

# INTERNING DISSENT: THE LAW OF LARGE POLITICAL EVENTS

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## INTRODUCTION

Despite the Supreme Court's recurrent indications that content-based distinctions pose the greatest danger to liberty of expression,<sup>1</sup> the central problems facing free speech today are primarily content-neutral. Several developments support this conclusion. For one, the Supreme Court has made clear over the past two decades that almost any content-based restriction on expression will fail, unless it involves some long-recognized category of unprotected speech.<sup>2</sup> The Court has struck down content-based restrictions targeting even some of the ugliest and most disturbing types of expression imaginable—cross burning,<sup>3</sup> depictions of animal cruelty,<sup>4</sup> and protests outside the

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1. See, e.g., *R.A.V. v. City of St. Paul*, 505 U.S. 377, 430 (1992) (“[R]estrictions based on viewpoint . . . are particularly pernicious.”); *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 62 (1983) (Brennan, J., dissenting) (“Viewpoint discrimination is censorship in its purest form . . .”).

2. Similarly, the Court has strongly suggested that it is not likely to recognize any new categories of unprotected speech. For example, in *United States v. Stevens*, the Court addressed a challenge to a statute aimed at “crush videos,” a particularly nasty type of pornography. See 559 U.S. 460, 465 (2010). The Government argued, based on a cost-benefit analysis, that depictions of animal cruelty should be considered a class of unprotected speech. *Id.* at 469–72. The Court rejected this argument in no uncertain terms. See *id.* at 470 (“As a free-floating test for First Amendment coverage, [an ad hoc cost-benefit analysis] is startling and dangerous.”). However, the Court did note that it is at least fair to describe the recognized categories of unprotected speech as reflecting just such an analysis, even if that description carries no real jurisprudential force. See *id.* at 470–71. And though the Court formally left open the door for the future recognition of categories of unprotected speech, it is hard to imagine what might qualify if depictions of animal torture do not. See *id.* at 472. Few types of speech reflect such a lopsided cost-benefit analysis, and it is difficult to imagine what sort of retelling of history might turn up a category of speech we have always forbidden, but never sufficiently identified.

3. See generally *Virginia v. Black*, 538 U.S. 343 (2003) (holding unconstitutional the provision in the Virginia cross burning statute that treats any cross burning as prima facie

military funerals of fallen soldiers.<sup>5</sup> Nor are these examples isolated. There is only one still-valid Court decision applying strict scrutiny to uphold what it recognized as a content-based restriction,<sup>6</sup> and that case pitted free speech against national security interests.<sup>7</sup> It is thus fair to say that once a federal court determines that a restriction is content-based,<sup>8</sup> the restriction will fall. In almost every case, this

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evidence of intent to intimidate); *R.A.V.*, 505 U.S. 377 (holding facially unconstitutional St. Paul's ordinance prohibiting bias-motivated crime, including cross burning).

4. See *Stevens*, 559 U.S. 460 (concluding that the federal statute enacted to criminalize the commercial creation, sale, or possession of certain depictions of animal cruelty is overbroad and facially unconstitutional).

5. See *Snyder v. Phelps*, 131 S. Ct. 1207, 1220 (2011) (stating that the speech of church members who picketed near the funeral of a gay soldier is protected speech under the First Amendment).

6. See Geoffrey R. Stone, *Content Regulation and the First Amendment*, 25 WM. & MARY L. REV. 189, 196 (1983) (“[T]he Court has invalidated almost every content-based restriction that it has considered in the past quarter-century.”).

7. See *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705, 2724 (2010) (holding that the material-support statute enacted by Congress, which prohibits providing material support or resources to foreign terrorist organizations, does not violate the plaintiffs’ free speech and is constitutional under the First Amendment). Somewhat confusingly, Chief Justice Roberts’s opinion for the majority never states explicitly that it is applying strict scrutiny, despite the fact that this is the well-established test for content-based distinctions that do not fall within an exception to the First Amendment. See, e.g., *R.A.V.*, 505 U.S. at 385–86, 395 (stating that strict scrutiny is appropriate for content-based distinctions). However, the Court explicitly states that it is applying a standard higher than “intermediate scrutiny,” *Humanitarian Law Project*, 130 S. Ct. at 2723, and the analysis generally proceeds as if the Court were applying strict scrutiny, albeit without evoking the familiar vocabulary of “compelling state interests” and “narrow tailoring.”

8. However, this inquiry is sometimes murkier than might be supposed. See, e.g., R. George Wright, *Content-Based and Content-Neutral Regulation of Speech: The Limitations of a Common Distinction*, 60 U. MIAMI L. REV. 333, 337 (2006) (“[C]ourts [attempting to distinguish content-based from content neutral regulations] incompatibly talk both of focusing their inquiry on the text or face of the regulation, and of a broader judicial inquiry into the legislative intent, purpose, and justification of the regulation.”). Perhaps most tellingly, a circuit split has started to develop on this very issue. Some circuits focus on the text and operation of the statute, and have held that a regulation is content-based if a government actor must look to the content of the speech to determine whether the regulation applies. See, e.g., *Neighborhood Enters. v. City of St. Louis*, 644 F.3d 728, 736 (8th Cir. 2011) (“[W]e conclude that the zoning code’s definition of ‘sign’ is impermissibly content-based because the message conveyed determines whether the speech is subject to the restriction.” (internal quotation marks omitted)); *Serv. Emps. Int’l Union v. City of Houston*, 595 F.3d 588, 596 (5th Cir. 2010) (“A regulatory scheme that requires the government to examine the content of the message that is conveyed is content-based regardless of its motivating purpose.” (internal quotation marks omitted)). Conversely, others have held that an inquiry into legislative purpose is required. In these circuits, a regulation will be considered content-based—even if it openly distinguishes categories of speech—only if there was some discriminatory or censorial legislative intent. See, e.g., *Brown v. Town of Cary*, 706 F.3d 294, 301–02 (4th Cir. 2013) (“Content neutrality bars only one particular sort of distinction—those made with a censorial intent to value some forms of speech over others to distort public debate, to restrict expression because of its message, its ideas, its subject matter, or to prohibit the expression of an [offensive or disagreeable] idea . . . .” (citation omitted) (internal quotation marks omitted)); *H.D.V.-Greektown, LLC v. City of Detroit*, 568 F.3d 609,

classification is outcome-determinative.

But there is more than a process of elimination to support the conclusion that content-neutral restrictions are the greater threat. As commentators have long observed, content-neutral speech restrictions can, in practice, be incredibly burdensome on free expression. Few areas of law illustrate this point as well as the recent case law of large political conventions and similar events, which is the focus of this Article.

Political conventions provide a particularly good example of the burdens of content-neutral restrictions for three reasons. First, what is at stake is generally core political speech, which the Supreme Court has consistently recognized as “at the heart of the First Amendment’s protection.”<sup>9</sup> Indeed, the Court has stated explicitly that political speech has “always rested on the highest rung of the hierarchy of First Amendment values”<sup>10</sup> and is “entitled to special protection.”<sup>11</sup> Thus, if anything, one would expect the application of a stricter legal standard, or at least a stricter application of the general content-neutral legal standard, for restrictions on expression at major political conventions. Yet that is not the case.

Second, the key dangers presented by strict restrictions at large political conventions are exactly those presented by restrictions that are explicitly content-based—namely, that the government will seek to distort the marketplace of ideas and shape in a self-serving way the search for political truth.<sup>12</sup> It is true that content-neutral regulations, by definition, do not depend on viewpoint. But the fact of the matter is the burdens of such regulations at political conventions fall disproportionately on the shoulders of dissent.<sup>13</sup> Modern major

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622 (6th Cir. 2009) (“The plaintiffs argue that the ordinances . . . are content based because they distinguish between various types of signs—and thus various types of protected speech—by content. . . . There is simply nothing in the record to indicate that the distinctions . . . reflect a meaningful preference for one type of speech . . .”).

9. *First Nat’l Bank of Bos. v. Bellotti*, 435 U.S. 765, 776 (1978).

10. *Carey v. Brown*, 447 U.S. 455, 467 (1980); *see also Snyder*, 131 S. Ct. at 1215 (“The First Amendment reflects ‘a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open.’” (quoting *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964))).

11. *Connick v. Myers*, 461 U.S. 138, 145 (1983).

12. *See Stone*, *supra* note 6, at 198.

13. Nor is this mere legal hypochondria: In several cases, convention officials have barred everyone from entering within hundreds of yards of the convention site, except individuals given special credentials by those officials. *See, e.g., ACLU of Colo. v. City of Denver*, 569 F. Supp. 2d 1142, 1153 (D. Colo. 2008); *Coal. to Protest the Democratic Nat’l Convention v. City of Boston (Coal. to Protest the DNC)*, 327 F. Supp. 2d 61, 65 (D. Mass. 2004); *Serv. Emps. Int’l Union v.*

political conventions are not debates—they are publicity extravaganzas, devoted to promoting the platform and candidate of a dominant political party. With all speech, across the board, confined by a content-neutral limitation, all that sees the light of day is the party orthodoxy. This is arguably the chief problem against which the First Amendment should guard.<sup>14</sup>

Third, the body of case law surrounding large political conventions illustrates how contemporary First Amendment jurisprudence, despite common perceptions, is not nearly as protective of free expression as may be commonly thought. The doctrine governing time, manner, and place (TMP) restrictions, especially as applied to large political events such as national political conventions, has been deferential to government interests, and has generally privileged those interests over individual interests in free expression. That such a doctrine could develop around a constitutional amendment dedicated, perhaps above all else, to allowing dissenters to speak truth to power, is disconcertingly ironic.

This Article addresses several aspects of that development. Part I reviews the general framework applicable to content-neutral TMP restrictions. Part II discusses two cases central to the development of this area of law. Part III describes general trends in the outcomes and analyses of key cases. Finally, Part IV suggests small changes that, if adopted, would make the doctrine more speech-protective.

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City of Los Angeles, 114 F. Supp. 2d 966, 968–69 (C.D. Cal. 2000). Perhaps the most direct recognition of the targeting of protest came in *Citizens for Peace in Space v. City of Colorado Springs*, in which the court held that “[i]t was not impermissible for the City to draw a distinction between [non-protesters] and those seeking to protest the NATO conference, because the City made a reasonable assumption that protestors could pose more of a security risk to the conference than other persons.” 477 F.3d 1212, 1224 (10th Cir. 2007).

14. See Stone, *supra* note 6, at 198.

## I. THE GENERAL FRAMEWORK

Though the distinction between content-based and content-neutral restrictions originally had an equal protection cast,<sup>15</sup> the general framework for content-neutral TMP restrictions was settled early and has been relatively clear for some time.<sup>16</sup> Restrictions are considered content-neutral when they are “justified without reference to the content of the regulated speech,” regardless of whether they have “an incidental effect on some speakers or messages but not others.”<sup>17</sup> Similarly, restrictions are considered content-neutral even when they create exceptions for certain categories of potential *speakers*, as long as those exceptions are independent of the *content* of any speech in which those speakers might engage.<sup>18</sup> However, facially content-neutral restrictions cannot grant overly broad discretion to a regulating official, and must “contain adequate standards to guide the official’s decision and render it subject to effective judicial review.”<sup>19</sup> Regulations granting overly broad discretion are unconstitutional because that discretion can chill speech<sup>20</sup> and can be used “to favor or

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15. See, e.g., *Carey*, 447 U.S. at 471 (finding that the Illinois statute was inconsistent “with the command of the Equal Protection Clause . . . because the statute discriminate[d] among pickets based on the subject matter of their expression” (internal quotation marks omitted)); *Police Dep’t of Chi. v. Mosley*, 408 U.S. 92, 94–95 (1972) (“Because Chicago treats some picketing differently from others, we analyze this ordinance in terms of the Equal Protection Clause of the Fourteenth Amendment.”). Kenneth Karst took this ideal seriously and famously argued that a principle of equality, understood as equal liberty, lies at the heart of the First Amendment and reflects the key First Amendment values of democratic self-governance, the search for truth, and autonomous self-expression. Kenneth Karst, *Equality as a Central Principle in the First Amendment*, 43 U. CHI. L. REV. 20, 23 (1975). This ideal can partially explain the development of differential treatment for content-based and content-neutral regulations. Yet, the principle of equality (however understood) cannot, by itself, offer full protection for these values because they can still be undermined by restrictions that weigh heavily—if equally—across all different types of messages.

16. See, e.g., *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 771 (1976) (“We have often approved [TMP] restrictions . . . provided that they are justified without reference to the content of the regulated speech, that they serve a significant governmental interest, and that in so doing they leave open ample alternative channels for communication of the information.”).

17. E.g., *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989); *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 47–48 (1986) (defining content-neutral regulations).

18. See, e.g., *Nat’l Council of Arab Ams. v. City of New York*, 331 F. Supp. 2d 258, 268 (S.D.N.Y. 2004) (holding that a regulation requiring permits for events involving more than twenty individuals is content-neutral, despite an exception for “casual park use by visitors or tourists,” because the regulation “does not turn on the message, if any, espoused by visitors or tourists [but instead] refers to the manner in which groups larger than twenty assemble” (citation omitted) (internal quotation marks omitted)).

19. *Thomas v. Chi. Park Dist.*, 534 U.S. 316, 323 (2002).

20. *City of Lakewood v. Plain Dealer Publ’g Co.*, 486 U.S. 750, 757 (1988) (“[Such regulations can] intimidate[] parties into censoring their own speech, even if the discretion and

disfavor speech based on its content.”<sup>21</sup>

Once a restriction has been deemed a content-neutral restriction on the time, manner, or place of speech, that restriction will be upheld if it satisfies three requirements (the TMP elements).<sup>22</sup> First, the law must serve a substantial government interest.<sup>23</sup> Though there is no general test for what makes an interest constitutionally “substantial,” a number of interests have been deemed to meet this threshold including providing security, maintaining the orderly flow of traffic on streets and sidewalks, and preserving public facilities.<sup>24</sup> Second, the restriction must be narrowly tailored to serve that interest.<sup>25</sup> This is not the sort of narrow-tailoring analysis used in First Amendment cases that employ strict scrutiny,<sup>26</sup> and there is no requirement that the government utilize the least restrictive measures.<sup>27</sup> Instead, the government need only show a “reasonable fit” between the regulation and the interest served.<sup>28</sup> Third, the restriction must leave open ample alternatives for conveying the same message.<sup>29</sup> This inquiry is

power are never actually abused.”).

21. *Thomas*, 534 U.S. at 323; *see also* *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 153 (1969) (“[Unfettered discretion allows officials] to roam at will, dispensing or withholding permission to speak, assemble, picket, or parade according to their own opinions . . .”).

22. *E.g.*, *Ward*, 491 U.S. at 791.

23. Courts sometimes refer to the need for a “significant” government interest, rather than a “substantial” one. *See, e.g.*, *ACLU of Colo. v. City of Denver*, 569 F. Supp. 2d 1142, 1175 (D. Colo. 2008). The Supreme Court has used the terms interchangeably. *See Ward*, 491 U.S. at 796 (stating that the regulation must be “narrowly tailored to serve a significant governmental interest” (citations omitted) (internal quotation marks omitted)).

24. *See infra* notes 78–84 and accompanying text.

25. *Ward*, 491 U.S. at 791.

26. *See, e.g.*, *United States v. Playboy Entm’t Grp., Inc.*, 529 U.S. 803, 813 (2000) (“If a less restrictive alternative would serve the Government’s purpose, the legislature must use that alternative.”); *Sable Comm’ns of Cal., Inc. v. FCC*, 492 U.S. 115, 126 (1989) (“The Government may . . . regulate the content of constitutionally protected speech in order to promote a compelling interest if it chooses the least restrictive means to further the articulated interest.”).

27. *E.g.*, *United States v. Albertini*, 472 U.S. 675, 688–89 (1985) (“Regulations that burden speech incidentally or control the time, place, and manner of expression . . . [are not invalid] simply because there is some imaginable alternative that might be less burdensome on speech.”).

28. *ACLU of Colo.*, 569 F. Supp. 2d at 1176.

29. *E.g.*, *Madsen v. Women’s Health Ctr., Inc.*, 512 U.S. 753, 791 (1994) (“[Speech] regulations . . . [must] leave open ample alternative channels of communication.” (citation omitted) (internal quotation marks omitted)). However, some cases merely speak of a need for “adequate” alternatives. *See, e.g.*, *City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 812 (1984) (“[A] restriction on expressive activity may be invalid if the remaining modes of communication are inadequate.”). Although these different terms can be (and have been) used selectively to frame the issue, an easy way to square this variable use of terminology is to hold that alternatives are not “adequate” unless they are “ample.” *See, e.g.*, *City of Ladue v. Gilleo*, 512 U.S. 43, 56 (1994) (“[Content-neutral regulation] must leave open ample alternative channels for communication. . . . [W]e are not persuaded

generally fact-intensive,<sup>30</sup> and it is unclear whether or not there is any constitutional right to reach one's intended audience.<sup>31</sup>

## II. TWO KEY CASES

Though the Supreme Court has never addressed restrictions on major political conventions, lower federal courts have applied the general framework just outlined to all recent cases concerning large political conventions. Two cases are key to understanding the overall development of this area of law, and they should be considered in tandem. The first, *Menotti v. City of Seattle*,<sup>32</sup> demonstrates how quickly a large political event can inspire violent protest. Combined with the September 11th attacks, it should be no surprise that security interests were at the forefront of post-2001 lower court opinions. The second case, *Coalition to Protest the DNC v. City of Boston*,<sup>33</sup> illustrates just how far courts would allow government to go in the name of security—and at the expense of free speech interests.

### A. *Menotti v. City of Seattle*

In *Menotti*, the Ninth Circuit addressed the local government's response to the riots that broke out in the early days of the 1999 World Trade Organization (WTO) conference. The City faced serious

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that adequate substitutes exist for the important medium of speech that Ladue has closed off." (citation omitted) (internal quotation marks omitted)).

30. *E.g., ACLU of Colo.*, 569 F. Supp. 2d at 1164 ("[T]he Court discerns that the 'ample alternatives' element is a multi-factor, fact-intensive inquiry.").

31. *See Heffron v. Int'l Soc'y for Krishna Consciousness, Inc.*, 452 U.S. 640, 647 (1981) ("[T]he First Amendment does not guarantee the right to communicate one's views at all times and places or in any manner that may be desired."). The Supreme Court has not clearly decided the issue and lower courts have reached different conclusions. *Compare Harrington v. City of Brentwood*, 726 F.3d 861, 865 (6th Cir. 2013) ("The key for purposes of the adequate-alternatives analysis is whether the proffered alternatives allow the speaker to reach its intended audience." (citation omitted)), *with McCullen v. Coakley*, 708 F.3d 1, 13 (1st Cir. 2013) ("In the last analysis, there is no constitutional requirement that demonstrators be granted particularized access to their desired audience. As long as adequate alternative means of communication exist, the First Amendment is not infringed." (citations omitted) (internal quotation marks omitted)).

32. 409 F.3d 1113 (9th Cir. 2005). Though this case does not technically address a large political convention, but rather the riots at the World Trade Organization (WTO) in 1999, *Menotti* has been discussed in several later cases addressing large political events. *See, e.g., Citizens for Peace in Space*, 477 F.3d at 1224 ("[T]he City made a reasonable assumption that protestors could pose more of a security risk to the conference than other persons, an assumption that, for example, finds some support given the violent protests surrounding the World Trade Organization meeting in Seattle, Washington."); *Coal. to Protest the DNC*, 327 F. Supp. 2d 61, 73 (D. Mass. 2004) ("[D]esignated protest or demonstration zones is a relatively recent innovation; they have apparently become routine at large political events ever since the 1999 World Trade Organization meeting in Seattle.").

33. 327 F. Supp. 2d 61(D. Mass. 2004).

problems: Despite the fact that over ninety-nine percent of demonstrators were well-behaved and orderly,<sup>34</sup> parts of Seattle descended into “seeming war zones.”<sup>35</sup> Within the first day of the WTO conference, this one percent of rogue protesters looted and broke windows at retail stores, started fires in the streets and in dumpsters, then blocked fire trucks from entering the area, and even assaulted WTO delegates and the driver of a garbage truck.<sup>36</sup> A few of these violent protesters were “well-organized and . . . coordinated,”<sup>37</sup> and some were even armed with Molotov cocktails.<sup>38</sup>

The police responded with tear gas, beanbag guns, rubber bullets,<sup>39</sup> and about 300 arrests.<sup>40</sup> Seattle Mayor Paul Schell declared a civil emergency, imposed a general curfew, and the Governor called out the National Guard.<sup>41</sup> A sizeable section of downtown Seattle was closed off to everyone except WTO delegates and staff members, the owners and employees of businesses in the section, and emergency and safety personnel,<sup>42</sup> though this closure was soon limited to banning only protesters.<sup>43</sup> Violent protest eased, but did not stop entirely.<sup>44</sup>

Confronted with both individual lawsuits and a class action seeking damages for First Amendment violations,<sup>45</sup> the Ninth Circuit generally affirmed the government’s actions.<sup>46</sup> As a threshold matter, the court held that the curfew and ban were content-neutral, even though they predominately affected anti-WTO protesters,<sup>47</sup> because the “literal command of the restraint” was content-neutral;<sup>48</sup>

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34. *Menotti*, 409 F.3d. at 1123.

35. *Id.* (citation omitted) (internal quotation marks omitted).

36. *Id.* at 1121–23.

37. *Id.* at 1123.

38. *Id.* at 1120. In several situations, nonviolent protesters facilitated violent protest by forming a buffer between violent protesters and police. *Id.* at 1132.

39. *Id.* at 1122.

40. *Id.* at 1126.

41. *Id.* at 1124.

42. *Id.* at 1125.

43. *Id.* at 1125–26.

44. *Id.* at 1126.

45. *Id.* at 1117–18.

46. *Id.* at 1118. The court held that the City’s actions were constitutional on their face, but that there was a material issue of fact regarding their constitutionality as applied to the specific plaintiffs in the case. *Id.*

47. *Id.* at 1129 (noting that Order No. 3, which closed off sections of Seattle to protesters, but not to delegates, business-owners, or employees, “predominantly affected protest[er]s with anti-WTO views,” but this “did not render it content based”).

48. *Id.* However, the Ninth Circuit’s treatment of government intent is somewhat confusing. In one sentence, it wrote that “the text of Order No. 3 is not in dispute, and it does



accordingly, the TMP framework applied. The court then went on to hold that the government had significant interests in maintaining security,<sup>49</sup> and that the blanket prohibition on protest was narrowly tailored—despite its large geographic scope—because it had become “unrealistic to expect police to be able to distinguish, minute by minute, those protestors with benign intentions and those with violent intentions.”<sup>50</sup> And the ability to protest elsewhere in downtown Seattle provided protesters with adequate alternatives.<sup>51</sup>

### B. Coalition to Protest the DNC v. City of Boston

The second key case is *Coalition to Protest the DNC*, in which a Massachusetts district court upheld severe restrictions on expression at the 2004 Democratic National Convention (DNC) against expedited pre-Convention challenges seeking injunctive relief.<sup>52</sup> The most important of these restrictions was the creation of a designated “demonstration zone” for protesters. Although protest was also allowed within a separate “soft security zone,” capacity there was limited,<sup>53</sup> and the demonstration zone provided the best access to DNC delegates.<sup>54</sup>

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not favor one content over another.” *Id.* With this sentence, the court appears to commit itself to a form of textualism in which the government’s motive is irrelevant to the analysis. The court even underscores this commitment with a footnote stating that it “will not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive.” *Id.* at 1130 n.29 (quoting *United States v. O’Brien*, 391 U.S. 367, 383 (1968)) (internal quotation marks omitted). However, immediately after that first sentence, the court wrote that “[t]he purpose of enacting Order No. 3 had everything to do with the need to restore and maintain civic order, and nothing to do with the content of [the protesters’] message.” *Id.* at 1129. This reference is in accord with the long-established need for a significant government interest.

49. *Id.* at 1131 (“No one could seriously dispute that the government has a significant interest in maintaining public order; indeed this is a core duty that the government owes its citizens.”).

50. *Id.* at 1134. This sort of blanket prohibition is difficult to square with existing First Amendment concepts like overbreadth. *See, e.g.*, *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 255 (2002) (“The argument, in essence, is that protected speech may be banned as a means to ban unprotected speech. This analysis turns the First Amendment upside down.”).

51. *Menotti*, 409 F.3d. at 1141.

52. *Coal. to Protest the DNC*, 327 F. Supp. 2d 61, 64–65 (D. Mass. 2004). The First Circuit affirmed the district court’s holding in *Coalition to Protest the DNC in Bl(a)ck Tea Soc’y v. City of Boston*, 378 F.3d 8 (1st Cir. 2004).

53. *Coalition to Protest the DNC*, 327 F. Supp. 2d at 65. In addition, within the “soft security zone,” tables and chairs were prohibited, and demonstrations involving more than twenty individuals required a permit. *See id.* at 65–66.

54. *Id.* at 74. One edge of the demonstration zone was “the only available location providing a direct interface between demonstrators, and the area where delegates will enter and leave the [convention site].”

Conditions in the demonstration zone were oppressive: The demonstration zone was surrounded by two rows of concrete barriers topped with eight foot chain-link fencing, and the outer fence was coated with a dense fabric to prevent demonstrators from throwing liquids at delegates.<sup>55</sup> Large portions of this fabric limited visibility of any passers-by<sup>56</sup> and prevented demonstrators from handing out materials.<sup>57</sup> Visibility was further reduced by the presence of a “two-story ‘media village’” between the demonstration zone and the convention site.<sup>58</sup> In addition, much of the demonstration zone was located directly beneath railroad tracks, which were wrapped with razor wire and patrolled by armed police and National Guardsmen.<sup>59</sup> As a result of the tracks and the supporting girders, much of the space within the demonstration zone was unfit for many types of demonstrations, and the number of people who could demonstrate effectively was limited.<sup>60</sup>

The district court expressed concern over these conditions.<sup>61</sup> At various times, it likened the demonstration zone to an “internment camp,”<sup>62</sup> and described it as “an offense to the spirit of the First Amendment.”<sup>63</sup> Yet, despite these reservations, the court upheld the use of the demonstration zone as “reasonable” and thus constitutionally acceptable, in light of the circumstances:

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 officers 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

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55. *Id.* at 67.

56. *Id.* at 66 (“The purpose of this [fabric], according to the [Boston Police Department] is ‘to protect the delegates and other attendees, and to prevent hostile viewers from determining the strength and positioning of . . . law enforcement assets.’” (second alteration in original)).

57. *Id.* at 68 (“It will be . . . completely impossible to pass a leaflet from the [demonstration zone] to a delegate or other DNC guest, even one who wants to approach the edge of the [demonstration zone] to receive the literature.”).

58. *Id.* at 72.

59. *Id.* at 67.

60. *Id.* (“Although the City calculated that some 4,000 persons could be accommodated in the entire [demonstration zone], this effectively usable area can accommodate approximately 1,500 persons.”).

61. Photos of the demonstration zone are available online. See Emily Steinmetz, *Democratic? National Convention Comes to Denver*, HIGH COUNTRY NEWS (July 3, 2008), <http://www.hcn.org/blogs/goat/democratic-national-convention-comes-to-denver>.

62. *Coal. to Protest the DNC*, 327 F. Supp. 2d at 74.

63. *Id.* at 87.

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 [railroad] 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.<sup>64</sup>

In short, each of these restrictions was reasonable, despite the lack of any specific threats of such tactics,<sup>65</sup> because “there [was] no way to ‘tweak’ the [demonstration zone] to improve plaintiffs’ free speech opportunities without creating a safety hazard”<sup>66</sup> and protesters retained “other opportunities for communication.”<sup>67</sup> Accordingly, the security plans, though onerous, were constitutional. In so holding, the district court set the stage for equally oppressive measures at later political events.

### III. GENERAL TRENDS IN THE CASE LAW

Since the WTO riots described in *Menotti*, and especially since *Coalition to Protest the DNC*, federal courts have continued to apply the content-neutral TMP framework in a way that privileges government regulations over free expression.<sup>68</sup> For example, in *ACLU of Colorado v. Denver*,<sup>69</sup> the District of Colorado upheld a security plan that limited protest to a “Public/Demonstration Zone” surrounded by concrete barriers and two rows of fencing.<sup>70</sup> At that location, the convention was not even visible, and the only access demonstrators had to the delegates was from 200 feet away as the delegates walked from their buses into the convention.<sup>71</sup> Similarly, in *Marcavage v. City of New York*,<sup>72</sup> the Southern District of New York upheld the arrests of two anti-abortion demonstrators, who peacefully

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64. *Id.* at 75.

65. See *Bl(a)ck Tea Soc’y v. City of Boston*, 378 F.3d 8, 13 (1st Cir. 2004) (“The appellant points out, correctly, that there is no evidence in the record that the City had information indicating that demonstrators intended to use such tactics at the Convention.”).

66. *Coal. to Protest the DNC*, 327 F. Supp. 2d at 76.

67. *Id.* at 75.

68. For a review of some of the tactics used to crackdown on protesters at these conventions, see generally Joshua Rissman, *Put it on Ice: Chilling Free Speech at National Conventions*, 27 *LAW & INEQ.* 413 (2009).

69. 569 F. Supp. 2d 1142 (D. Colo. 2008).

70. *Id.* at 1149.

71. *Id.* at 1155–56.

72. *Marcavage v. City of New York*, No. 05 Civ. 4945(RJS), 2010 WL 3910355, \*1 (S.D.N.Y. Sept. 29, 2010).

carried signs no larger than four-by-six feet, because they refused to move from a “no expressive activity zone” to the designated “demonstration area” two blocks from the convention.<sup>73</sup> Other cases are similar.<sup>74</sup> Only two cases, *Service Employees International Union v. City of Los Angeles (SEIU)*<sup>75</sup> and *Stauber v. City of New York*<sup>76</sup>—both of which were decided before *Coalition to Protest the DNC*—favored the First Amendment plaintiffs (and these cases may have limited reach).<sup>77</sup>

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73. *Id.* at \*10.

74. *See* *Coal. to March on the RNC and Stop the War v. City of St. Paul*, 557 F. Supp. 2d 1014, 1023–24 (D. Minn. 2008) (upholding the decision to deny a requested parade permit and to grant instead a permit for a different route, because it would slow traffic and divert police resources); *Nat’l Council of Arab Ams. v. City of New York*, 331 F. Supp. 2d 258, 268 (S.D.N.Y. 2004) (upholding the denial of a permit for a rally on the night before the Republican National Convention started because the number of attendees might exceed estimates, and this might damage the lawn at the site of the rally, especially in the event of rain). Similar decisions have been rendered in cases dealing with large gatherings other than national political conventions. *See, e.g.*, *Citizens for Peace in Space v. City of Colorado Springs*, 477 F.3d 1212, 1217, 1226 (10th Cir. 2007) (protesters outside a NATO conference); *Defending Animal Rights Today and Tomorrow v. Wash. Sports and Entm’t LP*, 821 F. Supp. 2d 97, 109–10 (D.D.C. 2011) (animal rights protesters outside a circus); *United for Peace and Justice v. City of New York*, 243 F. Supp. 2d 19, 30–31 (S.D.N.Y. 2003) (peace protesters outside the United Nations Building).

75. 114 F. Supp. 2d 966, 968, 975 (C.D. Cal. 2000).

76. No. 03 Civ. 9162(RWS), 2004 WL 1593870, \*33 (S.D.N.Y. July 19, 2004).

77. The First Amendment-friendly result in *Service Employees International Union v. City of Los Angeles* is likely attributable to two things. First, the restrictions involved were arguably more severe than even those employed at the 2004 DNC in Boston: 185 acres (8 million square feet) surrounding the convention were made off-limits to demonstrators, and protest was restricted to a “secured zone” over 250 yards away, with only a blocked view of the convention, and on the other side of a major highway. *Serv. Emps. Int’l Union.*, 114 F. Supp. 2d at 968–72. Thus, to the extent it establishes a ceiling on the restrictions that can be imposed in the name of security, that ceiling is high and few measures are prohibited. Second, this decision was written in 2000, before the terror attacks of September 11th. It is not inconceivable that a First Amendment plaintiff would have lost on the exact same set of facts in 2004, or even 2010. The reach of *Stauber* is similarly limited for two reasons. First, the police tactics addressed in *Stauber* were not unique to the Republican National Convention (RNC), but had been employed more widely. During a number of demonstrations in 2003 and 2004, the NYPD enforced a policy of shutting down streets and sidewalks while making no or minimal efforts to tell attendees how they could otherwise access the events. *Stauber*, 2004 WL 1593870, at \*8–9. Even more troubling, the NYPD commonly used barricades to create “pens” with only a single opening. *Id.* at \*9–10. Demonstrators often had difficulty leaving, and were sometimes told that they were not allowed to leave the pen at all. *Id.* at \*25. Had these practices been employed *only* at the RNC and not used more widely, the court may have decided differently. Second, and perhaps more importantly, the chief of the NYPD testified at trial that allowing individuals to enter and exit the pens “under controlled circumstances” would not undermine law enforcement. *Id.* at \*10, \*28. Largely based on the chief’s testimony, the court concluded that “no security, safety or organizational interests would be harmed by the NYPD making efforts to assure greater access by demonstrators to and from pens.” *Id.* at \*29.

This overall pattern has resulted from several notable trends in how courts have analyzed each of the three TMP elements. The next section will summarize these trends and offer brief examples of how they have thwarted First Amendment interests.

#### A. *The Government Interest*

Regarding the first element—that any restriction must serve a substantial government interest—two trends stand out. First, courts have identified a broad array of interests that qualify as at least “substantial” or “significant.” These interests have included maintaining security,<sup>78</sup> controlling traffic on streets and sidewalks,<sup>79</sup> managing and maintaining park facilities<sup>80</sup> and other public spaces,<sup>81</sup> reducing excessive noise,<sup>82</sup> avoiding visual clutter,<sup>83</sup> and, potentially, preserving an environment in which business can be conducted effectively.<sup>84</sup> Because of this breadth, the first TMP element has been uniformly satisfied in the context of large political conventions. Frankly, it is difficult to imagine any large gathering in which at least one of these interests would not be at issue.

Second, where implicated, the government’s interest in security has weighed heavily.<sup>85</sup> Some courts have referred to this interest as “a core duty that the government owes its citizens,”<sup>86</sup> whereas others

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78. *Menotti v. City of Seattle*, 409 F.3d 1113, 1131 (9th Cir. 2005) (“No one could seriously dispute that the government has a significant interest in maintaining public order.”).

79. *ACLU of Colo. v. City of Denver*, 569 F. Supp. 2d 1142, 1163 (D. Colo. 2008) (citing *Schenk v. Pro-Choice Network of W. N.Y.*, 519 U.S. 357, 375–76 (1997)).

80. *Nat’l Council of Arab Ams. v. City of New York*, 331 F. Supp. 2d 258, 268 (S.D.N.Y. 2004) (citing *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 296 (1984); *Paulsen v. Gotbam*, 982 F.2d 825, 830 (2d Cir. 1992)).

81. *ACLU of Colo.*, 569 F. Supp. 2d at 1163 (citing *Clark*, 468 U.S. at 296).

82. *Id.* at 1162 (citing *Ward v. Rock Against Racism*, 491 U.S. 781, 796–97 (1989)).

83. *See City Council v. Taxpayers for Vincent*, 466 U.S. 789, 808 (1984) (“[T]he visual assault on the citizens of Los Angeles presented by an accumulation of signs posted on public property . . . constitutes a significant substantive evil within the City’s power to prohibit.”).

84. *See Menotti*, 409 F.3d at 1131–32 & n.34 (“The City [has] an interest in seeing that the . . . delegates ha[ve] the opportunity to conduct their business at the chosen venue . . .”).

85. As commentators have noted, “[t]he recent trend is for large-scale political events to be designated as ‘National Special Security Events’ by the President, which makes the Secret Service the lead federal agency in charge of the security for the event.” Joseph D. Herrold, Note, *Capturing the Dialogue: Free Speech Zones and the “Caging” of First Amendment Rights*, 54 *DRAKE L. REV.* 949, 978 (2006). This development is troubling, not for doctrinal reasons, but because this has sometimes led to blatant viewpoint discrimination. For example, at a speech in West Virginia, the Secret Service ordered the arrest of two protesters for refusing to remove t-shirts critical of President George W. Bush. *Rank v. Jenkins*, No. Civ.A.2:04 0997, 2006 WL 515533, at \*1 (S.D. W.Va. Feb. 28, 2006).

86. *Menotti*, 409 F.3d at 1131.

have noted that 9/11 changed not just the political landscape,<sup>87</sup> but the constitutional landscape as well.<sup>88</sup> In several cases, despite opening with language suggesting that security concerns do not automatically trump expressive rights,<sup>89</sup> courts have been explicitly deferential to the needs of law enforcement. In *Coalition to Protest the DNC*, the court opined that “the police must have adequate flexibility to make judgments on the street concerning any emergency or public safety issues, and [courts] should not fashion an injunction to control that discretion.”<sup>90</sup> The court was similarly complaisant in *ACLU*, noting that “[s]imply put, some degree of deference must be afforded to the government’s judgment as to the most effective means for achieving its security goals.”<sup>91</sup> Cases addressing restrictions at other types of political events have been similar.<sup>92</sup> Just as troubling, the evidence required to establish a security interest has been minimal.<sup>93</sup>

In some cases, security concerns provided a general backdrop—in addition to being an element of the TMP test—against which the other elements were appraised.<sup>94</sup> This means that security was

87. As James J. Knically and John W. Whitehead have observed, “[i]n a climate of fear of threatened terrorist attacks, the potential for adverse political accountability by an unforgiving polity is even higher if security measures fail to prevent disaster, particularly if the measures are perceived as being undermined by an unelected Federal judiciary.” James J. Knically & John W. Whitehead, *The Caging of Free Speech in America*, 14 TEMP. POL. & CIV. RTS. L. REV. 455, 468 (2005).

88. See *Bl(a)ck Tea Soc’y v. City of Boston*, 378 F.3d 8, 19 (1st Cir. 2004) (Lipez, J., concurring) (“[T]he events of 9/11 and the constant reminders in the popular media of security alerts color perceptions of the risks around us, including the perceptions of judges. The risks of violence and the dire consequences of that violence seem more probable and more substantial than they were before 9/11.”).

89. *ACLU of Colo. v. City of Denver*, 569 F. Supp. 2d 1142, 1175 (D. Colo. 2008) (“The term ‘security’ cannot simply be brandished as a talisman to justify all burdens on speech.” (citing *Bl(a)ck Tea Soc’y*, 378 F.3d at 13)).

90. *Coal. to Protest the DNC*, 327 F. Supp. 2d 61, 76 (D. Mass. 2004).

91. *ACLU of Colo.*, 569 F. Supp. 2d at 1176 (citing *Citizens for Peace v. City of Colorado Springs*, 477 F.3d 1212, 1221 (10th Cir. 2007); *Bl(a)ck Tea Soc’y*, 378 F.3d at 13).

92. See, e.g., *United for Peace and Justice v. City of New York*, 243 F. Supp. 2d 19, 29 (S.D.N.Y. 2003) (“The Court will not second guess or substitute its judgment for that of the NYPD.”).

93. See, e.g., *Bl(a)ck Tea Soc’y*, 378 F.3d at 13 (upholding measures to guard against specific tactics even though “there [was] no evidence in the record that the City had information indicating that demonstrators intended to use such tactics”).

94. See, e.g., *Menotti v. City of Seattle*, 409 F.3d 1113, 1140 (9th Cir. 2005) (“[W]e apply the ample alternatives test with a practical recognition of the dire facts confronting the city [during the Seattle WTO riots.]”); *Coal. to March on the RNC and Stop the War v. City of St. Paul*, 557 F. Supp. 2d 1014, 1028 (D. Minn. 2008) (“The ample alternative channels analysis cannot be conducted in an objective vacuum, but instead it must give ‘practical recognition’ to the facts giving rise to the restriction on speech.” (quoting *Citizens for Peace in Space*, 477 F.3d at 1226)).

essentially double-counted—once as an element and again as a factor in the analyses of the other two elements.

The best example to illustrate how this can work concerns not a large political convention, but a banned protest outside a NATO conference. In *Citizens for Peace in Space v. City of Colorado Springs*,<sup>95</sup> the Tenth Circuit actually triple-counted security concerns. First, regarding the government’s interest in prohibiting protest within several hundred yards of the conference,<sup>96</sup> the court held that “the City’s security interest is of the highest order,”<sup>97</sup> especially in light of the fact that defense officials from several countries would be gathered together.<sup>98</sup> Second, regarding the narrow-tailoring analysis, the court opined that “the significance of the government interest bears an inverse relationship to the rigor of the narrowly tailored analysis.”<sup>99</sup> Third, regarding the existence of ample alternatives, the court opined that “given “the City’s need to . . . provide conference security, we must determine whether the alternative protest [site] was an adequate alternative.”<sup>100</sup> Thus, the government interest in security influenced the court’s holding on each element of the TMP restriction analysis.

### B. Narrow Tailoring

Regarding the second element—that any restriction must be narrowly tailored to serve the identified government interest—two general trends are noteworthy. First, these analyses have been uniformly fact-intensive.<sup>101</sup> Accordingly, and as some courts have explicitly acknowledged,<sup>102</sup> the precedential value of any particular

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95. 477 F.3d 1212 (10th Cir. 2007).

96. The protest was limited: Six individuals wanted to conduct a peace vigil on the sidewalk across the street from the NATO conference, in which they would hold banners for one hour. *See id.* at 1218. Because they were banned from protesting outside the conference, they had little choice but to hold their vigil at a security checkpoint, located several blocks from the conference, with no direct line of sight to the conference. *Id.* at 1218–19. Because they were effectively invisible to their target audience, they asked officers to at least inform conference attendees of their vigil, but “the officers declined.” *Id.* at 1219.

97. *Id.* at 1220.

98. *See id.* at 1221.

99. *Id.*

100. *Id.* at 1226.

101. *See, e.g., Coal. to Protest the DNC*, 327 F. Supp. 2d 61, 73 (D. Mass. 2004) (describing the case law on political conventions as “extremely factbound”); *see also Menotti v. City of Seattle*, 409 F.3d 1113, 1133 (9th Cir. 2005) (“The [large] size of the restricted zone cannot sensibly be evaluated without considering the size of the area in which delegates were housed and had to move freely in order to do the work of the WTO conference.”).

102. *See, e.g., Coal. to March on the RNC and Stop the War v. City of St. Paul*, 557 F. Supp.

opinion is limited, and restrictions held constitutional in one context may be invalidated in another.<sup>103</sup> This, in turn, has given courts free rein to reach the decision that seems most appropriate in a given situation, with few constraints from precedent. Courts have thus been able to couch in the normal vocabulary of the TMP elements what actually operated as a reasonableness test<sup>104</sup> or an interest-balancing test, rather than a proper elements-based analysis.<sup>105</sup>

Some courts have openly stated as much. In *ACLU*, for example, the court conceded that “closing down [a major highway] to the daily parades during the [DNC] w[ould] burden the expressive rights of marchers,” but the court did not find that the burden was “substantial when weighted against the Defendants’ interests in emergency access.”<sup>106</sup> Similarly, in *Bl(a)ck Tea Society v. City of Boston*,<sup>107</sup> the First Circuit approved the “balance of [security] and other factors”<sup>108</sup> employed by the lower court in *Coalition to Protest the DNC*.<sup>109</sup> *SEIU* also referred to a need to “balance . . . the competing interests,” though the district court for the Central District of California eventually held in favor of the First Amendment plaintiffs.<sup>110</sup> Other cases dealing with large events besides national political conventions have employed comparable language and reasoning.<sup>111</sup>

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2d 1014, 1022 (D. Minn. 2008) (referring to “the necessity of a fact-specific inquiry”).

103. See, e.g., *id.* (“Time-place-manner restrictions that may be constitutionally permissible at one site and event may be held constitutionally infirm at another site and event.” (citing *Hill v. Colorado*, 530 U.S. 703, 728)).

104. See *Coal. to Protest the DNC*, 327 F. Supp. 2d at 75 (stating why each individual restriction imposed was “reasonable” in light of past experience).

105. Such interest-balancing analyses are not entirely foreign to First Amendment cases, and they play a role in cases involving speech by government employees on matters of public concern. See *Connick v. Myers*, 461 U.S. 138, 142 (1983) (“Our task . . . is to seek a balance between the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.” (citation omitted) (internal quotation marks omitted)). However, interest-balancing seems to be limited to such cases, and the Supreme Court has recently rejected the use of balancing tests in deciding other First Amendment questions. See, e.g., *United States v. Alvarez*, 132 S. Ct. 2537, 2544 (2012) (determining whether a category of speech deserves First Amendment Protection); *Knox v. Serv. Emps. Int’l Union*, 132 S. Ct. 2277, 2291 (2012) (addressing whether a union can collect dues from non-consenting individuals).

106. *ACLU of Colo. v. City of Denver*, 569 F. Supp. 2d 1142, 1186 (D. Colo. 2008).

107. 378 F.3d 8 (1st Cir. 2004).

108. *Id.* at 14.

109. *Coal. to Protest the DNC*, 327 F. Supp. 2d at 73.

110. *Serv. Emps. Int’l Union v. City of Los Angeles*, 114 F. Supp. 2d 966, 972 (C.D. Cal. 2000).

111. See, e.g., *Menotti v. City of Seattle*, 409 F.3d 1113, 1141–42 (9th Cir. 2005) (“We recognize that our decision takes into account a balance of the competing considerations of



Second, and perhaps more importantly, these narrow-tailoring analyses have been undemanding. Courts addressing these speech restrictions have commonly emphasized that there is no requirement that the government employ the least restrictive measures,<sup>112</sup> and that the government need only show a “reasonable fit” between the government interest and the restriction on speech.<sup>113</sup>

*Citizens for Peace in Space* presents the best example of an undemanding narrow-tailoring analysis. There, the Tenth Circuit considered a challenge to a blanket ban on demonstration within several hundred yards of a NATO conference.<sup>114</sup> To guard against the “catastrophic risk”<sup>115</sup> provided by the “worst case scenario”<sup>116</sup> of “a terrorist attack utilizing explosives,”<sup>117</sup> the City of Denver created a “security zone” that extended several blocks from a NATO conference site in all directions.<sup>118</sup> The group Citizens for Peace in Space sought to conduct an hour-long peace vigil on the sidewalk across the street from the conference, in which six individuals would hold banners.<sup>119</sup> Though no other group had asked to protest within the secured zone,<sup>120</sup> the City refused their request, partially because allowing their protest might encourage other groups to protest as well.<sup>121</sup> The possible alternative of using a permitting scheme was insufficient because it would have required a diversion of resources and personnel.<sup>122</sup> This blanket prohibition was upheld as narrowly

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expression and order. But we do not think the Constitution requires otherwise.”); *United for Peace and Justice v. City of New York*, 243 F. Supp. 2d 19, 31 (S.D.N.Y. 2003) (“The City’s significant interest in . . . safety [outside the UN building], especially in this time of heightened security, outweigh[s] the restrictions on the Plaintiff.”).

112. *E.g.*, *Menotti*, 409 F.3d at 1138 (“A time, place, and manner restriction does not violate the First Amendment simply because there is some imaginable alternative that might be less burdensome on speech.” (quoting *United States v. Albertini*, 472 U.S. 675, 688–89 (1985)); *Heffron v. Int’l Soc’y for Krishna Consciousness, Inc.*, 452 U.S. 640, 647 (1981) (“[T]he First Amendment does not guarantee the right to communicate one’s views at all times and places or in any manner that may be desired.” (citations omitted))).

113. *ACLU of Colo. v. City of Denver*, 569 F. Supp. 2d 1142, 1179 (D. Colo. 2008).

114. *See Citizens for Peace in Space v. City of Colorado Springs*, 477 F.3d 1212, 1226 (10th Cir. 2007).

115. *Id.* at 1225.

116. *Id.* at 1224.

117. *Id.* at 1217.

118. *Id.*

119. *Id.* at 1218.

120. *See id.* at 1223.

121. *Id.* at 1218.

122. *See id.* at 1225 (“Though we agree that some content-neutral permitting system could have been enacted, we do not agree with the Citizens that such a system is an obvious alternative that easily could have been utilized without diverting resources and personnel.”).

tailored because another group might seek to protest NATO, that group might become violent, and that violence might have been more than the City could handle.<sup>123</sup> Yet to ban one protest because it might encourage *other* protest is patently inconsistent with general notions of narrow tailoring.

Besides being extremely deferential, these analyses have occasionally been loose and undisciplined. In at least two cases, courts suggested that the plaintiffs, rather than the government, bore the burden of proof on the issue of narrow tailoring.<sup>124</sup> In another, the court suggested that the narrow-tailoring analysis was closer to a rational basis test, such that the restriction would be valid so long as it had the desired effect.<sup>125</sup> On the whole, this looseness, like the lack of precedential constraints, has favored the government's interests over those of demonstrators.

### C. Ample Alternatives

Regarding the third element—that any restriction must leave open ample or adequate alternatives of communication—again, two related trends are of special importance. First, as with the narrow-

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123. See *id.* at 1224 (rejecting the contention “that all protest groups would be peaceful and law-abiding” as an unrealistic “best-case scenario”).

124. See *Marcavage v. City of New York*, No. 05 Civ. 4945(RJS), 2010 WL 3910355, \*7 (S.D.N.Y. Sept. 29, 2010) (“Because Plaintiffs fail to acknowledge or engage the situation specific inquiry of intermediate scrutiny, the Court also finds that Plaintiffs’ proposed alternative is neither reasonable nor constitutionally required.”); *Nat’l Council of Arab Ams. v. City of New York*, 331 F. Supp. 2d 258, 270 (S.D.N.Y. 2004) (“Nor has the [plaintiff] established . . . that the Parks Department’s denial of its application was not narrowly tailored to achieve the City’s significant interest of managing and maintaining the Great Lawn [in Central Park].”). There is some Supreme Court language to support this reasoning, at least regarding the requirement that ample alternatives for expression remain. See, e.g., *Ward v. Rock Against Racism*, 491 U.S. 781, 802 (1989) (“That the city’s limitations on volume may reduce to some degree the potential audience for respondent’s speech is of no consequence, for there has been no showing that the remaining avenues of communication are inadequate.”). However, later Supreme Court cases (including those citing *Ward*), have stated that the burden of proof in analyzing content-neutral restrictions falls on the government. See, e.g., *Turner Broadcasting Sys., Inc. v. FCC*, 512 U.S. 622, 665 (1994) (“[T]he Government still bears the burden of showing that the remedy it has adopted does not burden substantially more speech than is necessary to further [the government’s] interests.” (internal quotation marks omitted)).

125. *ACLU of Colo. v. City of Denver*, 569 F. Supp. 2d 1142, 1179 (D. Colo. 2008) (“The Court agrees that the closure of streets inside and adjacent to the [site of the DNC] is a reasonable fit to address concerns that people may obstruct traffic to or from the Convention grounds; one cannot obstruct a street if no one has access to it.”). If such reasoning were sound, then, the entire city of Denver could have been shut down, because this would presumably provide a safer convention site than would closing down only parts of it. The proper question for a narrow-tailoring test, of course, is not whether the measure actually does what it is supposed to do, but whether it does substantially *more* than it must.

tailoring requirement, courts have noted that the “ample alternatives” inquiry is heavily fact-dependent.<sup>126</sup> This means that each case is largely unhinged from precedent, and courts have considerable discretion to decide what is constitutional and what is not based on the circumstances at hand, with little input from past decisions.<sup>127</sup> Without such restrictions, courts have also broadly construed what qualifies as “ample.” For example, the ability to speak to media outlets,<sup>128</sup> to protest in other locations in the city,<sup>129</sup> or to protest outside the hotel rooms of event attendees<sup>130</sup> has often been enough to justify restrictions on protest near the target audience. The existence of restrictive demonstration zones has qualified as providing adequate alternative outlets.<sup>131</sup> The only real requirement seems to be that the ability to convey the desired message not be *wholly* closed off.<sup>132</sup> As a result of these broad readings—and the low threshold for adequacy—it is difficult to imagine a realistic contemporary scenario in which protesters would *not* have adequate alternative outlets. Any demonstrators with messages that depend on a specific time and place for effective delivery, or that seek to convey a message to the delegates themselves, are simply out of luck.

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126. *E.g., id.* at 1164 (“[T]he Court discerns that the ‘ample alternatives’ element is a multi-factor, fact-intensive inquiry.”).

127. However, this has not been uniformly true. For example, in *Coalition to March on the RNC and Stop the War v. City of St. Paul*, the court explicitly reviewed the degree of restraint imposed on protesters’ messages in prior cases, and how that compared to the channels available to protesters there. *See* 557 F. Supp. 2d 1014, 1028–30 (D. Minn. 2008) (comparing alternative channels in prior cases to the ones available to the plaintiffs).

128. *Id.* at 1029 (“[M]edia may afford ample alternatives to firsthand expression at high profile events.”); *see also* *Bl(a)ck Tea Soc’y v. City of Boston*, 378 F.3d 8, 14 (1st Cir. 2004) (“At a high-profile event, such as the [DNC], messages expressed beyond the first-hand sight of the delegates nonetheless have a propensity to reach the delegates through television, radio, the press, the internet, and other outlets.”). *But see* *Menotti v. City of Seattle*, 409 F.3d 1113, 1174 (9th Cir. 2005) (“[W]e should dispel any notion that media interest in an event can be a substitute for constitutionally-required alternative avenues of communication. . . . Public protests are at the heart of the First Amendment and are critical for incubating civic engagement and encouraging spirited debate.”).

129. *See id.* at 1141 (finding that other protest locations throughout Washington were ample alternatives to the downtown area).

130. *See id.*

131. *See* *ACLU of Colo. v. City of Denver*, 569 F. Supp. 2d 1142, 1182 (2008) (finding that a restricted “Public/Demonstration Zone” presents an adequate alternative method of communication).

132. *See* *Menotti*, 409 F.3d at 1138 (“[T]he Supreme Court generally will not strike down a governmental action for failure to leave open ample alternative channels of communication unless the government enactment will foreclose an entire medium of public expression across the landscape of a particular community or setting.” (internal quotation marks omitted)).

Second, most federal courts have held that protesters at political conventions do not have any particular right to reach their intended audience.<sup>133</sup> Although these holdings have usually been phrased in general terms,<sup>134</sup> or in terms suggesting that the protesters sought recognition of a “special” right beyond what others enjoy,<sup>135</sup> the end result has been the same: There has been very little practical recognition of a right to reach the target audience. For all these reasons, even very strict restrictions on speech have been upheld in federal courts.

#### IV. BETTER ANALYSES AND BETTER DOCTRINE

If the current case law on national political conventions has gone too far in favoring government interests over political protest, what can we do about it now? Part of the answer has to be for courts to offer better analyses. To start, courts should insist on placing burdens of proof on the government, particularly regarding the scope and intensity of the government’s interests, and whether or not restrictions are narrowly tailored.<sup>136</sup> Government actors are in a much better position to offer evidence regarding their interests, especially security interests. They are also in a better position to show what limits they face regarding resources, and why ostensibly feasible, and less restrictive, alternatives—such as permitting schemes, or bans on

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133. *E.g., id.* at 1139 n.49 (“[W]e hold that there is no constitutional requirement that protesters be allowed to reach their designated audience in the precise manner of their choosing.”); *Bl(a)ck Tea Soc’y v. City of Boston*, 378 F.3d 8, 14 (1st Cir. 2004) (“[A]lthough the opportunity to interact directly with the [target audience] 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.”). Outside of the specific context of large political events, several circuits have held that alternatives are not adequate unless they allow the speaker to reach her target audience. *See, e.g., Harrington v. City of Brentwood*, 726 F.3d 861, 865 (6th Cir. 2013) (“The key for purposes of the adequate-alternatives analysis is whether the proffered alternatives allow the speaker to reach its intended audience.” (citation omitted)); *Marcavage v. City of Phila.*, 481 F. App’x. 742, 747–48 (3d Cir. 2012); *Sarre v. City of New Orleans*, 420 F. App’x 371, 376 (5th Cir. 2011). Oddly enough, the Ninth Circuit has seemingly changed course since its holding in *Menotti*. *See, e.g., Hoyer v. City of Oakland*, 653 F.3d 835, 858 (9th Cir. 2011) (“[A]n alternative is not ample if the speaker is not permitted to reach the intended audience.” (quoting *Berger v. City of Seattle*, 569 F.3d 1029, 1049 (9th Cir. 2009))).

134. *See, e.g., Menotti*, 409 F.3d at 1139 n.49.

135. *See, e.g., Bl(a)ck Tea Soc’y*, 378 F.3d at 14 (“[T]here is no constitutional requirement that demonstrators be granted . . . particularized access.”).

136. *See, e.g., Stauber v. City of New York*, No. 03 Civ. 9162(RWS), 2004 WL 1593870, \*26 (S.D.N.Y. July 19, 2004) (“Because a time, place, and manner restriction exists, the defendants bear the burden of demonstrating that [it] is narrowly tailored to serve a significant governmental interest.” (alteration in original) (internal quotation marks omitted)).

certain materials within a given distance of the event—would not actually work or would be too burdensome. This would help prevent a general invocation of “security” from operating as a magic word that justifies even blanket prohibitions on protest in the absence of specific threats.

Similarly, courts need to recall that the TMP framework is a test with elements, and not a balancing test pitting expressive rights against government interests.<sup>137</sup> General reasonableness inquiries are the province of the Fourth Amendment,<sup>138</sup> not the First.<sup>139</sup> This also means that security cannot provide a general context within which the TMP analysis is conducted, *and* serve as an element within that test.<sup>140</sup> The needs of government—including security—are already built in to the analysis.

These two changes are necessary, and relatively easy given current doctrine, but they are only a first step. Although some commentators have proposed radically overhauling the existing framework,<sup>141</sup> this is

137. See, e.g., *Stauber*, 2004 WL 1593870, at \*29 (noting that the elements of the TMP analysis “are stated by the Supreme Court in the conjunctive rather than in the disjunctive”).

138. See, e.g., *Pennsylvania v. Mimms*, 434 U.S. 106, 108–09 (1977) (“The touchstone of our analysis under the Fourth Amendment is always the reasonableness in all the circumstances of the particular governmental invasion of a citizen’s personal security.” (citation omitted) (internal quotation marks omitted)).

139. See *supra* note 105.

140. See *supra* notes 94–100 and accompanying text.

141. R. George Wright, for example, has proposed ditching entirely the distinction between content-based and content-neutral speech restrictions in favor of one that looks at “realistic repressive potential.” As he has summarized his approach:

[C]ourts should be much more willing to make and defend their best informed judgments as to the *realistic repressive potential* of the speech restriction in question. Once this realistic repressive potential is judicially assessed, the most appropriate overall judicial test of the speech restriction can be selected and applied, regardless of whether the speech restriction would be characterized as [content-based] or [content-neutral] under current practice.

Wright, *supra* note 8, at 335–36 (emphasis added). Such an approach offers several clear benefits. For one, it seems truer to the Supreme Court’s recognition that political speech warrants special attention. See, e.g., *First Nat’l Bank v. Bellotti*, 435 U.S. 765, 776 (1978) (stating that political speech lies “at the heart of the First Amendment’s protection”). For another, this approach would move the focus from both the intent of the legislature and the text of the regulation to the likely effect. That being said, there are several difficulties that would have to be resolved. One is how to put this general standard into practice. What test(s) would apply once the judge had assessed the “likely repressive potential”? A second is the difficulty of the factual analysis the court will be required to conduct. Any inquiry into the “realistic repressive potential” would likely be fact-intensive and require no small amount of speculation. Because of this, what has been criticized as a legally convoluted doctrine, see, e.g., Leslie Kendrick, *Content Discrimination Revisited*, 98 VA. L. REV. 231, 232–33 (2012), would be swapped out for difficult factual inquiries. It is not clear why replacing difficult questions of law with difficult questions of fact would be an improvement.

probably unnecessary. Rather, it seems likely that small changes could be made to how each element of the current test is analyzed, such that we could discipline courts' analyses and offer better protection to speech without overly hampering government interests. Moreover, making small incremental changes to existing doctrine is simply more feasible in a common law system.

To begin with the first element—that the government must offer a “substantial” or “significant” interest to justify a TMP restriction<sup>142</sup>—the government should have to offer *specific* interests that are threatened by the speech and conduct that is likely to occur, particularly when it claims security is at stake. Despite offering disclaimers to the effect that “[t]he term ‘security’ cannot simply be brandished as a talisman to justify all burdens on speech,”<sup>143</sup> this is exactly how some courts have behaved. The Tenth Circuit, for example, upheld a blanket ban on protest within a large “secured zone” outside a NATO conference,<sup>144</sup> when there were no specifically identifiable threats, because “[i]t goes without saying . . . that security protocols exist to deal with hypothetical risks.”<sup>145</sup> The First Circuit acted similarly in upholding a security plan that placed protesters behind two rows of fencing, liquid dispersal mesh, and overhead netting, even though “there [was] no evidence in the record” that someone might attempt to break through the fence, or throw items or liquids at convention delegates.<sup>146</sup> In general, courts should bear in mind that what has happened at past events is clearly relevant, but the mere fact that something has occurred previously at some other protest does not mean it *will* happen at every similar future event. Whereas the WTO riots resulted in 300 arrests over approximately two days,<sup>147</sup> there were only around twenty-five arrests total at the 2012 DNC in Charlotte,<sup>148</sup> and even fewer at the 2012 Republican National Convention (RNC) in Tampa.<sup>149</sup> Not every scenario is the

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142. *Ward v. Rock Against Racism*, 491 U.S. 781, 791, 796 (1989).

143. *ACLU of Colo. v. City of Denver*, 569 F. Supp. 2d 1142, 1175 (D. Colo. 2008).

144. *See, e.g., Citizens for Peace in Space v. City of Colorado Springs*, 477 F.3d 1212, 1223–26 (10th Cir. 2007).

145. *Id.* at 1223.

146. *Bl(a)ck Tea Soc’y v. City of Boston*, 378 F.3d 8, 13 (1st Cir. 2004).

147. *Menotti v. City of Seattle*, 409 F.3d 1113, 1126 (9th Cir. 2005).

148. *See Jessica Sells, Police: 24 People Arrested During the DNC*, WBTW (Oct. 7, 2012, 4:31 PM), <http://www.wbtv.com/story/19486640/cmpd-releases-dnc-after-action-report>.

149. Colin Moynihan, *For the Police and Protesters, a Quieter Convention*, N.Y. TIMES (Aug. 31, 2012), <http://www.nytimes.com/2012/09/01/us/politics/for-police-and-protesters-a-quieter-convention.html>.

worst-case scenario; probabilities matter. If we ignore this, the specter of the Seattle WTO riots,<sup>150</sup> and even the terror attacks of September 11th, will swallow the First Amendment based on “mere speculation that violence *may* occur.”<sup>151</sup>

Addressing the second element—the requirement that TMP restrictions be narrowly tailored<sup>152</sup>—is somewhat more difficult. To be sure, requiring a higher degree of specificity for the first element will go a long way toward improving these analyses, by virtue of the fact that narrow-tailoring is about shaping regulations so that they serve the government’s interests without reaching further than necessary. Narrow-tailoring is about precision and reticence: If the concern is about guns and explosives, employ magnetometers and bomb-sniffing dogs; if it is about protesters making Molotov cocktails, ban outside bottles and hand out bottled water at the site of the event;<sup>153</sup> and if it is about sheer numbers of people, use a content-neutral permitting scheme that limits the numbers of individuals. There are almost always better options than banning protesters across the board, or restricting them to cages resembling “internment camp[s].”<sup>154</sup> As a general rule, “the more extensive the restrictions, the more precise the justifications for that restriction must be.”<sup>155</sup>

However, getting the first element right cannot solve every narrow-tailoring problem. Unless we are willing to employ something like a “least restrictive means test”—which the Supreme Court has definitively rejected,<sup>156</sup> and which would make intermediate scrutiny TMP analyses nearly identical to the strict scrutiny employed for content-based distinctions<sup>157</sup>—highly intuitive judgments regarding government overreach will necessarily play a role. There is simply no

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150. *See supra* Part II.A.

151. *Serv. Emps. Int’l Union v. City of Los Angeles*, 114 F. Supp. 2d 966, 9751 (C.D. Cal. 2000).

152. *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989).

153. Such an approach might sound unrealistic, but it is not. Something very much like this happened in 2012 at the RNC in Tampa. *See Moynihan, supra* note 149 (“[The] police officers in Tampa [wore protective gear, but nonetheless] . . . appeared to cultivate a friendly relationship with protesters, often greeting them on sidewalks and . . . at one point dropping off water and fruit at an encampment of tents and tarps where protesters were sleeping.”).

154. *Coal. to Protest the DNC*, 327 F. Supp. 2d 61, 74 (D. Mass. 2004).

155. *ACLU of Colo. v. City of Denver*, 569 F. Supp. 2d 1142, 1176 (D. Colo. 2008).

156. *See United States v. Albertini*, 472 U.S. 675, 688–89 (1985) (“Regulations that burden speech incidentally or control the time, place, and manner of expression . . . [are not invalid] simply because there is some imaginable alternative that might be less burdensome on speech.”).

157. *R.A.V. v. City of St. Paul*, 505 U.S. 377, 395 (1993).

way around this, and to require a wholly determinate jurisprudence asks too much. Judges will sometimes get it wrong, but judgment is required to adapt to changing and unforeseen circumstances.

That being said, we should ask the government to explain, and judges to evaluate, why alternative measures could not suffice to protect government interests. Instead of openly deferring to government actors (including law enforcement) on this point,<sup>158</sup> courts should require proof, and should not uphold speech restrictions when it would be feasible to employ more limited options (including ordinary law enforcement methods) that are likely to work nearly as well. Though, again, this will involve judicial discretion as to when government restrictions “go too far,” deliberately keeping this burden of proof on the government would help to ensure that core political speech is not swept up with proscribable violence.

Making the third element—that government regulations “leave open ample alternative channels for communication of the information”<sup>159</sup>—more speech protective could probably be achieved with one moderate change. Namely, courts should hold that “[a]n alternative channel is not sufficient if the speakers are not permitted to reach their intended audience.”<sup>160</sup> This makes intuitive sense. If a protester is denied the ability to get her message across to those who disagree, or to someone with the political clout to act on her concerns (and in time for it to make some difference), she is left preaching to the choir, or hoping that her message “trickles up” to political actors through whatever channels are available. Debate requires interlocutors, and political change is exceedingly unlikely in the absence of felt dissent. This is why, as the Ninth Circuit later opined in *Menotti*, “[p]ublic protests are at the heart of the First Amendment and are critical for incubating civic engagement and encouraging spirited debate.”<sup>161</sup>

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158. See, e.g., *United for Peace and Justice v. City of New York*, 243 F. Supp. 2d 19, 29 (S.D.N.Y. 2003) (“The Court will not second guess or substitute its judgment for that of the NYPD.”).

159. *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989).

160. *Serv. Emps. Int’l Union v. City of Los Angeles*, 114 F. Supp. 2d 966, 968, 978 (C.D. Cal. 2000). The Supreme Court has also suggested that such a right may be contained within the First Amendment. See *Heffron v. Int’l Soc’y for Krishna Consciousness, Inc.*, 452 U.S. 640, 655 (1981) (“The First Amendment protects the right of every citizen to reach the minds of willing listeners and to do so there must be opportunity to win their attention.” (citation omitted) (internal quotation marks omitted)).

161. *Menotti v. City of Seattle*, 409 F.3d 1113, 1174 (9th Cir. 2005).



In order to determine whether an alternative channel for communication is adequate in the context of large political events, courts could utilize the “sight and sound” standard offered by plaintiffs in cases like *Coalition to March on the RNC*<sup>162</sup> and *ACLU*.<sup>163</sup> In *ACLU*, the court criticized this standard as too vague to be useful.<sup>164</sup> Interestingly, however, the court also pointed to the solution when it opined that “[w]hat restrictions will permit communication depend upon the particular circumstances in which they are imposed.”<sup>165</sup> That is, this analysis will have to be contextual, and will have to focus on the message that the speakers actually seek to convey, in addition to the audience to whom they seek to convey it.<sup>166</sup> Generally speaking, marches can get their point across from a further distance than can individuals with picket signs, and sound amplification may be logistically necessary in a large rally, but not in a public park. Accordingly, applying this standard would be fact-intensive—but no more so than existing doctrine.

To be clear, the changes in doctrine and application proposed here cannot fix every problem. They cannot solve problems of having many speakers and too few spaces to accommodate them all. Though this is clearly a First Amendment concern, there will be times when demands for space and resources outstrip supply, and there is little that one can do about the fact that two individuals cannot occupy the same space at the same time. These changes also provide no answer to the question of how much deference a court should give to a speaker

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162. *Coal. to March on the RNC and Stop the War v. City of St. Paul*, 557 F. Supp. 2d 1014, 1016–17 (D. Minn. 2008).

163. *ACLU of Colo. v. City of Denver*, 569 F. Supp. 2d 1142, 1149, 1181 (D. Colo. 2008).

164. More specifically, the court asked a series of rhetorical questions to probe whether there could be such a standard:

Although the following questions might seem rhetorical, if the term “within sight and sound” is a legal standard, they must be answered in order to formulate a definition. From whose vantage point is “sight” or “sound” measured—the speaker or the audience? . . . Is a speaker within “sight” if she is merely within the range of normal visual perception (potentially thousands of feet under certain conditions)? Or does “being within sight” limit the range to that in which a speaker can be identified as a person, or where attributes of that person can be distinguished, or when a sign with text of a particular size held by the speaker can be read by the viewer? Is the speaker within “sound” of her audience if the audience can perceive that someone is speaking, or must the audience be able to discern the content of the message? Does the effect of cacophony or background noise change the calculation? Does amplification matter, or is it required?

*Id.* The court concluded: “[D]espite its catchy and cogent format, the phrase “sight and sound” does little more than restate the obvious—expressive speech is designed to communicate.” *Id.*

165. *Id.*

166. For a proposal along these lines, see Knicely & Whitehead, *supra* note 87, at 484–87.

regarding the content of her message, and to whom she wishes to communicate. There will be times when courts have to say “just because the plaintiffs say so, does not make it so.”<sup>167</sup> But the few changes proposed do not require radical departures from existing doctrine, and they will help to avoid situations in which dissent is literally caged.

### CONCLUSION

It would be only a slight exaggeration to say that the “law of large political conventions”<sup>168</sup> has turned the First Amendment on its head<sup>169</sup>: Core political speech, long viewed as living at the heart of the First Amendment, has been heavily and repeatedly restricted as a means of guarding against violent conduct, often based on weak or nonexistent evidence of actual danger. And federal courts, at both the district and appellate levels, have warped First Amendment doctrine to offer their blessings to such impediments. Justice Robert Jackson long ago noted the dangerous tendency to “reduce our liberties to a shadow, often in answer to exaggerated claims of security.”<sup>170</sup> That concern remains as real now as it was then. And unless courts are prepared to do more than pay lip service, and are willing to apply proper scrutiny to regulations that limit core political speech, we risk the slow erosion of the very political rights that ensure that our form of government is, and remains, democratic.

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167. See *Nat'l Council of Arab Ams. v. City of New York*, 331 F. Supp. 2d 258, 271 (S.D.N.Y. 2004) (“Simply because Plaintiffs feel that no other location in New York City is worthy of their cause . . . does not make it so.”).

168. *Coal. to Protest the DNC*, 327 F. Supp. 2d 61, 73 (D. Mass. 2004) (referring to the law it applied as “The Law of Demonstration Zones”).

169. See, e.g., *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 255 (2002) (“The argument, in essence, is that protected speech may be banned as a means to ban unprotected speech. This analysis turns the First Amendment upside down.”).

170. Robert H. Jackson, *Wartime Security and Liberty Under Law*, 1 *BUFF. L. REV.* 103, 116 (1951).