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Protesting in America

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Thursday, January 28, 2021

Protesting in America

Vital Interests: Tim, thanks very much for participating in the *Vital Interests Forum*. Your work focuses on First Amendment rights. I know you particularly for your book *Speech Out of Doors, Preserving First Amendment Liberties in Public Places*. You are working on a new book, *Managed Dissent, The Law of Public Protest*. Before we get into contemporary issues, can you put public protest in the context of American history of political discourse. You have written that our union was forged in the crucible of public protest and that the founders were very aware of what this meant for the body politic, specifically incorporating into the Constitution rights to freedom of speech, assembly, and petition.

Timothy Zick: Yes, that's a great place to start. We have a long and sometimes turbulent history of public protest in the United States. That history stretches back to the pre-revolutionary era. It's part of our national DNA. The people, when exercised, assembled in public places to make their collective voices heard. Not all of these protests were peaceful and non-disruptive. In fact, people burned officials in effigy, destroyed property, and even engaged in physical violence. Even peaceful public assemblies were often disruptive - and intentionally so. Public assembly and protest have always been important repertoires of contention - ways of presenting collective grievances to officials and the public. We are connected to that history, and of course our constitutional text reflects the importance of First Amendment freedoms - not just speech, but also peaceable assembly and the right to petition the government for redress of grievances.

My work acknowledges that history and urges preservation of robust speech and assembly rights. Despite the fact that we live in a digital era, people are obviously still assembling in the streets and parks as a way to present their views. We saw evidence of this during this past summer's extraordinary Black

Lives Matter protests. Before that, we witnessed countless other protests: environmental, anti-war, gender rights, gay rights, gun rights, etc. Public protest remains a critical part of our speech culture and our “out of door” politics.

We have a long and sometimes turbulent history of public protest in the United States. That history stretches back to the pre-revolutionary era. It’s part of our national DNA.

My work has focused on the legal and other limits that affect this kind of collective dissent today. It’s true we still see frequent public protests, demonstrations, rallies, and the like. But these events take place under increasingly difficult conditions. Governments have substantial power to restrict access to public places, impose time, place, and manner regulations, and suppress even peaceful

protest through aggressive policing methods.

The thesis of my current book may seem a little counterintuitive, given what we've seen on the streets of late. It catalogues and critiques the myriad restrictions and obstacles that continue to suppress public protest. Dissent is allowed, but managed pursuant to a law of public protest that is stacked against protest organizers, supporters, and participants. As the Capitol siege demonstrated, officials have to protect public safety and order. The First Amendment doesn’t protect violence and vandalism. However, managed dissent imposes restrictions far beyond what is necessary to serve these purposes and respect these restrictions.

Among other things, my new book will examine restrictions on where you can protest, protest policing methods, civil and criminal liabilities that protesters often face, and the lack of effective civil remedies available when protesters’ rights are violated. I will also consider the phenomenon of armed protests and the effect open displays of firearms may have on peaceful speech and assembly. Finally, one of the lessons of the pandemic and the civil unrest of this past summer is that governments have significant powers to restrict and potentially even suppress dissent during emergencies.

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VI: Looking back in history to the evolution of dissent and protest in the U.S., you talked about how current protests stand on the shoulders of demonstrations for

presenting collective grievances to officials and the public.

freedom in colonial times, the abolitionists and proselytizers, labor agitators, the suffragettes, the civil rights activists, the virulent anti war protesters during the Vietnam War.

What was the reaction of the public to those periods when there were major demonstrations and protests for important causes that contributed to shaping American history?

Timothy Zick: We have this long and venerable history of protests and our constitution reflects this fact. At the same time, Americans have always been ambivalent about public protests.

Polls indicate that in the abstract, Americans support the right to assemble and protest in public. However, when pollsters ask more granular questions about particular movements, or particular kinds of protest activities, support really falls off. Public protest is fine just so long as it does not disrupt the ordinary flow of commercial life, or make too much noise, or occur at night. Protest movements, including the civil rights movement, have historically been unpopular. At least initially, the Black Lives Matter protests seemed to have a broader level of public support. But like other movements, that support was likely to fade the longer the movement occupied the streets and disrupted routines.

Supreme Court jurisprudence actually reflects the same kind of protest ambivalence. The speaker who doesn't approach someone in a "truculent" way, or has a right to be where he is located, or perhaps wasn't even seen by his intended audience, receives the full protection of the First Amendment. The quiet "sidewalk counselor" should have an opportunity to reach her audience, but the noisy protest and targeted picket must be constrained.

We saw evidence of this during this past summer's extraordinary Black Lives Matter protests. Before that, we witnessed countless other protests: environmental, anti-war, gender rights,

It's also worth noting that although Americans are generally quite proud of the freedoms to speak, assemble, and petition in public and en masse, a very large segment of the public doesn't participate in this activity. Relative to citizens of other democracies, Americans have low levels of participation in public protests. That changed somewhat during the Trump administration. People expressed a greater

gay rights, gun rights, etc.

willingness to protest, and the Black Lives Matter protests were some of the largest - if not the largest - in our

history. However, even after the summer of protests, significant skepticism remains concerning the efficacy and value of this activity.

VI: There are many terms used - demonstrations, marches, rallies, parades. Is there any distinction or is it all just incorporated in the context of protest?

Timothy Zick: These are all different modes of assembling, speaking, petitioning, and protesting. However, there is no formal constitutional or legal distinction among them. They are all forms of collective expression covered by the First Amendment. To draw distinctions among them would actually raise the prospect of governmental regulation of the ideas or content being displayed.

As Greg Magarian has written, protests in all these forms are “fluid, contestable, radically democratic phenomena.” That makes them intriguing to study, but sometimes difficult to define and analyze.

VI: When a protest occurs sometimes they're planned but often they are spontaneous. Many are coordinated between different groups, but they all have to take place somewhere. You've written about the importance of place and protests. Can you go into that concept?

These events take place under increasingly difficult conditions. Governments have substantial power to restrict access to public places, impose time, place, and manner regulations, and suppress even peaceful protest through aggressive policing methods.

Timothy Zick: Important First Amendment doctrines determine where protests can occur. If you want to protest on a public street or a public sidewalk, you have pretty robust First Amendment rights to speak and assemble there. Beyond these places, governments have broad authority to exclude and regulate expression.

My first book, *Speech Out of Doors*, emphasized the limitations of the conception of “place” under these doctrines. People, speakers included, have close connections to places and special attachments to them. A fundamental problem from the protesters' perspective is

that where they situate themselves is often part of what they're trying to convey. It's part of voice or vocality. For example, given its history and functions, the U.S. Capitol is a highly symbolic place. Speakers and assemblies may have strong expressive interests in situating themselves so lawmakers can see and hear them, and the public can see them protesting there. In the wake of the Capitol siege, officials will likely make it much more difficult for protesters to get near this symbolic place.

VI: When you say the government, these demonstrations, protests, marches, they take place in cities and towns. What is the governing authority? Is it the mayor, the chief of police, the park commissioner? Is there some national security group that a governor consults with? Who actually makes these decisions when a group applies for permits or announces that they want to have a demonstration or a march?

Americans have low levels of participation in public protests. That changed somewhat during the Trump administration. People expressed a greater willingness to protest, and the Black Lives Matter protests were some of the largest - if not the largest - in our history.

Timothy Zick: For the run of the mill protest, it's typically the local government and local officials. If you want to use a local venue like a park, the permit registration system is typically run through local government offices. Local law enforcement is also often involved, particularly when the protest event is large and things like traffic control are necessary. Sometimes state law enforcement also gets involved, if additional resources are needed.

If you are talking about something like a presidential inaugural or a meeting of world leaders, there are additional players. If an event is designated a "special

national security event," federal law enforcement and the US Secret Service get involved. This is in addition to state and local authorities. In extraordinary cases, again something like a presidential inaugural, the National Guard may be called up to assist in maintaining peace and order.

VI: If protest organizers feel that permits are being unjustly withheld, if the local authorities or police departments just don't like the agenda of a particular group, is there a remedy for these organizers?

Timothy Zick: Yes. The government has to maintain neutrality with regard to the content of the speech or assembly. It generally can't deny a permit based on the message, the viewpoint, even the subject matter of the protest. Assuming that the speech is not obscene or otherwise not covered by the First Amendment, the government has no power to suppress its content. It can impose content-neutral rules to maintain order and safety, but can't treat Black Lives Matter protesters differently because they disapprove of the group's message.

VI: What about political rallies? During the 2016 and the 2020 elections the political campaigns organized massive rallies. Are political rallies considered a demonstration or in a different category?

The government has to maintain neutrality with regard to the content of the speech or assembly. It generally can't deny a permit based on the message, the viewpoint, even the subject matter of the protest.

Timothy Zick: Political rallies are an interesting example. Those are generally considered more private events. Unlike the protest in a public street, these events are typically organized by campaigns to take place on private property or public property leased by the campaign. This gives the campaign or candidate greater control over who can access the event. The campaigns are private actors, and they aren't bound by the same content neutrality rules as public officials and

governments. That's partly why candidate Trump could remove disruptive protesters from his rallies.

VI: What latitude do police forces have to determine whether a particular protest is a lawful event or a permitted demonstration is deemed to turn unlawful that needs to be suppressed and arrests made?

Timothy Zick: Law enforcement officials have extremely broad authority to dictate limits on even peaceful protest activities. Given the wide array of potential public disorder offenses, including breach of peace and failure to follow lawful orders, police can break up protests and demonstrations without any showing of violence or even disruptive activities. They can arrest protesters for offenses such as "conspiracy to riot," under statutes that have vague and overbroad terms. As we saw during this summer's protests law enforcement sometimes precipitates breaches of peace, for example by reacting to peaceful protests with non-lethal weaponry including tear gas and rubber bullets.

The ensuing disorder is then cited as grounds for breaking up a protest.

Scholars who study policing have observed, whether a protest or other assembly is allowed to occur often has more to do with discretionary policing power than the specific guarantees of the First Amendment.

In short, as scholars who study policing have observed, whether a protest or other assembly is allowed to occur often has more to do with discretionary policing power than the specific guarantees of the First Amendment.

VI: Often peaceful protests run up against aggressive police action and it escalates to violent confrontations. There is the infamous situation in Chicago in summer of 1968 when political protesters were attacked by club wielding Chicago police

officers, leading to the famous Chicago 7 trial of protest organizers being accused of conspiracy to riot.

Last week the attorney general for the State of New York, Letitia James, announced a suit against the New York Police Department, stating that the NYPD engaged in excessive, brutal and unlawful force against peaceful Black Lives Matter protesters. How should these situations be considered?

Timothy Zick: Aggressive and violent forms of protest policing pose major challenges for peaceful protest. As I mentioned, if the police aggress against peaceful protests, as we saw them do last summer during the Black Lives Matter protests, law enforcement may label the assembly “unlawful” or consider it a “riot.” If protesters then fail to disperse, they can be arrested.

Aggressive and violent forms of protest policing pose major challenges for peaceful protest... If the police aggress against peaceful protests, as we saw

I think it’s extraordinary that New York’s Attorney General has filed suit against the City’s police department. But when you look at footage of the police violence at the protests, it becomes very clear oversight is necessary. Police, in particular those who work in large departments like the City of New York’s, ought to be trained to protect protesters’

them do last summer during the Black Lives Matter protests, law enforcement may label the assembly “unlawful” or consider it a “riot.”

First Amendment rights. However, it seems law enforcement’s attitude was to clear the streets of even peaceful protesters, and in some cases to attack them physically.

None of this is to suggest that protest policing - particularly where you have mass demonstrations in the streets - is easy or without peril for the officers themselves.

However, when the record includes so many instances of what appears to be gratuitous violence against peaceful protesters, extraordinary measures like the New York Attorney General’s lawsuit are warranted.

One of the problems is lack of accountability for police aggression and brutality during protest events. It appears that internal accountability measures failed in New York City’s police department. Protesters also have little recourse in the courts, in part owing to qualified immunity doctrines that prevent protesters from obtaining remedies for violations of their First Amendment rights.

VI: A major point you're attempting to make in your new book is about the idea of managing dissent. There are efforts to discourage peaceful protests and gatherings which would deny a vital aspect of citizen’s political rhetoric and political capabilities. As you stated, the founders clearly recognized that the rights to assemble and petition the government are fundamental.

Timothy Zick: Managed dissent is a multi-faceted system or framework for regulating public convention. Its elements include restrictions on the place of protest, permit and other bureaucratic requirements, enforcement of vague public disorder offenses, aggressive protest policing, the presence of openly displayed firearms at protests, imposition of significant monetary and civil liabilities on protesters, and government’s exercise of emergency powers during periods of civil unrest. Separately and in combination, these aspects of managed dissent discourage and sometimes suppress public protest.

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Public and official attitudes are aligned with the philosophy of managed dissent. A segment of the American population equates any but the most docile protest with violent “riot.” Indeed, the notion of

Indeed, the notion of “peaceful protest” seems foreign to some. Since some violence occurs at some protests, all are condemned as mobs or riots.

“peaceful protest” seems foreign to some. Since some violence occurs at some protests, all are condemned as mobs or riots. Public officials have encouraged this false perception. They respond to public protests with mass and potentially lethal force: heavily armed police in full riot gear, use of military vehicles and other material, and “command and

control” policing tactics. During the summer protests, one of President Trump’s senior advisers referred to the streets as a “battle space.” President Trump said he wanted the police and National Guard to “dominate” protesters. The object of that war is to dominate and suppress the “enemy.” It is difficult to have a peaceful assembly or peaceful protest in this charged environment.

Of course there has been some violence at public protests. We recently had a riot or siege at the U.S. Capitol. In that instance a peaceful assembly did become a mob. However, it’s a mistake to dishonor and suppress peaceful exercises of First Amendment rights because some engage in unlawful activity. As I’ve noted, some of the earliest protests in this country were not docile affairs. We need to maintain breathing space for disruption and public contention. We can’t do that if even a hint of disruption is cause for suppression and every assembly is considered a riotous mob.

During the summer protests, one of President Trump’s senior advisers referred to the streets as a “battle space.” He wanted the police and National Guard to “dominate” protesters.

VI: Can protest organizers find some kind of redress for this? The police and other officials often have immunities so that they cannot be sued, or brought to any kind of reckoning because of their actions in managing protests.

Timothy Zick: That’s right, the doctrine of qualified immunity, which is the technical legal phrase, protects all but the least competent officer policing a protest. Officers have to go

far outside First Amendment boundaries in order to be held personally liable for alleged violations of free speech and assembly rights. It’s also difficult to hold their employers liable. People protesting have been dragged, netted, and swept up, and

put into the criminal justice system. This is costly in terms of financial outlays, time, and of course psychological and sometimes physical harms. Much more needs to be done in terms of holding law enforcement accountable for First Amendment violations. The New York Attorney General's lawsuit against NYPD is an alternative, if unusual, alternative way to impose some accountability.

VI: Aren't there potential major costs for organizers and people who are associated with demonstrations because they can be held liable for property damage and personal injuries?

Timothy Zick: These liabilities are part of the managed dissent system. Governments charge permit fees and sometimes require protesters to post monetary bonds to cover cleanup, policing, and other costs. Cities including the District of Columbia have recently proposed shifting these costs to protest organizers. For large events, we are talking potentially about hundreds of thousands of dollars.

We recently had a riot or siege at the U.S. Capitol. In that instance a peaceful assembly did become a mob. However, it's a mistake to dishonor and suppress peaceful exercises of First Amendment rights because some engage in unlawful activity.

Protest organizers and participants can also potentially be held liable for property damages and injuries. However, there are First Amendment limits on this sort of liability. Protesters are liable for what they personally say or do. But they can't be held liable for the unlawful acts of others, unless they explicitly incited those actions. These boundaries, which need to be clarified, are currently being tested in cases involving claims of "negligent protest" and "riot boosting" - theories of civil liability that purport to impose damages on protest organizers and supporters

even when they do not explicitly encourage or incite violence.

VI: Let's talk about emergency powers and the escalation of managing protests from the local to the Federal. This summer with the Black Lives Matter protests in Oregon, Minnesota, and in DC where it was decided that the local officials couldn't handle the situation and Federal authorities called in the National Guard and other Federal protection forces overruling or ignoring mayors and governors. What are the tensions there?

Timothy Zick: I think the biggest potential problem here was the threat, never quite carried out by President Trump, to send in the US military to police and put down the protests. It may well be the president has the statutory authority to do that, under the Insurrection Act of 1807. Thankfully, no US president has exercised that authority.

Presidents have called up the National Guard. For example, Eisenhower called them out when the schools in the South were being desegregated to uphold equal protection and civil rights. So it's not unprecedented during times of civil unrest for that to happen. Typically, though, this is done at the request of a state governor. In the case of the Portland protests, the governor actually did not want the president to be involved.

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As many noted, the National Guard had been called up in the school desegregation context to protect civil rights. In the context of civil rights protests, by contrast, military authority might be used to suppress civil rights.

VI: Wasn't one of the excuses also to protect federal property?

Timothy Zick: Yes, that was part of the legal explanation for invoking the Insurrection Act. The argument in Portland was that people had attacked a federal courthouse. So the Guard

was being called in to protect federal property. That's one of the statutory bases for invoking the Act. One problem, though, is that the protests extended well beyond the federal building. What is the basis for arresting even peaceful protesters in other areas of the city?

At some point, Department of Homeland Security agents were dispatched to Portland. That raised a separate set of issues. The agents were not well identified, and yet they were arresting protesters and exercising other law enforcement powers. President Trump's antipathy towards the protesters and their message raised serious concerns about these agents' roles in protest policing.

Protesters are liable for what they

VI: Tim, let's discuss what happened on January 6th at the U.S. Capitol in Washington, DC. This is

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been stopped?

Timothy Zick: I don't know the specific terms of the permit they received, but my impression was that they had a permit for the rally itself and perhaps a permit for the march down Pennsylvania Avenue. Where the event turned into a riot, of course, is when individuals breached the perimeter and eventually broke into the Capitol building. Capitol police presumably could have declared the assembly unlawful at the point of breach, although it does not appear they were prepared to enforce an order to disperse.

Much of the activity prior to that may be protected speech and assembly. Indeed, one could argue the protesters had a First Amendment right to make their collective voices heard near the Capitol, where the activity they (wrongly) objected to was occurring. However, the First Amendment does not protect violent action. The rioters had no First Amendment right to assault officers, climb the Capitol walls, break windows, steal

obviously going to become a case study which will be closely studied about the failure of all kinds of local and federal agencies to manage this particular situation. This started out as an organized rally that was to take place the same day that the Senate was certifying the state electoral votes that would establish the results of the Biden/Harris election. Organizers had gotten permits for a gathering near the White House but then President Trump and others urged the crowd to march down Pennsylvania Avenue to the Capitol - and we know what happened.

Do we know what the organizers originally envisioned? As soon as people left the designated rally area and marched down Pennsylvania Avenue to the Capitol grounds would that have exceeded the terms of the permit and the police determined this was now an unlawful protest that should have

laptops and other items, or vandalize the Capitol. Whatever the organizers envisioned or planned, once they crossed over from peaceful assembly to violence and property destruction they lost the protections afforded by the First Amendment.

Incitement is a First Amendment term of art. The First Amendment does not protect speech that advocates imminent unlawful action likely to occur.

VI: In this transformation of an initial peaceful protest and a march down Pennsylvania Avenue, and then what happened in the Capitol, where does the concept of incitement come?

Timothy Zick: Incitement is a First Amendment term of art. The First Amendment does not protect speech that advocates imminent unlawful

action likely to occur. There were many speakers involved on January 6: protest organizers and participants, supporters of the president including Rudy Giuliani and the President's son, and of course the President himself. There are questions concerning whether some of the speech, including the President's, could meet the technical definition of incitement under *Brandenburg v. Ohio*, a 1969 Supreme Court case which set forth the applicable standard.

Brandenburg is a purposefully difficult standard to meet. It allows a fair amount of room for policial hyperbole and rhetoric. In a case called *Claiborne Hardware*, where there was a boycott of white businesses, a civil rights activist stood up at a meeting and said, "If any of you go into those white businesses, we're going to break your damn necks." The Court concluded this was not incitement.

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Context matters a great deal, and one could argue that given the rally and its proximity to the Capitol, the allusions to use of force or even physical "combat" in some of the speeches, and the extensive campaign to discredit the 2020 presidential election results, some of the speech incited the riot that occurred shortly after the rally. But as I say, the incitement standard presents a very high bar. One might just as plausibly argue

forth the applicable standard.

the speeches were protected political hyperbole.

VI: If there was a conspiracy, prior planning, by a group of the protesters to go in and actually do the things people have been talking about - capture members of Congress and do harm to Vice President Pence - then that's a totally different circumstance?

Timothy Zick: Yes. Words used in connection with an unlawful conspiracy are not protected by the First Amendment. Even so, you have to be careful to separate heated political rhetoric from an actual plan to engage in unlawful conduct. Combat rhetoric and the like is an example of speech that is likely protected. The question is whether there is enough evidence that individuals conspired to engage in violence on January 6. Investigators and prosecutors will be carefully examining the online and other evidence in order to make that determination.

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VI: We have come into the end of our time. Thanks for this really interesting conversation on the legacy and contemporary reality of protest in America and what they mean for our society. We will see what repercussions and backlash come forward from the events on January 6th in Washington, DC. We will have to pay close attention to how protests are controlled and policed given these new circumstances.

Timothy Zick: Yes, I'll certainly be paying very close attention, and thanks so much for highlighting these important topics.