Legal Digest
Time, Place, and Manner: Controlling the Right to Protest
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In towns it is impossible to prevent men from assembling, getting excited together and forming sudden passionate resolves. Towns are like great meeting houses with all the inhabitants as members. In them the people wield immense influence over their magistrates and often carry their desires into execution without intermediaries.

—Alexis de Tocqueville

hese words, published in 1835 by Alexis de Tocqueville in the book American Democracy, were intended as an observation on the importance of the right of assembly to a citizen's ability to directly in?uence the political process.1 However, the ability to "carry their desires into execution" has a potentially ominous connotation in a post-September 11 environment where a concern for security and public safety is paramount. If, for example, the desire to be carried into execution is to "affect the conduct of a government by mass destruction," then it quali?es as an act of terrorism that law enforcement is charged with preventing.2 An event, activity, or meeting having political, ideological, or social signi?cance might hold an equal attraction to a peaceful protestor as it would to a potential terrorist or anarchist. Thus, the dilemma, long faced by law enforcement but now exacerbated by the omnipresent threat of terrorism, is how to effectively exercise control over such events, which often involve large gatherings of people, in the interest of preserving public order and safety without trammeling the First Amendment rights of protesters. This article examines how courts have recently reconciled security-based restrictions with the right to protest.

The Right of Public Protest
Freedom of speech and the right of the people peaceably to assemble are speci?cally guaranteed by the First Amendment to the U.S. Constitution.3 Protest activity falls squarely within the First Amendment's guarantees of freedom of speech and assembly.4 The right to protest is most highly protected when assembly for purposes of expression takes place on property that, by law or tradition, has been given the status of a public forum, such as public streets, sidewalks, and parks, rather than on property that has been limited to some other governmental use.5 Nevertheless, it is well settled that the First

Amendment does not guarantee unlimited access to government property for expressive purposes. Because expressive conduct occurring in public places, by its very nature, may con?ict with other pursuits of the general population within that space, the need to balance competing interests in this area has long been recognized.6 The U.S. Supreme Court itself has noted that "courts have for years grappled with the claims of the right to disseminate ideas in public places as against claims of an effective power in government to keep the peace and protect other interests of a civilized community."7

Accordingly, although protest activity in public places is protected by the Constitution as free speech, it is afforded less protection than other forms of expression that do not involve conduct.8 Individuals who communicate ideas by conduct, such as participating in a protest march, have less protection than those who communicate ideas by "pure speech," such as speaking or publishing. Indeed, the terms speech plus and expressive conduct are used to describe public demonstrations that involve the communication of political, economic, or social viewpoints by means of picketing, marching, distributing lea?ets, addressing publicly assembled audiences, soliciting door-to-door, or other forms of protest.9 The expression of ideas in a manner that neither threatens public safety nor undermines respect for the rule of law is afforded comprehensive protection under the First Amendment. When speech does not involve aggressive disruptive action or group demonstrations, it is almost always protected from government regulation.10 Conduct, however, is subject to reasonable regulation by the government even though intertwined with expression and association.11 Demonstration routes, for instance, sometimes must be altered to account for the requirements of traf?c or pedestrian ?ow.12 People have a constitutional right to march in a protest but not with noisy bull horns at 4 a.m. in a residential neighborhood.13 In regulating expressive conduct, the government is not permitted to completely close all avenues for public protest or to restrict access to public forums based on considerations of the content of the message or viewpoint of the speaker.14

Government restriction of expressive activity imposed in advance of its occurrence raises the specter of a prohibited form of content or viewpoint discrimination known as a "prior restraint" on speech.15 Concerns over prior restraints relate primarily to government restrictions on speech that result in censorship.16 Although the U.S. Supreme Court has indicated that "any system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity," it has consistently refused to characterize government restriction of protest activity as a prior restraint.17

Restrictions imposed on expressive conduct must not operate as a form of censorship. Therefore, when imposing restrictions on protest activity, the government is not permitted to discriminate based on the content or viewpoint of the demonstrators and must allow for adequate alternative means of expression. A complete ban on protest activity that effectively silenced dissent in a public forum would be a presumptively unconstitutional prior restraint on speech and, accordingly, is rarely encountered in actual practice.18 Much more commonly presented are government efforts to regulate protest activity through a permitting or licensing process whereby of?cials are put on notice of the planned activity and then seek to impose an alternative date or time or a different location or route than that requested by the organizers of the protest.19

Time, Place, and Manner Restrictions

Where government restrictions are not based on censorship of the viewpoint of the protestors, courts employ the First Amendment doctrine of time, place, and manner to balance the right to protest against competing governmental interests served by the enforcement of content-neutral restrictions.20 In differentiating between content-based and content-neutral restrictions on the right to public protest, the U.S. Supreme Court has held that "[t]he principal inquiry in determining content neutrality, in speech cases generally and in time place or manner cases in particular is whether the government has adopted a regulation of speech because of disagreement with the message it conveys."21 A fundamental principle behind content analysis is that "government may not grant the use of a forum to people whose views it ?nds acceptable, but deny use to those wishing to express less favored or more controversial views."22 Even given that protest activity is expressive conduct, courts take a categorical approach to the question of conduct versus content regulation. In assessing whether a government restriction is content neutral, courts look at the literal language of the restriction, rather than delving into questions of any hidden motive to suppress speech; stated another way, "whether a statute is content neutral or content based is something that can be determined on the face of it; if the statute describes speech by content then it is content based."23

Time, place, and manner restrictions do not target speech based on content, and, to stand up in court, they must be applied in a content-neutral manner. The U.S. Supreme Court has developed a four-part test to determine the constitutional validity of time, place, and manner regulation of expressive conduct in a public forum.

1) The regulation must serve an important government interest (e.g., public safety).

2) The government interest served by the regulation must be unrelated to the suppression of a particular message (i.e., content neutral).

3) The regulation must be narrowly tailored to serve the government's interest.

4) The regulation must leave open ample alternative means for communicating the message.24

All four of these requirements must be satis?ed to survive a constitutional challenge, and failure to satisfy even one will render the restriction invalid. The third and fourth criteria are closely aligned. Narrow tailoring means that the restriction imposed is not substantially broader than necessary to achieve the government's interest. However, "the regulation will not be invalid simply because a court concluded that the government's interest could be adequately served by some less speech-restrictive alternative."25 In other words, a narrowly tailored restriction does not require the government to impose the least intrusive restriction possible. The case of Hill v. Colorado illustrates the straightforward approach taken by the U.S. Supreme Court when applying this test to government-imposed restrictions on protest activity.26 In Hill, antiabortion protestors challenged the constitutionality of a Colorado statute that made it unlawful for "any person to 'knowingly approach' within eight feet of any person, without that person's consent, 'for the purpose of passing a lea?et or handbill to, displaying a sign to, or engaging in oral protest, education or counseling with such other person," within 100 feet of the entrance to any health care facility.27 In declaring the statute a valid time, place, and manner restriction, the Court held:

The Colorado Statute passes that test for three independent reasons. First, it is not a "regulation of speech." Rather, it is a regulation of the places where some speech may occur. Second, it was not adopted "because of disagreement with the message it conveys." This conclusion is supported not just by the Colorado court's interpretation of legislative history, but more importantly by the State Supreme Court's unequivocal holding that the statute's "restrictions apply equally to all demonstrators, regardless of viewpoint, and the statutory language makes no reference to the content of the speech." Third, the state's interest in protecting access and privacy, and providing police with clear guidelines, are unrelated to the content of the demonstrator's speech. As we have repeatedly explained, government regulation of expressive activity is "content neutral" if it is justi?ed without

reference to the content of regulated speech.28

The Court also held that the statute was narrowly tailored and left open ample alternatives for communication, observing that it only restricted the location where communication could take place, and noted that no limitations were placed on the number, size, or content of text or images portrayed on protestors' signs.29 "Under this statute, absolutely no channel of communication is foreclosed. No speaker is silenced. And no message is prohibited."30

Content-neutral regulation of speech means the restrictions are placed on speech regardless of what the speaker has to say. Such content-neutral regulations that interfere with what otherwise would be First Amendment protected expression are examined under a balancing test, comparing the state's interest in prohibiting the activity in question to the level of interference with the speaker which is often determined by looking at available avenues of communication.

Demonstration Zones

The undeniable and very serious concerns about safety and security at public venues that attract large-scale protest activity have been described by one court as follows: "We have come to a point where it may be anticipated at…national security events, that some signi?cant portion of demonstrators among those who want the closest proximity to…participants, consider assault, even battery, part of the arsenal of expression. And as a consequence, those responsible for safety must plan for violence."31 Where it can be reasonably anticipated that an event likely will attract threats from persons seeking to carry out criminal acts to disrupt the proceedings and bring attention to extremist political causes, law enforcement preparations commonly include the proactive imposition of demonstration zones or security zones as a means of providing some measure of physical security to the event.

Both free-speech zones that designate restricted areas within which protest activity may take place and speech-free zones that prohibit protest activity from taking place within designated areas have been employed and often in conjunction with each other.32 An analysis of the relatively few cases concerning the legality of demonstration zones re?ects that the challenged security measures were indisputably content neutral and that there was no doubt as to the importance of the government interest in maintaining security at special events,

such as political conventions.33 Accordingly, the decisions turn predominantly on the resolution of whether the array of security precautions were narrowly tailored to meet the security interest at stake and whether those precautions left open ample alternative avenues of communication.

In response to events surrounding the 1999 World Trade Organization (WTO) conference in Seattle, a restricted zone was implemented by the city in response to actual physical obstruction of the conference venue, property damage, and other violent acts committed by protestors.34 Under the city's emergency order, protestors were completely barred from entering a designated restricted zone—in First Amendment terms, a no-speech zone—that covered the convention site and hotels where the WTO delegates were staying.35

The U.S. Court of Appeals for the Ninth Circuit found that the restricted zone "was not a regulation of speech content, but rather was 'a regulation of the places where some speech may occur.'"36 In reaching that conclusion, the court applied the traditional time, place, and manner analysis, ?nding both that 1) the order itself made no reference to the content of speech and 2) the fact that the order "predominantly affected protestors with anti-WTO views did not render it content based."37 The court next determined that the measure was narrowly tailored to serve the government's interest in maintaining public order. "In the face of a violent riot, the City had a duty to restore order and to ensure the safety of WTO delegates and the residents of Seattle. The 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."38

The court noted that "a municipality is required to provide tangible evidence that speech-restrictive regulations are necessary to advance the proffered interest in public safety."39 Although the city was not required to choose the least restrictive alternative, the court indicated that an assessment of alternatives still can bear on the reasonableness of the tailoring of the restriction and whether it is narrowly tailored as required. "We have said that 'if there are numerous and obvious less-burdensome alternatives to the restriction on [protected] speech, that is certainly a relevant consideration.'"40

Finally, the court resolved what it described as a very dif?cult question, in holding that ample alternative channels of communication were available to the demonstrators outside the restricted zone.41 On

the one hand, the protestors were not permitted to protest directly in the presence of the delegates they presumably sought to in?uence. On the other hand, the protestors were able to demonstrate and express their views immediately outside the restricted zone, including areas directly across the street from WTO venues. Ultimately, the court concluded that the protestors could reasonably expect their protest to be visible and audible to delegates even if not as proximate as the protestors might have liked. Citing the U.S. Supreme Court's holding in Hill, the court concluded, "Appellants argue that they were prevented from communicating with the WTO delegates at close range, but there is no authority suggesting that protestors have an absolute right to protest at any time and at any place, or in any manner of their choosing."42

While the WTO case concerned a reactive response to actual civil disorder, the government interest in maintaining security and order can be adequately supported through observation and analysis of past occurrences to identify tactics that might be used by violent demonstrators at future events. In engaging in security preparation and planning, any proactive restrictions imposed on protest activity must be narrowly tailored to meet the anticipated threat and also must leave open adequate alternative means for expression. In Service Employee International Union 660 v. City of Los Angeles, the court considered–nearly a month in advance of the event–proposed security restrictions surrounding the 2000 Democratic National Convention in Los Angeles.43 The Los Angeles police, in conjunction with the U.S. Secret Service and other agencies, imposed a very large secured zone that encompassed the convention facility and involved the closing of several public streets. No protest activity would be permitted within the secured zone. Outside the secured zone, a designated demonstration zone was set up about 260 yards from the entrance to the convention facility, where a platform, a sound system, and portable toilets were provided to facilitate protest activity.44 In justifying the security and demonstration zones, the government did not suggest that the protestor's speech itself created a safety issue. Rather, the government sought to safeguard against risks generally associated with 1) the presence of prominent people at the event, 2) the fact that the convention was a real and symbolic target for terrorist activity, and 3) the fact that a large media concentration could encourage groups to become violent to attract attention to their causes.45

The court found that the proposed security zone was not narrowly tailored because it burdened more speech than was necessary.46 The principal problem with the secured area was its size—it covered approximately 185 acres of land— combined with its con?guration that

prevented anyone with any message from getting within several hundred feet of the entrance to the venue where delegates would arrive and depart. The court concluded that while there was no dispute that a narrowly tailored zone is constitutionally permissible to ensure that delegates can enter and exit the venue safely, the secured zone covered much more area than necessary to serve that interest.47

The court also found that the demonstration zone was not an adequate alternative for speech, rejecting, in part, the city's claim that there would be a sight line to the convention facility, concluding, instead, that the "distance ensure[d] that only those delegates with the sharpest of eyesight and most acute hearing have any chance of getting the message, that is, assuming that the 'sight line' is not blocked during the convention."48 The court noted that whether a sight line existed at all was a "questionable assumption" because a 10,000-person media area would lie directly between the demonstration zone and the convention center entrance.49

In United for Peace and Justice v. City of New York, a group opposing the war in Iraq applied, 3 weeks in advance, for a permit to authorize a parade of up to 10,000 people to march in front of the United Nations (UN) headquarters in New York City.50 The city refused to allow the demonstrators to march in front of the UN as requested because the police determined that they could not provide adequate security for the event, even though the road where the march would take place was six lanes wide and there would be almost 40 feet between the marchers and the outer fence protecting the UN.51 The city, however, did permit the marchers to conduct a large stationary demonstration con?ned to Dag Hammarkjold Plaza, where the demonstrators had intended to begin the parade.52

The U.S. District Court upheld the denial of the permit distinguishing the requested event from other large-scale parades commonplace in New York City.53 Important to the court's decision was testimony from the police that detailed the rather disorganized nature of the proposed march, with widely varying estimates of the number of participants and no reliable contact information regarding the various participating organizations. According to the police, past approved parade permits typically involved regularly recurring events where applications were submitted well in advance and contained speci? c details about the number of participants. Further, in approved parades, there were opportunities for meetings between the police and the organizers to jointly discuss issues, such as the manner of protest, means of formation, and spacing of demonstrators along the route.

The district court found that the restrictions imposed were not substantially broader than necessary to achieve the city's interest in public, participant, and of?cer safety.54 The Second Circuit Court of Appeals af?rmed, ?nding that "short notice, lack of detail, administrative convenience, and costs are always relevant considerations in the fact-speci?c inquiry required in all cases of this sort."55 The court cautioned that "these factors are not talismanic justi?cations for the denial of parade permits" and "[l]ikewise, simply offering an alternative of stationary demonstration does not end the analysis."56

In Stauber v. City of New York, the court considered, inter alia, a challenge to the New York City Police Department's practice of using barricades or "pens" to contain and control demonstration activity.57 The pens, in this instance, were "metal interlocking barricades…in which demonstrators were required [by police] to assemble" and from which they were not permitted to leave, even to go to the bathroom.58 The court, ?nding that the pens policy violated the First Amendment because it was not narrowly tailored, issued a preliminary injunction against "unreasonably restricting access to and participation in demonstrations through the use of pens."59 Although the city had a legitimate interest in regulating the demonstrators to prevent violence, the court held that completely enclosing demonstrators within the pens and preventing their movement was not a suf? ciently narrowly tailored speech regulation.60

Stauber contained an extensive factual record concerning how the pens actually were used to essentially herd and very restrictively con?ne persons who wanted to exercise their right to protest throughout the duration of the protest. It should be noted, however, with a different factual record before it, a court has observed that a "barricaded enclosure for demonstrators… is a practical device used by the police to protect those actively exercising their rights from those who would prevent its exercise," such as counterdemonstrators.61

The legality of a demonstration zone imposed at the 2004 Democratic National Convention was upheld by the U.S. Court of Appeals for the First Circuit in Bl(a)ck Tea Society v. City of Boston.62 This event was the ?rst national political convention to be held following the September 11, 2001, terrorist attacks on New York's World Trade Center that were launched from Boston's Logan Airport and was designated as a national special security event, thereby placing the Secret Service directly in charge of security.63 The Boston Police Department acted

in conjunction with the Secret Service to enforce two different restrictive zones in the vicinity of the FleetCenter convention venue located in downtown Boston. A so-called "hard security zone" encompassed an area immediately surrounding the FleetCenter, and a so-called "soft security zone" encompassed certain public streets adjacent to the hard zone. The Secret Service restricted access within the hard security zone to convention business only and no protestors were permitted within that zone. The soft zone was controlled by the city and remained open to the general public, including demonstrators who were subject to certain permit and crowd-control measures.64 Among these was the creation of a designated demonstration zone, the major issue of contention in the case.65

The demonstration zone was described by a U.S. District Court judge as follows based on an actual visit to the site:

The "designated demonstration zone" [DZ] is located in the soft zone…[and] is a roughly rectangular space of approximately 26,000 to 28,000 square feet–very approximately 300 feet by 90 feet.… A written description cannot begin to convey the ambiance of the DZ site as experienced during the view. Most–at least two thirds of the DZ lies under unused Green Line tracks [elevated train tracks].… It is a grim, mean, and oppressive space whose ominous roof is supported by a forest of girders that obstruct sight lines throughout as the tracks slope downward towards the southern end.… The City is providing a sound system and will allocate access to the stage itself through a permitting system…. During the view, I observed that a person of normal height could not carry a sign underneath it without lowering it to head level or lower. If that were done, no one on the other side of the girders would be able to see it once it was raised again beneath the tracks.… 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-?ve degrees to horizontal is a looser mesh netting, designed to prevent objects from being thrown at the delegates."66

Even though the district court found that the overall impression created by the demonstration zone was "that of an internment camp," it concluded that the design of the demonstration zone was narrowly tailored "given the constraints of time, geography, and safety."67 In reaching this conclusion, the court noted that the demonstration zone was placed at a location suggested by the American Civil Liberties

Union and the National Lawyers Guild, counsel for the groups that challenged the restrictions, and was the only available location providing a "direct interface between demonstrators and the area where delegates will enter and leave the FleetCenter."68 As it happened, this location included some unfortunate geographic and structural constraints, such as the sight-obstructing girders and low clearance presented by the overhead tracks, that were not susceptible to timely modi? cation by the government.
With respect to those features that were subject to modi?cation, such as the barriers, multiple layers of fencing, mesh, and netting, the court determined that each of these were adequately supported, reasonable security precautions. The court's conclusion was based on testimony from various law enforcement personnel's past experience at comparable events, including the 2000 Democratic National Convention in Los Angeles.

The double fence is reasonable in light of past experience in which demonstrators have pushed over a single fence. A second fence may prevent this altogether, or at least give police of?cers more time to respond and protect the delegates. The liquid dispersion fabric is reasonable in light of past experience in which demonstrators have squirted liquids such as bleach or urine at delegates or police. The overhead netting is reasonable in light of past experience in which demonstrators have thrown objects over fences. The razor wire atop the Green Line tracks…is reasonable in light of the possibility of demonstrators climbing upon the tracks and using them as an access point to breach the hard zone perimeter and/or rain objects on delegates, media, or law enforcement personnel from above.69

In short, given the unique circumstances presented, there was "no way to 'tweak' the DZ to improve the plaintiffs' free speech opportunities without increasing a safety hazard."70

On appeal, the First Circuit af?rmed the decision of the district court. While noting that the security measures at the convention "dramatically limited the possibilities for communicative intercourse between the demonstrators and the delegates...[and] imposed a substantial burden on free expression," the court found that past experiences with large demonstrations created a "quantum of 'threat' evidence...suf?cient to allow the trier to weigh it in the balance."71 The court indicated that the question was not whether the government can make use of past experience to justify security measures–it most assuredly can–but the degree to which inferences drawn from past experiences are plausible.

While a government agency charged with public safety responsibilities ought not to turn a blind eye to past experience, it likewise ought not to impose harsh burdens on the basis of isolated past events. And, in striking this balance, trial courts should remember that heavier burdens on speech must, in general, be justi?ed by more cogent evidentiary predicates.72

The court said that unfounded speculation about potential violence cannot justify an insuf?ciently tailored restriction on expression. On the other hand, law enforcement of?cials may draw upon experiences of other cities or entities that have hosted comparable events when assessing the type of security measures necessary to police an upcoming event. The reality that some demonstrators at other recent large political events had engaged in acts, such as pushing over fences and throwing objects over barricades, was deemed to be clearly relevant to the safety risk posed to delegates at the 2004 Democratic National Convention. Nevertheless, while not requiring a showing of event-speci? c intelligence, the court found the lack of speci?c information in the record about a risk of violence speci?c to the event "troubling in light of the particularly stringent restrictions that were imposed."73

The court also found that viable alternative means existed to enable protestors to communicate their messages. The demonstration zone did provide an opportunity for expression within the sight and sound of the delegates, "albeit an imperfect one." Two other considerations were deemed to be pertinent to the analysis and were described as follows:

First, although the opportunity to interact directly with the body of delegates by, say, moving among them and distributing literature, would doubtless have facilitated the demonstrator's ability to reach their intended audience, there is no constitutional requirement that demonstrators be granted that sort of particularized access. Second, we think that the appellants' argument greatly underestimates the nature of modern communications. At a high pro?le event, such as the convention, messages expressed beyond the ?rsthand sight and sound of the delegates nonetheless has the propensity to reach the delegates through television, radio, the press, the Internet and other outlets.74

Thus, on balance, the importance of providing demonstrators with some measure of physical connection to an event venue, such as relatively proximate line-of-sight access, may be lessened where there are other available outlets for effective communication.

Conclusion

It has been said that "the greater the importance of safeguarding the community from incitements to the overthrow of institutions by force and violence, the more imperative is the need to preserve inviolate the constitutional rights of free speech, free press and free assembly in order to maintain the opportunity for political discussion, to the end that that government may be responsive to the will of the people and that changes, if desired, may be obtained by peaceful means."75 Freedom of expression, especially the expression of political views, ranks near the top of the hierarchy of constitutional rights.76 Despite the importance of that right, the protections of the First Amendment are not without limits. Reasonable restrictions as to the time, place, and manner of speech in a public forum are permissible provided those restrictions are justi?ed without reference to content, are narrowly tailored to serve a signi?cant government interest, and leave open ample alternative channels for communication of the protestors' message.

No one can seriously dispute that the government has a signi?cant interest in maintaining public order; indeed, this is a core duty that the government owes its citizens. Security measures may inevitably require the imposition of restrictions on large numbers of peaceful protestors to effectively address the threat posed by a violent few among them. Courts have recognized this inherent dilemma and that the public interest cuts both ways. Freedom of expression is vital to the health of democracy but making public safety a reality and ensuring that important political and social events are able to proceed normally also are valuable.77 While a case-by-case determination must be made in consideration of the unique geographic, logistical, and security challenges posed by an actual event, a safety net is cast too broadly if it restricts protest activity unduly in too large of an area and, thus, is not narrowly tailored. However, courts generally will not strike down government action for failure to leave open ample channels of communication unless the government action will foreclose an entire medium of public expression across the landscape of a particular community or setting. A time, place, or manner restriction does not violate the First Amendment simply because there is some imaginable alternative that might have been less burdensome on speech. The U.S. Supreme Court has instructed that the First Amendment does not require that individuals retain the most effective means of communication, only that individuals retain the ability to communicate effectively.78

Endnotes

1 Quotation retrieved from http://www. tocqueville.org.

2 See, e.g. 18 U.S.C.A. §2331(1)(B) (iii); 18 U.S.C. § 2332b(f), (g). Annex II of National Security Presidential Directive (NSPD) 46 and Homeland Security Presidential Directive (HSPD) 15 designate the FBI as the lead federal agency for counterterrorism.

3 The First Amendment to the U.S. Constitution provides "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." The question of whether state action deprives a person of the "liberty of expression" guaranteed by the First Amendment is analyzed under the Due Process Clause of the Fourteenth Amendment. See, e.g. Gitlow v. New York, 268 U.S. 652 (1925).

4 Shuttlesworth v. City of Birmingham, 394 U.S. 147, 152 (1969) (describing the privilege of citizens to assemble, parade, and discuss public questions in streets and parks while striking down a parade ordinance that gave the government complete discretion to prohibit any "'parade,' 'procession' or 'demonstration' on the city's streets or public ways").

5 The three types of forums on government property are 1) traditional public forum (e.g., streets, sidewalks, and parks); 2) designated or limited public forums (e.g., state university meeting facility, municipal theater, school board meeting rooms, or other place opened to the public as a place for certain forms of expressive activity); 3) nonpublic forums (e.g., government of?ces, jailhouses, military bases, polling places, or other place operated by the government as a proprietor and not made accessible to the public for expressive activity). See International Society for Krishna Consciousness v. Lee, 505 U.S. 672, 678 (1992) (Holding that an airport concourse was not a public forum, "The government need not permit all forms of speech on property that its owns or controls. Where the government is acting as proprietor, managing its internal operations, rather than acting as a lawmaker with the power to regulate or license, its actions will not be subject to the heightened review to which its actions as lawmaker may be subject.").

6 See Cox v. New Hampshire, 312 U.S. 569, 576 (1941) ("If a municipality has authority to control the use of its public streets for parades or processions, as it undoubtedly has, it cannot be denied

authority to give consideration, without unfair discrimination to time, place and manner, in relation to other proper uses of the streets.").

7 Niemotko v. Maryland, 340 U.S. 268, 273 (1952) (J. Frankfurter, concurring).

8 The U.S. Supreme Court found that picketing and marching in public were protected as free speech in Thornhill v. Alabama, 310 U.S. 88 (1940). In subsequent rulings, the Court established that regulations affecting time, place, and manner of demonstrations were lawful but that government discrimination based on the content or viewpoint of speech was prohibited by the First Amendment. See, e.g., Edwards v. South Carolina, 372 U.S. 229, 237 (1963) ("The Fourteenth Amendment does not permit a State to make criminal the peaceful expression of unpopular views."); Cox v. Louisiana, 379 U.S. 559, 563 (1965) ("The conduct which is the subject of this statute–picketing and parading–is subject to regulation even though intertwined with expression and association."); Adderly v. Florida, 385 U.S. 39, 48 (1966) (Persons who want to "propagandize protests or views" do not have "a constitutional right to do so whenever and however, and wherever they please.").

9 See, e.g. U.S. v. Grace, 461 U.S. 171, 177 (1983) ("It is also true that 'public places' historically associated with the free exercise of expressive activities, such as streets, sidewalks, and parks, are considered, without more, to be 'public forums.' In such places, the government's ability to permissibly restrict expressive conduct is very limited: the government may enforce reasonable time, place and manner regulations….") (emphasis added, internal citations omitted).

10 See, e.g., Tinker v. Des Moines Independent School District, 393 U.S. 503, 508 (1969).

11 See Cox v. Louisiana, 379 U.S. at 563.

12 Cox v. New Hampshire, 312 U.S. at 574 ("Civil liberties, as guaranteed by the Constitution, imply the existence of an organized society maintaining public order without which liberty itself would be lost in the excesses of unconstrained abuses. The authority of a municipality to impose regulations in order to assure the safety and convenience of the people in the use of public highways has never been regarded as inconsistent with civil liberties but rather as one of the means of safeguarding the good order upon which they ultimately depend. The control of travel on the streets of cities is the most familiar illustration of this recognition of social need.").

13 This example retrieved from http:// www.? rstamendmentcenter.org.

14 See Forsythe County, Ga. v. Nationalist Movement, 505 U.S. 123 (1992) (A county ordinance permitting a government administrator to vary the fee for assembling or parading to re?ect the estimated cost of maintaining public order was facially unconstitutional due to the absence of narrowly drawn, reasonable, and de? nite standards to guide the fee determination and because it required the administrator to examine the content of messages to estimate the public response and cost of public service necessitated by the parade or assembly.).

15 The use of designated demonstration zones or security zones in which no protest activity is permitted has been the subject of substantial commentary suggesting that the practice should be viewed as a form of content discrimination or as a "prior restraint" on speech. Courts have generally not been receptive to that suggested interpretation. See, e.g., "Capturing the Dialogue: Free Speech Zones and the 'Caging' of First Amendment Rights," 54 Drake L. Rev. 99 (2006); "Speech and Spatial Tactics," 84 Tex. L. Rev. 581 (2006).

16 The "prior restraints" doctrine encompasses a wide range of activity but is chie?y concerned with government suppression of speech by enjoining publication. See, e.g., "Prior Restraints," 883 PLI/Pat 7 (November 2006) (contains a comprehensive digest of cases on the topic).

17 New York Times Co. v. U.S., 403 U.S. 713, 714 (1971) (internal quotations and citations omitted); See Madsen v. Women's Health Center, Inc., 512 U.S. 753, 764, FN 2. (1994) ("Not all injunctions that may incidentally affect expression, however, are 'prior restraints'…. Here petitioners are not prevented from expressing their message in any one of several ways…moreover, the injunction was not issued because of the content of petitioner's expression…."); Schenck v. Pro-Choice Network of Western N.Y., 519 U.S. 357, 374, FN 6. (1997) ("As in Madsen, alternative channels of communication were left open to the protestors….").

18 See "Balancing the Right to Protest in the Aftermath of September 11," 40 Harv. C.R.-C.L. Rev. 327, 330 (2005).

19 Id.

20 See Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989) ("[T]he government may impose reasonable restrictions on the time, place, or manner of protected speech, provided the restrictions are justi?ed

without reference to the content of the regulated speech.…").

21 Id.

22 City of Renton v. Playtime Theaters, Inc., 475 U.S. 41, 48-49 (1986) (internal quotation marks and citation omitted).

23 City of Los Angeles v. Alameda Books, Inc., 535 U.S. 425, 448 (2002) (J. Kennedy, concurring).

24 See Ward, 491 U.S. at 799-800. Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 293 (1984). Frisby v. Schultz, 487 U.S. 474, 481 (1988).

25 Coalition to Protest the Democratic Nat'l Conv. v. Boston, 327 F. Supp. 2d 61, 70 (D. Mass. 2004) (quoting Ward, 491 U.S. at 800).

26 530 U.S. 703 (2000).

27 Id. at 707.

28 Id. at 719-720.

29 Id. at 734.

30 Id.

31 Coalition to Protest, 327 F. Supp. 2d at 77.

32 The case law re?ects that crowd-control measures intended to control protest activity have involved various forms and degrees of restriction deemed necessary by government of?cials to accommodate the safety and security requirements posed by the unique physical environments of speci?c venues. At least one commentator, who has expressed concern that demonstration zones can be used to impose content or viewpoint censorship, described such activity as the use of "spatial tactics." See "Speech and Spatial Tactics," 84 Tex. L. Rev. 581 (2006).

33 The FBI de?nes a special event as a "signi?cant domestic or international event, occurrence, circumstance, contest, activity, or meeting which by virtue of its pro?le and/or status represents an attractive target for a terrorist attack." Manual of Investigative Operations and Guidelines (MIOG) 300-1(2). This de?nition is not limited to threats of international terrorism, but, rather, includes

threats posed by domestic anarchist groups whose members may commit violent acts at demonstrations. See A Review of the FBI's Investigative Activities Concerning Potential Protestors at the Democratic and Republican National Political Conventions, U.S. Department of Justice, Of?ce of the Inspector General, (April 27, 2006), 10. In addition to the FBI's responsibilities concerning special events, the U.S. Secret Service is statutorily authorized to provide security to protected of?cials at national special security events designated by the secretary of the Department of Homeland Security. See 18 U.S.C. 3056(e)(1).

34 See Menotti v. City of Seattle, 409 F.3d 1113 (9th Cir. 2005).

35 Id. at 1125.

36 Id. at 1129.

37 Id.

38 Id. at 1131-1132.

39 Id. at 1131.

40 Id. at 1131, FN41.

41 Id. at 1138.

42 Id. at 1138-1139.

43 114 F. Supp. 2d 966 (C.D. Cal. 2000).

44 Id. at 966.

45 Id. at 971, FN2.

46 Id. at 971.

47 Id. at 971.

48 Id. at 972.

49 Id.

50 243 F.Supp. 2d. 19 (S.D. N. Y. 2003).

51 Id. at 24 (Since the terrorist attacks at the World Trade Center on September 11, 2001, the city had banned all demonstrations, parades, or other public events in front of the United Nations and U.S. Mission. The court applied the narrowly tailored test to this total ban in light of the security concerns posed by the requested march.).

52 Id. at 20.

53 Id. at 25-28.

54 Id. at 20-31.

55 323 F.3d 175, 178 (2nd Cir. 2003).

56 Id.

57 2004 WL 1593870 (S.D.N.Y. 2004).

58 Id. at 28.

59 Id. at 2,6,34.

60 Id. at 29.

61 Oliveri v. Ward, 801 F.2d 602, 607 (2nd Cir. 1986).

62 378 F.3d 8 (1st Cir. 2004).

63 A comprehensive statement of the facts surrounding this litigation is contained in the district court opinion. See Coalition to Protest, 327 F. Supp. 2d 61 (D. Mass. 2004).

64 Id. at 71-72 (The court noted that the city provided "nuanced, reticulated options for many different types of expression within the soft zone…. Inside it, plaintiffs may conduct small demonstrations with no permits whatsoever, and may conduct 21-50 person stationary demonstrations on an expedited permitting basis. Anyone may distribute lea?ets or hold signs.").

65 Id. at 66-67.

66 Id.

67 Id. at 74-75.

68 Id. at 75.

69 Id.

70 Id at 76.

71 378 F.3d. at 13-14.

72 Id. at 14.

73 Id. at 17 (Lipez, Circuit Judge,

concurring).

74 Id. at 14.

75 De Jonge v. Oregon, 299 U.S. 353, 365 (1937).
76 See 378 F.3d. at 11-12.
77 Id. at 15.
78 409 F.3d at 1138, FN 48 (citing City Council v. Taxpayers for Vincent, 466 U.S. 789, 812 (1984)).

Law enforcement officers of other than federal jurisdiction who are interested in this article should consult their legal advisors. Some police procedures ruled permissible under federal constitutional law are of questionable legality under state law or are not permitted at all.