common law counterpart fell flat; the federal courts effectively nullified these provisions making prosecution under the Sedition Act the full equivalent of prosecution under the common law by disregarding sentencing limits and nullifying the statutory truth defense through judicial construction of the statute.[225] Thus, the truth did not operate as an effective defense[226] and judges instructed juries on the defendant's intent,[227] which they presumed from the "bad tendency" of his words.[228]

For example, in the trial of Thomas Cooper, a prominent Republican, the judge ruled that Cooper's attempt to "prove the truth of his publication demonstrated his bad intent" by showing that "'he intended to dare and defy the Government, and to provoke them . . . . For he justifies the publication, and declares it to be formed in truth.'"[229] Thus, "it was the tendency of the words to find fault with elected officials which was penalized and not the intent to cause violence."[230]

Consequently, under the Sedition Act, individuals "were punished if the tendency of their words was to undermine public confidence in the elected officials and thus to render it less likely that they might be re-elected."[231] The Act therefore operated, just as common law seditious libel before it, to silence criticism of the government.[232] Within two years, the Federalists indicted fourteen individuals under the Sedition Act and ultimately procured ten convictions;[233] all of these indictments were pursued to silence speech critical of the Adams Administration.[234]

The House debates make clear beyond peradventure that Federalist supporters of the Sedition Act believed "that the political opinion of the

224. *Id.*

225. Thomas Carroll, *Freedom of Speech and of the Press in the Federalist Period: The Sedition Act*, 18 MICH. L. REV. 615, 648 (1920).

226. *Id.* at 639.

227. *Id.* at 641.

228. James Morton Smith, *The Sedition Law, Free Speech, and the American Political Process*, 9 WM. & MARY Q. 497, 502 (1952).

229. *Id.* at 503.

230. *Id.* at 502.

231. *Id.* (internal citation omitted).

232. Carroll, *supra* note 225, at 648.

233. David Yassky, *Eras of the First Amendment*, 91 COLUM. L. REV. 1699, 1711 (1991). For an account of every prosecution under the Sedition Act, see JAMES MORTON SMITH, FREEDOM'S FETTERS: THE ALIEN AND SEDITION LAWS AND AMERICAN CIVIL LIBERTIES 254 (1956) (also detailing the prosecution of the Act's state-law equivalents during Adams' presidency).

234. *Id.*; *see also* Smith, *supra* note 228, at 504.

opposition party constituted seditious libel, subject to prosecution" under the Act.[235] As Pennsylvania Representative Albert Gallatin stated:

> This bill and its supporters suppose, in fact, that whoever dislikes the measures of Administration and of a temporary majority in Congress, and shall, either by speaking or writing, express his disapprobation and his want of confidence in the men now in power, is seditious, is an enemy, not of Administration, but of the Constitution, and is liable to punishment . . . this bill must be considered only as a weapon used by a party now in power in order to perpetuate their authority and preserve their present places.[236]

Consistent with this legislative history, the Federalists first used the Sedition Act to attack Republican Representative Matthew Lyon of Vermont, a known critic of the Adams Administration and the Federalist Party in general. Shortly after the Act was passed, Lyon was convicted based on two letters published during his congressional reelection campaign.[237] In the letters, Lyon criticized Adams' "'continual grasp for power' and his 'unbounded thirst for ridiculous pomp, foolish adulation, and selfish avarice.'"[238]

As the election of 1800 neared, Sedition Act prosecutions intensified. Adams' Secretary of State, Timothy Pickering, systematically orchestrated prosecutions of the leading Republican (pro-Jefferson) newspapers in preparation for the election,[239] specifically targeting the "big five" in the opposition press: the Philadelphia *Aurora*, the Boston *Chronicle*, the New York *Argus*, the Richmond *Examiner*, and the Baltimore *American*.[240] In the summer of 1799, Pickering sent directives to district attorneys in Baltimore, New York, and Richmond "instructing them to scrutinize the Republican papers issued in their cities and to prosecute [their editors] for any seditious libels against the President or any federal official."[241] Pickering deliberately sent these directives early enough in the summer so that the district attorneys would have sufficient time to bring indictments in either the fall or the spring term of circuit court. In addition, with President Adams'

235. LEVY, *supra* note 209, at 259.

236. *Id.* (internal citation omitted).

237. Yassky, *supra* note 233, at 1711.

238. *Id.* By far the most ludicrous of the Sedition Act prosecutions was that of Luther Baldwin, who was indicted, convicted, and fined $150 for stating that the country would have benefitted if some cannon fire had lodged in President Adams' buttock. *See id.*

239. Smith, *supra* note 228, at 504.

240. *Id.*

241. *Id.* at 254, 504–05. The Boston *Chronicle* had already been prosecuted for violation of the Sedition Act in March 1799. Its bookkeeper, Abijah Adams, was convicted under the Act because the *Chronicle*'s editor, Thomas Adams, was too ill to stand trial. SMITH, *supra* note 233, at 254.

approval, Pickering took personal control over the proceedings against William Duane, editor of Philadelphia's *Aurora*.[242]

As a result of Pickering's scheme, indictments were brought against all of the big five, except for the Baltimore *American*, for criticizing the Adams Administration.[243] Three of the most prominent Republican editors were forced to stop publishing, two permanently. This was no small feat; prior to the Sedition Act, the Republican newspapers were already significantly outnumbered by their Federalist counterparts. It is estimated that out of 101 newspapers at the time, only twelve were Republican.[244] Furthermore, these four newspapers' influence was not limited solely to their subscribers; at that time, smaller newspapers, for the most part, simply reprinted material from the larger papers. Consequently, the Adams Administration came dangerously close to wiping out the opposition press in America just in time for the election.[245]

The Sedition Act, although a sordid chapter in the history of U.S. free speech law, was hardly an isolated incident. The Espionage Act of 1917,[246] as amended in 1918, contained "sections that oddly echoed the idiom of seditious libel: 'language intended to bring the form of government of the United States . . . or the Constitution . . . or the flag . . . or the uniform of the Army or Navy into contempt, scorn, contumely, or disrepute.'"[247] Judith Koffler and Bennett Gershman argue that prosecution under the Espionage Act constituted prosecution for seditious libel because those prosecuted under the Espionage Act "had, by written or spoken word, defamed the government. Holding the administration up to hatred, contempt, and ridicule, they . . . had attacked official judgment as corrupt and mercenary; they had accused the government of deception," and for this they were convicted of a crime.[248] Moreover, the Supreme Court expressed its acceptance of seditious libel in the series of cases that arose from prosecutions under the Espionage Act.[249]

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242. SMITH, *supra* note 233, at 254.
243. Smith, *supra* note 228, at 505.
244. Anderson, *supra* note 196, at 515 n.345 (internal citation omitted).
245. *Id.* at 515.
246. Ch. 30, 40 Stat. 217 (1917), *repealed by* Act of June 25, 1948, ch. 645, § 21, 62 Stat. 864.
247. Kalven, *supra* note 34, at 207.
248. Koffler & Gershman, *supra* note 23, at 832. David Jenkins also asserts that the Espionage Act, like the Sedition Act of 1798, constituted seditious libel because it "specifically applied to press activity that defamed the federal government." Jenkins, *supra* note 208, at 205.
249. *Id.* at 207; *see* Schaefer v. United States, 251 U.S. 466 (1920); Pierce v. United States, 252 U.S. 239 (1920); Debs v. United States, 249 U.S. 211 (1919); Frohwerk v. United States, 249 U.S. 204 (1919); Schenck v. United States, 249 U.S. 47 (1919); *see also* Koffler & Gershman, *supra* note 23, at 831–40 (discussing and critiquing several of the principal cases arising under the

World War I did not mark the last time the federal government attempted to adopt a law that essentially tracked the common law crime of seditious libel. At least arguably, the Smith Act of 1940[250] also constituted seditious libel because it "made it a crime to help organize any group of persons 'who teach, advocate, or encourage the overthrow or destruction of any government in the United States by force or violence,' and also proscribed the advocacy of these doctrines."[251] Koffler and Gershman persuasively argue that the Supreme Court's decision in *Dennis v. United States*,[252] upholding the Smith Act, strengthened and reaffirmed the tradition of seditious libel in this country.[253]

From the creation of the doctrine of seditious libel in Great Britain to its importation to colonial legal systems and its subsequent adoption and ratification by the federal government as a means of promoting national security in times of international stress, governments ostensibly committed to protecting the freedom of speech have consistently attempted to limit speech critical of the government in the name of national security. The government's efforts in Boston, Colorado Springs, and Seattle[254] may not seem as vulgar or outrageous as those of the Adams Administration (although we believe that the matter is debatable), but the motivation is little different; nor are the effects of the restrictions on the marketplace of ideas. Democracy suffers whenever government succeeds in banishing its critics from public view.

The question that presents itself, then, is how can one best meet the challenge that today's iteration of seditious libel presents to full, free, and open public discourse? We believe that the answer potentially lies in what, at least at present, represents a dark, largely unexplored constitutional corner: the Petition Clause.

IV. A REBIRTH OF THE PETITION CLAUSE

In his seminal article on the paradigm shift in First Amendment doctrine wrought by *New York Times v. Sullivan*,[255] Professor Harry Kalven eloquently expressed his regard for the civil rights movement that precipitated

Espionage Act of 1917). Contemporary scholarly commentary also supported the notion that the federal government could criminalize seditious libel. *See* Corwin, *supra* note 23.

250. Ch. 439, 54 Stat. 670 (1940) (current version at 18 U.S.C. § 2385 (2000)).

251. Koffler & Gershman, *supra* note 23, at 840.

252. 341 U.S. 494 (1951).

253. *See* Koffler & Gershman, *supra* note 23, at 840–44.

254. *See infra* text accompanying notes 110–158.

255. 376 U.S. 254 (1964).

the case, writing that "[w]hatever the irritations and crises of 'the long hot summer,' the protest has maintained the dignity of political action, of an elaborate petition for redress of grievances."[256] Kalven's reference to a "petition for redress of grievances," however, was more than mere poeticism; it was also an invocation of the oft-forgotten Petition Clause of the First Amendment: "Congress shall make no law . . . abridging . . . the right of the people . . . to petition the Government for a redress of grievances."[257] This most neglected of First Amendment freedoms is little more than a footnote in modern Supreme Court jurisprudence. Yet the right to petition for redress of grievances was once the preeminent right of the people against government tyranny, and it retained that status for well over a hundred years after giving birth to the secondary freedoms of speech and press.[258]

Although made over thirty years ago, Professor Kalven's assessment of political protest activity is as relevant now as ever because such activity was the exemplar of his overall argument that, after the Court's decision in *Sullivan*, "[t]he central meaning of the [First] Amendment is that seditious libel cannot be made the subject of government sanction."[259] And despite courts' willingness of late to turn away from this central meaning, standing passively by as the government interest in security all but consumes the time, place, and manner doctrine, Kalven's recognition that a political protest is a petition for redress of grievances hints at a novel solution to this unwelcome return of seditious libel.

Indeed, for hundreds of years before the Petition Clause fell into desuetude by disuse and Supreme Court neglect, one of the foremost principles of the right to petition was that petitioners enjoyed absolute immunity from prosecution for seditious libel based on the contents of their petitions.[260] Moreover, the history of the Clause, including the history of its colonial and English antecedents, strongly suggests that the right to petition the government for redress of grievances contemplates a right to do so in

256. Kalven, *supra* note 34, at 192–93.

257. U.S. CONST. amend. I.

258. *See infra* Part IV.A (discussing the history of the right to petition).

259. Kalven, *supra* note 34, at 209; *see also* Williams v. Wallace, 240 F. Supp. 100, 105–06 (M.D. Ala. 1965) (issuing an injunction to facilitate a civil rights march in protest of Alabama's discriminatory voter registration practices, noting that "[t]he law is clear that the right to petition one's government for the redress of grievances may be exercised in large groups," and holding that the conduct of Alabama's state government "had the effect of preventing and discouraging Negro citizens from exercising their rights of citizenship," notably, the right to "remonstrate with governmental authorities and petition for redress of grievances").

260. *See infra* Part IV.C.1 (discussing petitioners' immunity from seditious libel prosecution).

close proximity to the government officials to whom the petition is addressed.[261] In other words, the Petition Clause guarantees political protestors a right, exclusive of their speech and assembly freedoms, to seek redress of their grievances within both sight and hearing of those capable of giving such redress.

To be sure, there are reasonable limits to this right of proximity, as the history of petitioning amply demonstrates.[262] Public safety remains a legitimate concern, though not an all-encompassing one, and petitioning activity may be restricted to public forums near places of official business. Our argument is not that protestors have a right, for example, to encamp at Senator John McCain's private residence.[263] (The sidewalks outside the Senate office buildings or the Republican National Convention, however, should be another story.) Furthermore, our claim that the Petition Clause contemplates a right to be seen and heard is itself limited—we do not argue, as have some scholars, that the Petition Clause imposes on government officials an obligation to consider and respond to petitions for redress of grievances on their merits.[264]

Yet even with these limitations, the Petition Clause provides the time-honored political protest with the needed protection that the other First Amendment guarantees have thus far failed to provide. By treating regulations that would remove protestors from the sight or hearing of government officials as presumptively invalid, the government is robbed of its broad brush; it is forced to justify its interest in security with more

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261. *See infra* Part IV.C.2 (discussing petitioners' historical right to have their petition be received and heard by the government).

262. *See infra* Part IV.D (discussing the historical limitations on the right to petition).

263. *Cf.* Frisby v. Schultz, 487 U.S. 474, 479–81, 484–86 (1988) (rejecting, on privacy grounds, a right to protest at a person's home).

264. *See, e.g.*, James E. Pfander, *Sovereign Immunity and the Right to Petition: Toward a First Amendment Right to Pursue Judicial Claims Against the Government*, 91 NW. U. L. REV. 899, 905 n.22 (1997); Julie M. Spanbauer, *The First Amendment Right to Petition Government for a Redress of Grievances: Cut From a Different Cloth*, 21 HASTINGS CONST. L.Q. 15, 51 (1993); Stephen A. Higginson, Note, *A Short History of the Right to Petition Government for the Redress of Grievances*, 96 YALE L.J. 142, 165–66 (1986). *But see* Smith v. Ark. State Highway Employees, Local 1315, 441 U.S. 463, 465 (1979) ("The public employee surely can associate and speak freely and petition openly . . . . But the First Amendment does not impose any affirmative obligation on the government to listen [or] to respond . . . ."); Gary Lawson & Guy Seidman, *Downsizing the Right to Petition*, 93 NW. U. L. REV. 739, 740 (1999) ("[W]e do not agree that the Petitions Clause imposes on Congress a general obligation to consider or respond in any fashion to petitions that it receives."); Norman B. Smith, *"Shall Make No Law Abridging . . .": An Analysis of the Neglected, but Nearly Absolute, Right of Petition*, 54 U. CIN. L. REV. 1153, 1190–91 (1986) ("Such an extension of the right of petition . . . could exceed the practical limitations of our system of government; with our present capacity for multiplying documents, the business of government could be halted if each paper produced in a massive petition campaign is addressed.").

than mere speculation and to carry out that interest with the means that least restrict petitioning protestors' right to be seen and heard. With the re-emergence of seditious libel, the Petition Clause is needed now more than ever.[265] Through a Petition Clause–based right of proximity to government officials, the doctrine of seditious libel can be returned to its rightful place in the dustbin of history.[266]

A. One Thousand Years of Petitioning: A Brief History of the Right to Petition for Redress of Grievances[267]

Whereas the rights of speech, press, and assembly cannot be said to have fully emerged until the late eighteenth or early nineteenth century, the near absolute right of all British subjects to petition the king was codified in the English Bill of Rights of 1689.[268] In fact, the First Amendment rights of

265. In the 1960s, a handful of federal judges were bold enough to suggest that the Petition Clause can and should do independent work in political protest cases. *See* Adderley v. Florida, 385 U.S. 39, 52 (1996) (Douglas, J., dissenting) ("We do violence to the First Amendment when we permit this 'petition for redress of grievances' to be turned into a trespass action. . . . To say that a private owner could have done the same if the rally had taken place on private property is to speak of a different case, as an assembly and a petition for redress of grievances run to government . . . ."); Williams v. Wallace, 240 F. Supp. 100, 108 (M.D. Ala. 1965) ("[T]he extent of a group's constitutional right to protest peaceably and petition one's government for redress of grievances must be, if our American Constitution is to be a flexible and 'living' document, found and held to be commensurate with the enormity of the wrongs being protested and petitioned against.").

266. *See* Kalven, *supra* note 34, at 205 ("The concept of seditious libel strikes at the very heart of democracy. . . . My point is not the tepid one that there should be leeway for criticism of the government. It is rather that defamation of the government is an impossible notion for a democracy. In brief, I suggest that the presence or absence in the law of the concept of seditious libel defines the society. . . . If . . . it makes seditious libel an offense, it is not a free society no matter what its other characteristics.").

267. For in-depth histories of the Petition Clause, see generally Carol Rice Andrews, *A Right of Access to Court Under the Petition Clause of the First Amendment: Defining the Right*, 60 OHIO ST. L.J. 557 (1999); Gregory A. Mark, *The Vestigial Constitution: The History and Significance of the Right to Petition*, 66 FORDHAM L. REV. 2153 (1998); Smith, *supra* note 264; Spanbauer, *supra* note 264; Higginson, *supra* note 264. The history of the Petition Clause is also discussed in Lawson & Seidman, *supra* note 264; Pfander, *supra* note 264; Eric Schnapper, *"Libelous" Petitions for Redress of Grievances—Bad Historiography Makes Worse Law*, 74 IOWA L. REV. 303 (1989); Rebecca A. Clar, Comment, Martin v. City of Del City*: A Lost Opportunity to Restore the First Amendment Right to Petition*, 74 ST. JOHN'S L. REV. 483 (2000); James Filkins, Note, Tarpley v. Keistler*: Patronage, Petition, and the* Noerr-Pennington *Doctrine*, 50 DEPAUL L. REV. 265 (2000); Kara Elizabeth Shea, Recent Development, San Filippo v. Bongiovanni*: The Public Concern Criteria and the Scope of the Modern Petition Right*, 48 VAND. L. REV. 1697 (1995).

268. *See* Schnapper, *supra* note 267, at 318; Smith, *supra* note 264, at 1155–62, 1165–69; Spanbauer, *supra* note 264, at 34–39. Even after their codification in the First Amendment, the rights of speech, press, and assembly in both the United States and England still lacked the near absolute character of the right to petition, largely due to the continuing existence of seditious libel laws. *Compare id.* (describing the means by which the rights of speech and press continued to be

speech, press, and assembly are, in many respects, the progeny of the right to petition.[269] Yet, even in 1689, the incorporation of petitioning into the English Bill of Rights was merely the culmination, rather than the origination, of the right to petition for a redress of grievances.

1. The English Right to Petition

Indeed, the origins of the right to petition are much more ancient than the English Bill of Rights, dating as far back as the tenth century, when petitions to the King of England were not of right and were limited to redress of property disputes that had not been resolved to the parties' satisfaction by lesser tribunals.[270] It was not until 1215, when the barons exacted Magna Carta from King John, that petitioning began to take significance as a means of exerting political power against the State.[271] In exchange for the barons' allegiance—and their agreement to finance the government—the King agreed to the following:

> [I]f we or our justiciar, or our bailiffs, or any of our servants shall have done wrong in any way toward any one, or shall have transgressed any of the articles of peace or security; and the wrong shall have been shown to four barons of the aforesaid twenty-five barons, let those four barons come to us . . . laying before us the

limited through the early nineteenth century), *and* Smith, *supra* note 264, at 1181 ("[P]rior to the American Revolution, several of the other rights guaranteed by the Bill of Rights, including the cognate rights of speech, press, and assembly, were subjected to widespread suppression."), *with* Bill of Rights, 1689, 1 W. & M., c. 2, § 5 (Eng.), *reprinted in* 5 THE FOUNDERS' CONSTITUTION 1 (Philip B. Kurland & Ralph Lerner eds., 1987) ("[I]t is the right of the subjects to petition the King, and all commit[ ]ments and prosecutions for such petitioning are illegal."), *and* Smith, *supra* note 264, at 1165 ("In England, after 1702, there appear to have been no cases of criminal prosecution or parliamentary contempt proceedings on account of petitioning.").

269. *See* Smith, *supra* note 264, at 1168–69 (describing the role of petitioning in giving birth to the rights of free expression and assembly); *id.* at 1179 ("Petitioning, in a sense, is the fountain of liberties, because historically it was the first popular right to be recognized. Vigorous exercise of the right to petition has been associated with forward strides in the development of speech, press, and assembly."). Highlighting the supremacy of petitioning, an English judge in 1688 interrupted the Recorder's comparison of writing a book with writing a petition to say, "Pray, good Mr. Recorder, don't compare the writing of a book to the making of a petition; for it is the birthright of the subject to petition." Trial of the Seven Bishops for Publishing a Libel, 12 How. St. Tr. 183, 415 (1688), *reprinted in* 5 THE FOUNDERS' CONSTITUTION, *supra* note 268, at 189, 191.

270. Mark, *supra* note 267, at 2163 & nn.24 & 26 ("The ability to apply for redress of grievances was, at least in its earliest stages, clearly not a tool for general grievances, much less reform, or even a mechanism for first hearing an individual's grievance, but rather was akin to an appellate mechanism from the decisions of inferior authorities.").

271. *Id.* at 2164–65.

> transgression, and let them ask that we cause that transgression to be corrected without delay.[272]

Magna Carta thus secured to the barons and, indirectly, to the people, the right to petition the king for redress of their grievances.

Over time various segments of society, including knights and burgesses, were also granted audiences by the Crown as the royal government's financial needs increased. Like those of the barons, the petitions these representatives presented on behalf of individuals and communities were granted in exchange for commitments to make payments to the Crown. As England transitioned away from feudalism toward a centralized bureaucracy and the emergence of Parliament, the status and frequency of petitioning blossomed.[273]

As Parliament began to gain independence from the Crown in the late fourteenth or early fifteenth century, petitions began to be directed to Parliament in addition to or instead of the king.[274] While the rising legislative power was beginning to supplant royal prerogative,

> "[c]ommon and frequent petitioning . . . took the place of prolonged discontent and abrupt presentation of a complex cahier of grievances at the point of the sword." Under Edward III, it became established practice at the opening of every session of parliament . . . to declare the king's willingness to consider petitions of the people.[275]

Although petitioning became commonplace and took on great political significance between the fourteenth and sixteenth centuries, it was a "right" only to the extent that the king and Parliament found it expedient.

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272. MAGNA CARTA, c. 61 (1215), *reprinted in* 5 THE FOUNDERS' CONSTITUTION, *supra* note 268, at 187.

273. *See* 2 RUDOLPH GNEIST, THE HISTORY OF THE ENGLISH CONSTITUTION 13 (Philip A. Ashworth trans., G.P. Putnam's Sons 1886) ("[T]he whole of the Middle Ages is a practical refutation of the theory of an executive power *in abstracto*. The motions of the commoners and the petitions which they recommended, gain with each ensuing generation a stronger stress, which metamorphosed their right of praying into a virtual right of co-resolution."); *see also* Mark, *supra* note 267, at 2165–66; Smith, *supra* note 264, at 1155–56; Spanbauer, *supra* note 264, at 23.

274. *See* Mark, *supra* note 267, at 2166 n.34. As Rudolph Gneist explained:

> The custom of presenting private petitions immediately to the Lower House, with the desire that the House be pleased to exert its influence with the King, occurs for the first time under Henry IV. Such petitions are now directed sometimes to the King, sometimes to the King in council, sometime to the King, Lords, and Commons, sometimes to the Lords and Commons, and sometimes to the Commons alone, with the request to use their good offices with the King and the council.

2 GNEIST, *supra* note 273, at 14–15.

275. Smith, *supra* note 264, at 1155 (quoting J.E.A. JOLLIFFE, THE CONSTITUTIONAL HISTORY OF MEDIEVAL ENGLAND 405 (4th ed. 1961)).

Petitioners could be, and were, punished for their petitions.[276] Nevertheless, petitioning flourished because the government did find it expedient. Not only were petitions an effective and efficient source of information, they were also a means by which the branches of government, particularly the Commons, could assert and expand their power against the Crown and Lords.

Over time, this self-interest in receiving petitions evolved into a governmental sense of obligation to receive and consider all petitions, and the citizenry came to expect no less. By the close of the sixteenth century, petitioning had grown into a right, albeit still not an absolute one, held by all of the king's subjects.[277]

By the seventeenth century, petitioning in England had achieved "enormous popularity,"[278] and it was during that era that "petitions complaining of public grievances, and asking for some change in the general law, or some legislation to meet new circumstances, [became] common . . . ."[279] Even more importantly, it was during the seventeenth century that petitioning became a near absolute right.[280] In fact, it was outcry over an attempt to punish a petitioning group of clergy for seditious libel[281] that "led directly to the Glorious Revolution of 1688 and to the Bill of Rights that fully confirmed the right of petition as an element of the British constitution."[282]

2. The American Right to Petition

The right to petition for redress of grievances was, if anything, even more robust in the American colonies than in England.[283] As British subjects,

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276. *See* Spanbauer, *supra* note 264, at 19–20.

277. Mark, *supra* note 267, at 2169–70 ("Petitioning came to be regarded as part of the Constitution, that fabric of political customs which defined English rights. . . . Petitioning became part of the regular political life of the English, not just because it was conducive to the interests of petitioners, and not just because it provided a foundation for Parliament . . . to assert its own expanding legislative powers. It was also a mechanism that bound the English together in a web of mutual obligation and acknowledgment of certain commonalities.").

278. Smith, *supra* note 264, at 1157.

279. 1 WILLIAM R. ANSON, THE LAW AND CUSTOM OF THE CONSTITUTION 393 (5th ed. 1922). Prior to the seventeenth century, most petitions were private petitions, "which asked for changes or exemptions from the law on behalf of individuals." *Id.*

280. Smith, *supra* note 264, at 1157.

281. Trial of the Seven Bishops for Publishing a Libel, 12 How. St. Tr. 183, 415 (1688), *reprinted in* 5 THE FOUNDERS CONSTITUTION, *supra* note 268, at 189; *see infra* text accompanying notes 328–338.

282. Smith, *supra* note 264, at 1160.

283. *See* Mark, *supra* note 267, at 2175 ("Colonial experience appears not only to have replicated England's widespread use of the petition, it likely extended it in both law and practice.").

the colonists held the right to petition the king and Parliament, and through their colonial charters and assemblies they secured for themselves the right to petition their colonial governments.[284] The colonists were not shy about exercising the right, either: For example, between 1750 and 1800, the Virginia legislature received, on average, over two hundred petitions per legislative session.[285] And, as in England, the large majority of both private and public legislation arose out of petitions.[286]

Amidst the growing discontent with British rule, the colonists repeatedly petitioned the king and Parliament for redress of their grievances. Indeed, the overarching injustice decried in the Declaration of Independence was the refusal of the British government to hear the colonists' petitions:

> In every stage of these Oppressions We have Petitioned for Redress in the most humble terms: Our repeated Petitions have been answered only by repeated injury. A Prince, whose character is thus marked by every act which may define a Tyrant, is unfit to be the ruler of a free people.[287]

To the colonists, the right to petition for redress of grievances (and the concomitant right to have one's petition heard) was so fundamental that the denial of the right was an act of tyranny and grounds for revolution.[288]

Following independence, the right to petition remained fundamental.[289] Although the conventions in the states ratified the Constitution without a formal declaration of the rights of the people against the government, such a declaration was in the forefront of the national conscience as the first Congress took up the task of building a nation.

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284. *See id.* at 2176–78. For example, the Body of Liberties adopted by the Massachusetts Bay Colony Assembly in 1641 promised an exceptionally broad right to petition almost fifty years before passage of the English Bill of Rights:

> Every man whether Inhabitant or fforreiner, free or not free shall have libertie to come to any publique Court, Councell, or Towne meeting, and either by speech or writing to move any lawfull, seasonable, and materiall question, or to present any necessary motion, complaint, petition, Bill or information, whereof that meeting hath proper cognizance, so it [can] be done in convenient time, due order, and respective manner.

Id. at 2177 (quoting A COPPIE OF THE LIBERTIES OF THE MASSACHUSETTS COLLONIE IN NEW ENGLAND (1641), *reprinted in* 1 DOCUMENTS ON FUNDAMENTAL HUMAN RIGHTS: THE ANGLO-AMERICAN TRADITION 122, 124 (Zechariah Chafee, Jr., ed. & compiler, 1963) (1951)).

285. Higginson, *supra* note 264, at 145 n.10.

286. *Id.* at 146.

287. THE DECLARATION OF INDEPENDENCE (U.S. 1776), *reprinted in* 5 THE FOUNDERS' CONSTITUTION, *supra* note 268, at 199.

288. *See* Mark, *supra* note 267, at 2192 ("Having met the sole precondition for reception by petitioning 'in the most humble terms,' the colonists felt entitled to consideration."); *see also* DECLARATION OF RIGHTS AND GRIEVANCES § 13 (1765), *reprinted in* 5 THE FOUNDERS' CONSTITUTION, *supra* note 268, at 198 ("That it is the right of the British subjects in these colonies, to petition the king or either house of parliament.").

289. *See* Mark, *supra* note 267, at 2199–2203; Smith, *supra* note 264, at 1174.

Responding to this widely felt desire, James Madison proposed amendments to the Constitution that would eventually become the Bill of Rights—including the right to petition—to the House of Representatives on June 8, 1789.[290] The right to petition, as framed in Madison's proposal, was in a clause separate from the freedoms of speech and press, and stated that "[t]he people shall not be restrained . . . from applying to the Legislature by petitions, or remonstrances, for redress of their grievances."[291]

In the few extant records of the congressional debates of the Bill of Rights, the right to petition generated little discussion, most likely because the proposition that it is the right of the people to petition their government for a redress of grievances would have been viewed at the time as self-evident, a total nonissue.[292] The primary insight into the right to petition that may be gleaned from the record comes from the controversy surrounding a proposed addition to the Amendment: the right of the people to instruct their representatives, or, in other words, to bind their representatives to legislate according to the popular will of their constituencies.[293] Arguing against such a right, Madison stated:

> [W]e have asserted the right sufficiently in what we have done; if we mean nothing more than this, that the people have a right to express and communicate their sentiments and wishes, we have provided for it already. The right of freedom of speech is secured; the liberty of the

290. *See* Proceedings in the House of Representatives, June 8, 1789, *in* 1 ANNALS OF CONGRESS (Joseph Gales, Sr. ed. 1834), *reprinted in* BENNETT B. PATTERSON, THE FORGOTTEN NINTH AMENDMENT 100–27 (1955).

291. *Id.* at 110. Limiting petitioning to "the Legislature" was consistent with the early state protections of the right to petition. *See* Mark, *supra* note 267, at 2200–03 (attributing the limitation to "the republican faith in the legislature and the central role accorded that body in republican thought," and stating that it "did not mean that the petitioning of other branches of the state government was barred or left unprotected"). The change from "the Legislature" to "the government" in the final version of the amendment is, however, more consistent with British and colonial practice. *See* Spanbauer, *supra* note 264, at 40. For a discussion of Madison's use of the word "apply" rather than "petition," see Mark, *supra* note 267, at 2208–09.

292. This is not to say that the Petition Clause, as adopted, escaped debate amongst early American legal scholars. In his commentaries on Blackstone, St. George Tucker criticized the language of the Clause as "savour[ing] of that stile of condescension, in which favours are supposed to be granted." 1 ST. GEORGE TUCKER, BLACKSTONE'S COMMENTARIES: WITH NOTES OF REFERENCE, TO THE CONSTITUTION AND LAWS, OF THE FEDERAL GOVERNMENT OF THE UNITED STATES; AND OF THE COMMONWEALTH OF VIRGINIA app. at 299 (1803). In reply, Joseph Story wrote in his famous Commentaries on the Constitution that "Mr. Tucker has indulged himself in a disparaging criticism upon the phraseology of this clause . . . . But this seems to be quite overstrained; since it speaks the voice of the people in the language of prohibition, and not in that of affirmance of a right, supposed to be unquestionable, and inherent." 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 745–46 (Fred B. Rothman & Co. 1991) (1833).

293. *See* Proceedings in the House of Representatives, Aug. 15, 1789, *in* 1 ANNALS OF CONGRESS (Joseph Gales, Sr. ed. 1834), *reprinted in* PATTERSON, *supra* note 290, at 163–79.

> press is expressly declared to be beyond the reach of the Government; the people may therefore publicly address their representatives, may privately advise them, or declare their sentiments by petition to the whole body; in all these ways they may communicate their will. If gentlemen mean to go further, and to say that the people have a right to instruct their representatives in such a sense as that the delegates are obliged to conform to those instructions, the declaration is not true.[294]

It appears that Madison's argument carried the day. The proposed right of instruction fell by the wayside, and after the language was modified, petitioning was enshrined in the First Amendment as "the right . . . to petition the Government for a redress of grievances."[295]

Petitioning both state and national governments remained immensely popular until the national crisis over slavery ultimately resulted in the right to petition falling from its position as the most important of expressive freedoms and as a central means of securing democratic self-government to the constitutional footnote it is today.[296] "Since the daily business of Congress began with the reading by each state of its petitions, too many petitions could bring proceedings to a standstill. Groups like the American Anti-Slavery Society emerged with national constituencies able to mobilize such petitioning drives."[297] When these groups began to assert their petitioning power in the 1830s, Congress responded with various measures that allowed it to devote as little time as possible to anti-slavery petitioners:

> The attempts to stifle the petitions became known as the gag rule or gag law. For eight years, the existence of the rule was a source of tremendous controversy in the House and the nation.
>
> . . . .
>
> . . . Designed to staunch the flow of such petitions to the House, [the gag rule] was sweeping in its breadth.[298]

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294. *Id.* at 169.

295. *See* Proceedings in the House of Representatives, Sept. 24, 1789, *in* 1 ANNALS OF CONGRESS (Joseph Gales, Sr. ed. 1834), *reprinted in* PATTERSON, *supra* note 290, at 210.

296. *See* Higginson, *supra* note 264, at 156; Andrews, *supra* note 267, at 642 n.292 ("Most commentators acknowledge that Congressional processing of petitions forever changed after abolitionists, beginning in the 1830s, inundated Congress with petitions urging it to end slavery in the District of Columbia."). The right to petition enjoyed equal popularity in England during this period. *See* 1 ANSON, *supra* note 279, at 395 ("In the five years ending 1789 [the number of petitions presented to the House] was 880. In the five years ending 1831 it was 24,492. In the five years ending 1877 it was 91,846. The cost of printing petitions amounted between 1826–1831 to £12,000."); Mark, *supra* note 267, at 2215 n.291 (stating that Parliament received 33,898 petitions in 1843).

297. Higginson, *supra* note 264, at 157.

298. Mark, *supra* note 267, at 2216–17 (citations omitted). For an in-depth discussion of the gag rule and its effects on the right to petition, see Higginson, *supra* note 264, at 155–65, and Mark, *supra* note 267, at 2215–26.

Remarkably, throughout this escapade, Congress's infringement of the right to petition was never challenged in the Supreme Court. Without support from the judicial branch, and with outright hostility from the legislative branch, petitioning evolved from an activity with independent legal and political significance as a means of empowering "We the People" to directly influence the government into simply another form of indirect political propagandizing.[299] Thus lacking a unique character or independent power, petitioning eventually fell largely into disuse, and the practice faded into obscurity. Today, even lawyers and judges steeped in First Amendment jurisprudence would be hard pressed to identify and describe the historic right of petition.

B. The Supreme Court's Neglect of the Petition Clause

It was not until 1867 that the Supreme Court first addressed the right to petition, and even then the Court did so only in the context of an interstate right to travel.[300] After some early signs that the Justices would give the Petition Clause independent legal significance,[301] the Court declared in 1945 that "[i]t was not by accident or coincidence that the rights to freedom in speech and press were coupled in a single guaranty with the rights of the people peaceably to assemble and petition for redress of grievances. All these, though not identical, are inseparable. They are cognate rights."[302]

Since that time, the Court has focused far more on the petition right's inseparability from the other First Amendment expressive guarantees of the First Amendment than on its distinct identity,[303] giving independent effect to the Petition Clause in only one limited context.[304] For the most part, the insignificance of the Petition Clause in Supreme Court jurisprudence is due simply to inattention—the Court feels that it can resolve its cases on other First Amendment grounds, so it need not consider the Petition Clause.[305]

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299. Mark, *supra* note 267, at 2226–28.

300. *See* Crandall v. Nevada, 73 U.S. (6 Wall.) 35, 43–44 (1867).

301. *See, e.g.*, United States v. Cruikshank, 92 U.S. 542, 552 (1875) ("The very idea of a government, republican in form, implies a right on the part of its citizens to meet peaceably for consultation in respect to public affairs and to petition for a redress of grievances.").

302. Thomas v. Collins, 323 U.S. 516, 530 (1945).

303. *See, e.g.*, Wayte v. United States, 470 U.S. 598, 610 n.11 (1985) ("Although the right to petition and the right to free speech are separate guarantees, they are related and generally subject to the same constitutional analysis.").

304. *See infra* text accompanying notes 320–322 (discussing the *Noerr-Pennington* doctrine).

305. Part of the problem may also be that litigants invoking the Petition Clause have not done a particularly good job of distinguishing claims under the Petition Clause from run-of-the-mill Speech or Assembly Clause claims. *See, e.g.*, *Wayte*, 470 U.S. at 610 n.11 (refusing to consider a

However, in its most recent general treatment of the Petition Clause, the 1985 decision in *McDonald v. Smith*,[306] the Court went beyond merely ignoring the Clause and instead struck an affirmative blow by grossly misstating the history of petitioning in order to hold that there is no immunity from civil libel for statements made in petitions.[307] In doing so, the Court made explicit its long practice of treating the protection afforded by the Petition Clause as co-equal and co-extensive with that of the other First Amendment expressive freedoms, and therefore having no independent legal significance for most purposes. According to the *McDonald* Court, not only is the right to petition "cut from the same cloth as the other guarantees of [the First] Amendment,"[308] but "there is no sound basis for granting greater constitutional protection to statements made in a petition to the President than other First Amendment expressions."[309]

As the preceding discussion of the history of the right to petition should make abundantly clear, this latter statement is simply false, particularly as applied to libel actions.[310] The Court was correct that "[t]o accept petitioner's claim of absolute immunity would elevate the Petition Clause to special First Amendment status,"[311] but what the Court failed to recognize was that the Petition Clause, by its history, virtually demands special First Amendment status. True enough, "[t]he Petition Clause . . . was inspired by the same ideals of liberty and democracy that gave us the freedoms to speak, publish, and assemble."[312] It is equally true, however, that the freedoms to speak, publish, and assemble—freedoms of relatively recent vintage—were inspired by the ideals of the Petition Clause; the right of petition antedates

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Petition Clause claim independently where the plaintiff failed to argue that the government's conduct "burdened each right differently" and treating speech and petition claims "as essentially the same"). With respect to a right to protest proximate to government officials, however, this Article argues for an independent, Petition Clause–based claim. Indeed, because the lower federal courts have repeatedly rejected any right to protest near an intended audience under the Speech and Assembly Clauses, the government's policy of banishing dissenters from areas physically proximate to officeholders does burden the Petition Clause "differently" than other First Amendment rights.

306. 472 U.S. 479, 484–85 (1985).

307. *See generally* Schnapper, *supra* note 267 (arguing that the Court's historical analysis in *McDonald* is incorrect).

308. *McDonald*, 472 U.S. at 482. *But see* Spanbauer, *supra* note 264, at 17 ("[C]ontrary to the Court's assertion, the right to petition was cut from a different cloth than were the rights of speech, press, and assembly.").

309. *McDonald*, 472 U.S. at 485.

310. *See generally* Schnapper, *supra* note 267 (arguing that, historically, petitioners were immune from liability for both civil and criminal libel); *see also* Andrews, *supra* note 267, at 624 (describing the unique values protected by the Petition Clause).

311. *McDonald*, 472 U.S. at 485.

312. *Id.*

the rights of speech and assembly, both of which derive from the right of petition.[313] To fail to give the Petition Clause independent meaning and effect is, quite simply, to ignore history. The Court's analysis also violates the notion that a court, when interpreting a legal text, should attempt to give legal effect to all provisions of the text.[314]

The Supreme Court's unwillingness to give independent meaning and effect to the Petition Clause is also inconsistent with the Court's treatment of other amendments, and even other provisions of the First Amendment. By its terms, the First Amendment protects the following freedoms: the freedom from religious establishments, the freedom of religious exercise, the freedom of speech, the freedom of the press, the freedom of assembly, and the freedom to petition the government.[315] Of these freedoms, the Supreme Court denies independent significance only to the freedom to petition.[316] Incredibly, even the nontextual freedom of association is given far greater meaning by the Court than the right to petition.[317]

Looking to other amendments, the inconsistency of the Supreme Court's treatment of the Petition Clause is further underscored. For example, the clauses of the Fifth Amendment relating to grand jury indictment, double jeopardy, self-incrimination, due process, and government takings are each given independent significance.[318] The Court also gives independent significance to each of a criminal defendant's Sixth Amendment rights to a speedy trial, to an impartial jury, to be informed of the nature and cause of the accusation, to confront witnesses, to compulsory process for obtaining favorable witnesses, and to the assistance of counsel.[319]

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313. See *supra* Part IV.A.

314. *See* ANTONIN SCALIA, A MATTER OF INTERPRETATION 14–18, 23–25, 29–32, 37–41 (1997); *see also* WILLIAM N. ESKRIDGE, JR., DYNAMIC STATUTORY INTERPRETATION 268, 282, 324 (1994).

315. *See* U.S. CONST. amend. I.

316. *See, e.g.*, Employment Div. v. Smith, 494 U.S. 872 (1990) (free exercise); Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555 (1980) (press); Lemon v. Kurtzman, 403 U.S. 602 (1971) (establishment); Cohen v. California, 403 U.S. 15 (1971) (speech); De Jonge v. Oregon, 299 U.S. 353 (1937) (assembly).

317. *See, e.g.*, Rumsfeld v. Forum for Academic and Inst'l Rights, Inc., 547 U.S. 47 (2006); Boy Scouts of Am. v. Dale, 530 U.S. 640 (2000); Roberts v. U.S. Jaycees, 468 U.S. 609 (1984); Healy v. James, 408 U.S. 169 (1972).

318. *See, e.g.*, Phillips v. Wash. Legal Found., 524 U.S. 156 (1998) (takings); United States v. Williams, 504 U.S. 36 (1992) (grand jury indictment); Mathews v. Eldridge, 424 U.S. 319 (1976) (due process); Miranda v. Arizona, 384 U.S. 436 (1966) (self-incrimination); Fong Foo v. United States, 369 U.S. 141 (1962) (double jeopardy).

319. *See, e.g.*, Crawford v. Washington, 541 U.S. 36 (2004) (confront witnesses); Doggett v. United States, 505 U.S. 647 (1992) (speedy trial); Duncan v. Louisiana, 391 U.S. 145 (1968) (impartial jury); Washington v. Texas, 388 U.S. 14 (1967) (compulsory process); Gideon v. Wainwright, 372 U.S. 335 (1963) (assistance of counsel); Bartell v. United States, 227 U.S. 427 (1913) (nature and cause of the accusation).

The Supreme Court's inconsistency is not, however, limited only to history and to its treatment of other amendments. Its general reluctance to give independent significance to the Petition Clause is also inconsistent with the Court's own application of the Clause in the apparently unique context of antitrust cases. In antitrust cases alone, the Court has given independent meaning to the Petition Clause in the form of the *Noerr-Pennington* doctrine.

Arising out of *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*[320] and *United Mine Workers of America v. Pennington*,[321] the *Noerr-Pennington* doctrine relies on the Petition Clause to give absolute immunity from suit under antitrust laws for actions, such as advertising and lobbying, that are intended to influence legislation, even if the actions, are in furtherance of an anticompetitive scheme that is itself illegal under antitrust laws.[322] True, this grant of Petition Clause immunity appears consistent with history; certainly speech to government officials for the purpose of influencing legislation is petitioning activity. Yet the policies against anticompetitive activities underlying antitrust laws are an invention of the twentieth century and played no part in the development of the right to petition. In contrast, the *McDonald* Court faced an opportunity to apply the Petition Clause to libel—an issue that has been at the heart of petitioning for hundreds of years—and turned a blind eye. Thus, the Supreme Court's willingness to correctly apply the history of the Petition Clause in the limited context of antitrust suits serves only to make its unwillingness to apply it in more traditional contexts all the more perplexing.

C. Enhanced Protection Under the Petition Clause for Protest Activity Proximate to Government Officials

Although he stated the matter in particularly eloquent terms, Harry Kalven was not alone in recognizing that a political protest is "an elaborate petition for redress of grievances."[323] During the 1960s, even the Supreme Court acknowledged that civil rights protests constituted petitions for a redress of grievances (though its majority opinions uniformly avoided developing an independent theory of the Petition Clause, relying instead on

320. 365 U.S. 127 (1961).
321. 381 U.S. 657 (1965).
322. *Noerr*, 365 U.S. at 138–39; *Pennington*, 381 U.S. at 669–70.
323. Kalven, *supra* note 34, at 192–93.

the other First Amendment freedoms for its decisions).[324] Even *McDonald* reiterated this theme, with Justice Brennan stating in concurrence that the Petition Clause "includes such activities as peaceful protest demonstrations."[325]

This broad view of the nature of petitions and petitioning is not entirely inconsistent with historical practice. In England "[a] petition was not just any form of communication addressed to the King, his officers, or Parliament. Rather, it was a communication which, to be protected, had to take a certain form and embody certain components."[326] The colonies, however, were not always so formal. For example, the Body of Liberties adopted by the Massachusetts Bay Colony Assembly in 1641 allowed "[e]very man whether Inhabitant or fforreiner, free or not free shall have libertie to come to any publique Court, Councell, or Towne meeting, and *either by speech or writing* . . . to present any necessary motion, complaint, [or] petition . . . ."[327] Thus, the Massachusetts colony appears to have allowed petitions to be presented both orally and in writing.

Accepting that political protests have a legitimate claim to protection under the Petition Clause, the question then becomes the nature of that protection. As the history of the Petition Clause demonstrates, fundamental to the right to petition are two constituent rights: the right to immunity from prosecution for seditious libel and the right to be heard. When considered in the light of history, these two rights work together to provide political protestors with a right of proximity to those government officials to whom their protests are addressed.

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324. *See, e.g.*, Gregory v. Chicago, 394 U.S. 111 (1969); Adderley v. Florida, 385 U.S. 39, 40–42 (1966); Brown v. Louisiana, 383 U.S. 131 (1966) (plurality opinion); Henry v. Rock Hill, 376 U.S. 776 (1964) (per curiam); Edwards v. South Carolina, 372 U.S. 229 (1963); NAACP v. Button, 371 U.S. 415 (1963); Bates v. Little Rock, 361 U.S. 516 (1960).

325. McDonald v. Smith, 472 U.S. 479, 488 n.2 (1985) (Brennan, J., concurring).

326. Mark, *supra* note 267, at 2171. A nineteenth-century historian described the formalities of petitioning as follows:

> It must be written, it must be free from erasures or interlineations, it must not be a simple memorial or remonstrance, but must conclude with a prayer. In matter it must be respectful of the privileges of the House, and free from disloyalty or expression of intention to resist the law. Beyond this the inclination of modern time is to allow the widest latitude to petitions.

1 ANSON, *supra* note 279, at 396. Consistent with this view, Gregory Mark argues that "had historical understandings been fully extended [in *McDonald*], the plaintiff would have had his claim dismissed by the trial court at the outset. Mr. McDonald's 'petitions' were not actually petitions at all, but rather letters to President Reagan (copied to others)." Mark, *supra* note 267, at 2228 n.358. If "historical understandings" are limited to those derived from England, then this assessment is undoubtedly correct.

327. Mark, *supra* note 267, at 2177 (emphasis added) (quoting A COPPIE OF THE LIBERTIES OF THE MASSACHUSETTS COLLONIE IN NEW ENGLAND, *supra* note 284).

1. The Right to Immunity From Prosecution for Seditious Libel

In 1688, the right to petition faced perhaps its greatest challenge up to that point. That year, King James II, a Roman Catholic, issued a Declaration of Indulgence that many perceived as the first step in the establishment of Catholicism as the state religion of England.[328] As head of the Protestant Church of England, James ordered that his Declaration be read from all church pulpits.[329] The Archbishop of Canterbury and six other bishops petitioned the King, setting forth the reasons why they could not comply with the order and asking to be excused.[330] "The seven bishops were arrested and prosecuted for seditious libel, the allegedly libelous statement being the petition they had presented to the King."[331] Rather than defend against the charge on its merits, the bishops in effect asserted that they were immune from seditious libel prosecution for statements made in a petition.[332]

At the famous *Trial of the Seven Bishops*, the defendant bishops were acquitted, much to the joy of the populace.[333] Nevertheless, the public outrage that the Crown would even attempt such a prosecution "led directly to the Glorious Revolution of 1688 and to the Bill of Rights that fully confirmed the right of petition as an element of the British constitution."[334] In response to the *Trial of the Seven Bishops*, the English Bill of Rights stated that "it is the right of the subjects to petition the King, and all committments [sic] and prosecutions for such petitioning are illegal."[335] Moreover, the government was nearly as good as its word—the Bill of Rights was enacted in 1689, and the last recorded prosecution for seditious libel based on the contents of a petition occurred in 1702.[336] This absolute immunity crossed the Atlantic into the American colonies, where, with few exceptions, it persisted through the passage of the First Amendment and beyond.[337] For

328. Schnapper, *supra* note 267, at 313 (citing *His Majesty's Gracious Declaration to All His Loving Subjects for Liberty of Conscience* (Apr. 1687 & May 1688)).

329. *Id.*

330. *Id.* at 313–14.

331. *Id.* at 314.

332. *Id.*

333. *See generally* Trial of the Seven Bishops for Publishing a Libel, 12 How. St. Tr. 183, 415 (1688), *reprinted in* 5 THE FOUNDERS' CONSTITUTION, *supra* note 268, at 189–96.

334. Smith, *supra* note 264, at 1160; *see also* Schnapper, *supra* note 267, at 314–15.

335. Bill of Rights, *supra* note 268, at 1.

336. Smith, *supra* note 264, at 1165.

337. *See, e.g.*, Spanbauer, *supra* note 264, at 29–31 (describing the restrictions (or lack thereof) on the right to petition in the colonies).

example, there were seventeen prosecutions under the Sedition Act of 1798, but none resulted from a petition for redress of grievances.[338]

Of course, *New York Times v. Sullivan* ostensibly closed the book on seditious libel prosecution for any First Amendment activity.[339] Yet, as demonstrated by cases such as *Bl(a)ck Tea Society*[340] and *Citizens for Peace in Space*,[341] the government interest in security has given new life to the doctrine of seditious libel as applied to political protest activity.[342] But if seditious libel is returning through the courts' willingness to allow protestors to be involuntarily shoved out of sight and hearing of government officials on pain of arrest and criminal prosecution, then the absolute immunity from seditious libel afforded to petitioning suggests that there must be a Petition Clause right of proximity. Anything less would allow a de facto return of a junior varsity form of seditious libel, in direct contravention of the right to petition as understood and embraced by the Framers.

2. The Right to be Heard

The evidence is clear that as a matter of history, petitioners have a right to have their petitions received and heard by the government.[343] To be given effect in the context of political protests, this right to be heard must include a right of proximity to the government officials to whom a petition is addressed. To the extent that protestors are being moved out of the sight and hearing of government officials, these protestors are being denied their

338. Smith, *supra* note 264, at 1176. New York Assemblyman Jedediah Peck was, however, indicted for "a vehemently worded petition to Congress advocating repeal of the Alien and Sedition laws"—one of many such petitions—but the case was dropped "due to pressure from popular demonstrations in Peck's favor." *Id*.

339. N.Y. Times Co. v. Sullivan, 376 U.S. 254, 273–77 (1964) ("Although the Sedition Act was never tested in this Court, the attack upon its validity has carried the day in the court of history."); *see also* Kalven, *supra* note 34, at 209 (stating that since the Supreme Court's decision in *Sullivan*, "[t]he central meaning of the [First] Amendment is that seditious libel cannot be made the subject of government sanction").

340. 378 F.3d 8 (1st Cir. 2004).

341. 477 F.3d 1212 (10th Cir. 2007).

342. *See supra* Part I.C.

343. *See supra* Part IV.A; *see also* 2 WILLIAM STUBBS, THE CONSTITUTIONAL HISTORY OF ENGLAND 276–77 (1880) (describing the process for receiving and hearing petitions during the reign of Edward I). As previously mentioned, some scholars would take the right to be heard a step further by also requiring a government response to every petition for redress of grievances. *See* sources cited *supra* note 264. Although this view is undoubtedly consistent with the history of the Petition Clause, we tend to agree with those who argue that such a requirement is simply too impractical in the modern era. *See id*. This is particularly true with less formal forms of petitioning such as political protests, in which, even if government officials were inclined to respond, the identities and contact information of those petitioning may not be readily ascertainable.

Petition Clause right to have their petitions heard. The only means of guaranteeing the right to be heard is through a right to be within the eyesight and earshot of the government officials to whom a petition is addressed.

Furthermore, the history of the Petition Clause strongly suggests that the right to petition has always contemplated a coordinate right of proximity:

> It was under Edward III that it became a regular form at the opening of parliament for the chancellor to declare the king's willingness to hear the petitions of his people: all who had grievances were to bring them to the foot of the throne that the king with the advice of his council or of his lords might redress them . . . .[344]

That "all who had grievances" were to bring their petitions "to the foot of the throne" clearly establishes that the right of petition, at least as an historical matter, encompassed a right to in-person presentation. Moreover, this "up close and personal" aspect of petitioning recurs throughout the history of the right.[345] In short, petitioners have an historical right to present their petitions in the physical presence of the government officials to whom they are addressed.

For example, in the Tumultuous Petition Act of 1661, designed to prevent the near-riots that had sometimes accompanied the presentation of petitions by limiting the number of persons who could present a single petition to ten, Parliament made sure to note that "this Act . . . shall not be construed to extend to debar or hinder any person or persons not exceeding the number of ten aforesaid to present any publique or private grievance or complaint to any member or members of Parliament . . . or to the Kings Majesty for any remedy to bee thereupon had . . . ."[346] The language and intent of the Act clearly contemplate in-person presentation, else why specify "any member or members of Parliament," much less limit the number of presenters at all?

The *Trial of the Seven Bishops* also makes the case for in-person presentation of petitions. In summarizing the testimony of a witness, "my lord president," Lord Chief Justice Sir Robert Wright explained the presentation of the seven bishops' petition as follows:

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344. 2 STUBBS, *supra* note 343, at 602 (internal citation omitted).

345. *See supra* Part IV.A (providing historical examples showing a right of in-person presentation of petitions).

346. The Tumultuous Petition Act, 1661, 13 Chas. 2, st. 1, c. 5, § 2 (Eng.), *reprinted in* 5 THE FOUNDERS' CONSTITUTION, *supra* note 268, at 188; *see also* 4 BLACKSTONE, *supra* note 53, at *146–47 ("Nearly related to this head of riots is the offence of *tumultuous petitioning*; which was carried to an enormous height in the times preceding the grand rebellion. Wherefore by statute . . . no petition shall be delivered by a company of more than ten persons.").

> [The court] staid till my lord president came, who told us how the bishops came to him to his office at Whitehall, and after they had told him their design, that they had a mind to petition the king, they asked him the method they were to take for it, and desired him to help them to the speech of the king: and he tells them he will acquaint the king with their desire, which he does; and the king giving leave, he comes down and tells the bishops, that they might go and speak with the king when they would; and, says he, I have given direction that the door shall be opened for you as soon as you come. . . . [W]hen they came back, they went up into the chamber and there a petition was delivered to the king.[347]

Further evidence for a right of in-person presentation may be found in the "necessity of frequent sessions of parliament for providing subjects with an opportunity to present their petitions,"[348] and in the fact that "[w]hen petitions were presented to the [king's] council, the council would examine the petitioners . . . ."[349] Moreover, in-person presentation carried over into the colonies, where "[p]etitioners directly presented written petitions . . . to the court, legislative body, council, or governor."[350]

This is not to suggest that in-person presentation need rise to the level of a personal audience with a government official.[351] Rather, in the context of political protest activity, the right to present petitions in the physical presence of the government officials to whom they are addressed amounts simply to a right of physical proximity such that the officials can see and hear the protestors' petitions.

D. Uncritical Acceptance of the Security Rationale: A Violation of Both the History and the Spirit of the Petition Clause.

As a general proposition, the courts are correct to give considerable weight to the government's strong interest in security, and the Petition Clause demands nothing else. Indeed, its history solidly supports the notion that the

347. Trial of the Seven Bishops for Publishing a Libel, 12 How. St. Tr. 183, 192 (1688), *reprinted in* 5 THE FOUNDERS' CONSTITUTION, *supra* note 268, at 192.

348. Smith, *supra* note 264, at 1157.

349. Spanbauer, *supra* note 264, at 23.

350. *Id.* at 28; *see also* Mark, *supra* note 267, at 2177 (quoting A COPPIE OF THE LIBERTIES OF THE MASSACHUSETTS COLLONIE IN NEW ENGLAND, *supra* note 284).

351. Spanbauer, *supra* note 264, at 26 (stating that the right to petition "did not include a right to a personal audience").

Petition Clause should accommodate reasonable concessions to security.[352] "During 1641–42, petitions were often delivered by riotous assemblies, some plainly for the purpose of trying to coerce or intimidate parliament and other officers of the government."[353] Faced with such circumstances, sometimes resulting in bloodshed, Parliament, on more than one occasion, restricted both the numbers of persons who could sign petitions and the number who could present them.[354] Moreover, the text of the Petition Clause itself can be read to protect only "the right of the people *peaceably* . . . to petition the Government for redress of grievances."[355] Finally, there is nothing to suggest that the right of in-person presentation of petitions has ever extended beyond places of official government business.

Accepting that each of these limitations applies to political protest petitioning, the restrictions on protest activity sustained in cases such as *Citizens for Peace in Space*[356] are nevertheless clear violations of protestors' rights under the Petition Clause.[357] None of the historical limitations on the right to petition countenances the total ban on proximite protest that was upheld in each of these cases; only reasonable limits on the number of petitioners is consistent with historical practice. Moreover, advances in security technology—such as metal detectors, x-ray machines, and bomb-sniffing dogs—should, in most cases, allow far more than ten petitioners to safely exercise their rights of proximity to government officials. The nature of political protests, as opposed to more traditional petitioning, also counsels in favor of expanding rather than contracting the number of permissible protestors, in that protests, with their banners, slogans, signs, and chants, require a lesser degree of proximity—again, sight and hearing are the fundamental requirements. And perhaps most importantly, the use of

352. Blackstone's few mentions of the right to petition discuss little else. *See* 1 BLACKSTONE, *supra* note 53, at *138–39 (discussing the security-based restrictions on the right to petition); 4 BLACKSTONE, *supra* note 53, at *147 (discussing "the offence of *tumultuous petitioning*").

353. Smith, *supra* note 264, at 1158.

354. *See id.* at 1158–59.

355. U.S. CONST. amend. I (emphasis added); *see also* WILLIAM RAWLE, A VIEW OF THE CONSTITUTION OF THE UNITED STATES 124 (2d ed. 1829), *reprinted in* 5 THE FOUNDERS' CONSTITUTION, *supra* note 53, at 207. ("It may, however, be urged, that history shows how those meetings and petitions have been abused . . . . But besides the well known irrelevancy of the argument from the abuse of any thing against its use, we must remember that by requiring the assembly to be peaceable, the usual remedies of the law are retained, if the right is illegally exercised.").

356. 477 F.3d 1212 (10th Cir. 2007).

357. At an absolute minimum, these principles counsel that the outcome in *Citizens for Peace in Space* was a clear violation of the protestors' Petition Clause right to protest proximate to government officials to whom their intended protest was addressed. Given that they had voluntarily agreed to limit the number of protestors to six and to submit to the same rigorous security screening applied to members of the press, there was simply no justification for denying their right to petition.

speculative predictions of possible violence as a basis for eliminating proximity is also inconsistent with the history of the Petition Clause. Past incidents of violence did not cause the seventeenth-century Parliament to endorse prophylactic bans on the presentation of petitions, and neither should they do so for the present-day federal courts.

It bears noting, moreover, that in the one doctrinal area in which the Supreme Court has given the Petition Clause independent effect, the *Noerr-Pennington* doctrine, the Justices had no problem embracing the concept of "indirect" petitioning via billboards, print advertisements, and broadcast commercials.[358] It is more than a little ironic that, under contemporary doctrine, the Petition Clause affords no meaningful right of access to government or party officers, in direct contravention of historical practice, but does protect mass media communications, for which there is no historical basis for treating as petitions. In any event, if the Petition Clause reaches indirect forms of petitioning, it certainly should extend to the older, more well-established forms of the right.

Above all, it must be remembered that the right to protest proximate to government officials is not simply a restoration of the Petition Clause's independent and historical meaning. It is also a constitutional, historically justified, and effective means of combating an invidious return of seditious libel that has thus far proven immune to the usual First Amendment doctrines. Therefore, this right should be construed liberally to provide the antiseptic to seditious libel that is both desperately needed and demanded by history.

CONCLUSION

The lower federal courts' application of the *Ward* time, place, and manner test to define the metes and bounds of access to public property for protest activity has failed to adequately protect core political speech, at least when such speech activity seeks to bring grievances directly to the attention of those holding governmental power.[359] Since the events of 9/11, the U.S. courts of appeals have sustained ever broader, ever more draconian limits on public protest activity proximate to government officials and the political

358. E. R.R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127, 132–40 (1961) (sustaining a generic mass media campaign as protected petitioning activity because it was "a publicity campaign to influence governmental action").

359. *See supra* Part I.C.

party leaders who control the means of selection to elected office.[360] Although we agree with the scholarly commentary that decries the lax application of the narrow tailoring and alternative channels of communication requirements of the *Ward* time, place, and manner test, it is abundantly clear that these admonitions are not likely to reform judicial decisionmaking in this area. Simply put, when government officials invoke security concerns as the basis for restricting or proscribing speech activity, federal judges are not inclined to enforce the time, place, and manner test strictly in order to safeguard the rights of protestors.

The traditional *Ward* time, place, and manner test works reasonably well in testing the limits of access to particular public spaces for speech activity, as opposed to more routine uses, such as for pedestrian and vehicular traffic. The heart of the problem lies in the fact that under the traditional time, place, and manner test would-be speakers enjoy no right of access to their intended audience. In this respect, the First Circuit was correct in observing that "there is no constitutional requirement that demonstrators be granted that sort of particularized access."[361] Moreover, this result holds true even if the group seeks to reach its intended audience by engaging in protest activity in a traditional public forum, such as a public sidewalk or street, that would otherwise be open and available for speech activity both before and after the intended audience leaves the area. Thus, resolution of

360. *Cf.* Bruce Ackerman, *The Emergency Constitution*, 113 YALE L.J. 1029 (2004) (arguing that limits must exist regarding the extent to which claims of national emergency may justify erosions of constitutional practices derived from the Constitution itself); Blasi, *supra* note 15 (arguing forcefully that judges should enforce the First Amendment most aggressively in times of great national stress because it is precisely at those times that free speech comes under the greatest threat and also, paradoxically, the time at which full and free political discussion is most crucial).

361. Bl(a)ck Tea Soc'y v. City of Boston, 378 F.3d 8, 14 (1st Cir. 2004). In this respect, Professor Timothy Zick's arguments about protecting spatial relationships has some relevance; Zick argues that the notion of space should also take into account the overall context of proposed speech activity, including the ability of a speaker to reach an intended audience. *See* Zick, *Space, Place, and Speech*, *supra* note 12, at 499–505; Zick, *Speech and Spatial Tactics*, *supra* note 12, at 630–46. This view certainly represents one way of addressing the problem: broadening the notion of spatial access to make it more context specific. From our perspective, the problem with this approach is that nothing in the existing legal doctrine seems to take seriously the idea that audience access is a relevant consideration when testing reasonable time, place, and manner restrictions on speech in a public forum. On the contrary, the lower federal courts have routinely brushed aside arguments that alternative public forums were insufficient substitutes because the forums limited access to a preferred target audience. *See, e.g.*, *Bl(a)ck Tea Soc'y*, 378 F. 3d at 13–14; Citizens for Peace in Space v. Colo. Springs, 477 F.3d 1212, 1220–22 (10th Cir. 2007). In fact, if any potential access to an audience is sufficient to meet the "reasonable alternative channels of communication" prong of the *Ward* test, then the ability to blog about the concerns on the Internet would potentially satisfy the existing time, place, and manner test. *See Bl(a)ck Tea Soc'y*, 378 F.3d at 14 (arguing that the ability to reach a target audience via the local media and the Internet, rather than person-to-person, satisfies the alternative channels of communication requirement).

the conflict requires balancing the state's interest in shielding the intended audience from the speech activity (in the name of security) against the interest of would-be demonstrators in communicating a message directly to that particular audience. We believe that attempting to rehabilitate the existing time, place, and manner test to incorporate greater consideration of whether a speaker can reach her intended audience, although presenting a potential solution, seems unlikely to meet with substantial success. Rather than reforming the traditional time, place and manner test, we believe that the test must be displaced entirely and transcended.

The Petition Clause presents a logical textual source for a right of access to government and party officials to seek changes in existing government policy (to seek a "redress of grievances" in the actual language of the Clause).[362] The historical roots of the right of petition include a right to present petitions in person and also a right to petition collectively. Although it is true that the right of petition fell into a state of desuetude by the mid-nineteenth century, largely because of abusive petitioning by proponents of the abolition of human slavery, this provides no support for failing to reanimate the Clause in the twenty-first century. Indeed, to allow the antebellum advocates of slavery to turn the Petition Clause into little more than collateral damage, effectively stranding the Clause in the dungeon of antiquated constitutional rights, makes very little sense and would serve simply to compound an unjustified abrogation of a longstanding and important legal right. Indeed, the Framers viewed the right of petition as of no less importance to securing democratic accountability than suffrage itself: Voting secured democratic accountability at regular intervals, whereas the right of petition secured democratic accountability after and between those elections. If the people cannot communicate directly with those elected to public office, how can it be expected that those holding office will be accountable to the people who elected them?

Finally, the Petition Clause presents a near-perfect antidote to the invocation of security as a means of protecting politicians from seeing or hearing dissent within eyesight or earshot. Historically, the right of petition not only guaranteed a right of access to government officials, but also enjoyed an exemption from the doctrine of seditious libel. Even during times when public opposition to the government's policies could be prosecuted as a crime, such as during the first Adams Administration under the Sedition Act of 1798, the right of petition remained a lawful means of expressing dissenting views directly to the government. In other words, at a time when

362. U.S. CONST. amend I.

security concerns justified generalized criminal bans on speech activity that was thought to present a risk to national security, the right of petition provided a legally protected means of direct communication with government officials.

The Petition Clause can and should provide a qualified right of access to seek a redress of grievances on a public street or sidewalk within the personal hearing and view of government and party officials. This is not to say that the government has no interest in ensuring the personal security of the president, other government officers, or political party leaders. We do not advocate an unqualified right of access to government officials under the Petition Clause; instead, we merely suggest that the federal courts should read the Petition Clause to create a general duty for the government to facilitate meaningful access to government and party officials, at least in public places that are otherwise open to expressive activity.

In order to operationalize this restored right of petitioning, federal courts should require that any and all restrictions on protest activity proximate to government officials should be justified by actual—as opposed to merely hypothetical—risks, and that the government should be required to use the least restrictive means possible to address their security concerns.[363] Thus, the Petition Clause should support a right to communicate a message directly to the relevant government officials in a meaningful way, at a meaningful time, and in a fashion that reasonably ensures that the message will be received by its intended audience.

The existing time, place, and manner doctrine does not secure any of these interests from government abridgement and, therefore, the federal courts should recognize a new and broader right of access to government and party officials as an incident of the Petition Clause. The Petition Clause should play no less meaningful a role in helping to secure democratic deliberation than do the Speech, Press, and Assembly Clauses; that current doctrine permits this contrary result reflects the continuing legacy of the antebellum pro-slavery movement more than a considered and intellectually justifiable textual exegesis of the text of the First Amendment.

363. For example, limits on the number of protestors permitted to demonstrate proximate to a venue might be permissible, as would a requirement of clearing a security check before reaching the demonstration area. If a group of fifty protestors has been screened for noxious substances and weapons, and found to possess only placards and signs opposing a government policy, it is difficult to understand why such a group must be excluded entirely from the earshot or eyesight of the government officials and other guests attending the event. By the same token, if a mass of 10,000 persons attempted to invoke the right of petition by blocking the entrance to the meeting site of a national nominating convention, we do not believe that the Petition Clause should stand as an obstacle to the government, disallowing a protest of such a size and with such an objective.

This historical accident can and should be corrected; the Petition Clause must reclaim its central importance as a crucial means of securing democratic accountability from those holding power in the name of "the People." In the words of Justice Jackson:

> The First Amendment forbids Congress to abridge the right of the people "to petition the Government for a redress of grievances." If this right is to have an interpretation consistent with that given to other First Amendment rights, it confers a large immunity upon activities of persons, organizations, groups and classes to obtain what they think is due them from government. Of course, their conflicting claims and propaganda are confusing, annoying and at times, no doubt, deceiving and corrupting. But we may not forget that our constitutional system is to allow the greatest freedom of access to Congress, so that people may press for their selfish interests, with Congress acting as arbiter of their demands and conflicts.[364]

364. United States v. Harriss, 347 U.S. 612, 635 (1954) (Jackson, J., dissenting).