"There are no asterisks on the First Amendment"[1]

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[1] Ann Coulter is an author and conservative political commentator. www.anncoulter.com

Introduction

On March 12, 1990, over one thousand activists descended on to Washington, D.C. and gathered in front of the Capitol building. About 60 disabled activists proceeded to crawl up the stairs to the Capitol building in what became known as the Capitol Crawl[2]. Four months later, on July 26, 1990, the Americans with Disabilities Act, or the ADA, was signed into law. On April 5, 1977, over 100 disabled activists and non-disabled supporters staged a sit-in at the Federal Building to demand recognition of disabled civil rights[3]. The sit-in lasted approximately 30 days, with food and medical support coming from outside groups. The activists were protesting the 4-year delay in signing section 504 of the 1973 Rehabilitation Act into law. On February 13, 2018, disabled activists and their allies returned to the Capitol building. Members of ADAPT[4], some who were involved in the Capitol Crawl, flooded the hearing room where arguments for and against HR620, a bill that advocates believed would weaken the ADA,

[2] *A Magna Carta and the Ides of March to the AD*, THE MINNESOTA GOVERNOR'S COUNCIL ON DEVELOPMENTAL DISABILITIES, (2005). retrieved from http://mn.gov/mnddc/ada-legacy/ada-legacy-moment27.html.
[3] Kitty Cone, *Short History of the 504 Sit in*. DISABILITY RIGHTS EDUCATION & DEFENSE FUND (nd). retrieved from https://dredf.org/504-sit-in-20th-anniversary/short-history-of-the-504-sit-in/
[4] The Nation of ADAPT Community, *Our Journey*, ADAPT (nd). https://adapt.org/our-journey/

were being heard[5]. Many activists were dragged out or arrested[6]. On February 15, 2018, HR620 passed in the House of Representatives[7].

The purpose of these demonstrations? To protest against the inequality and inequity faced by the disabled population. Participants in these and other marches and demonstrations exercised a right protected in the Bill of Rights – freedoms of speech and assembly. However, a concern amongst disabled activists and protestors is the accessibility of the events themselves. While the three examples demonstrations mentioned above saw a large number of disabled participants, their involvement was in spite of any restrictions or regulations implemented by the government that infringe on the First Amendment rights of the disabled population.

This paper discusses the time, place, and manner restrictions on one's freedom of speech and assembly as it relates to disabled speakers. Part I provides a brief background on the freedom of speech and assembly in the United States. Part I also discusses the time, place, and manner restrictions, police-implemented restrictions, and permitting schemes that legislation implemented and the courts deemed either constitutional or struck down. Part II provides an overview of the Americans with Disabilities Act of 1990. It briefly outlines what disability is under the Americans with Disabilities Act and the protection it affords the disabled population. Part II also summarizes Universal Design and defines the seven principles of Universal Design. Finally, Part III briefly

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[5] *ADA Education and Reform Act of 2017*, H.R. 620, 115TH CONG. (2017-18).
[6] Cristina Marcos, *Capitol Police arrest disability rights protesters for disrupting hearing*, THE HILL (2018), retrieved from https://thehill.com/homenews/house/373721-capitol-police-arrest-disability-rights-protesters-for-disrupting-hearing.
[7] *ADA Education and Reform Act of 2017*, H.R. 620, 115TH CONG. (2017-18).

explores how the concept of Universal Design in regulations may may be implemented in legislation so as to ensure those with disabilities are afforded their full rights and benefits under the law, including First Amendment protections.

A search for legislation, case law, and articles pertaining to disability and the first amendment revealed a plethora of scholarship linking the two mainly in the realm of employment and housing discrimination. Other areas included web accessibility and students' rights[8]. However, the closest the author of this paper came to finding sources related to the First Amendment and disability outside of those areas was in regards to web accessibility. Even the American Civil Liberties Union, or ACLU, an organization committed to defending the constitutional rights of the public dedicates an entire section of their website to "Free Speech"[9]. However, no mention is made of how disability and Free Speech intertwine. Therefore, the focus of this piece will focus solely on these two areas of American life. What will not be explored in-depth are remedies or prophylactic measures as those will require further research and study.

I. First Amendment – Assembly and Protest

A. A brief background

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."[10]

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[8] The author conducted keyword searches on legal research databases and mainstream internet search engines.

[9] https://www.aclu.org/issues/free-speech

[10] U.S. Const. Amend. I.

While we may have a basic right to use public property, such as streets and parks, and that use includes assembly and public communication and discussion[11], there is nothing in the Constitution that gives people free reign over public property for the purposes of protesting and demonstrating[12]. There is a time and place for everything. Thus, governments may regulate speech and conduct on government-owned property which includes public forums.

Permitting and other public speech regulations were not commonplace in early American history. Large, public gatherings were "central to the democratic polities that emerged after the founding [of the United States of America]."[13] To illustrate this point, Tabatha Abu El-Haj describes a 1793 celebration in Boston, Massachusetts of a French Revolutionary battle which began with a gun salute to signal the beginning of a day of "public festivity and rejoicing", followed by a parade in the streets, and ending with "celebratory feasts" in local bars and other venues in the city, fireworks and a bonfire[14]. Such a public display may not be possible today due to regulations and permitting requirements that restrict when, where, and how a speaker exercises their right and how people assemble in public. El-Haj argues that the permit requirements "undercut the

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[11] *Hague v. Committee for Industrial Organization*, 307 US 496 (1939)
[12] Kevin Francis O'Neill, *Article: Disentangling the Law of Public Protest*, 45 LOY L. REV. 411 (1999).
[13] Tabatha Abu El-Haj, *Article: The Neglected Right of Assembly*, 56 UCLA L. REV. 543 (2009). at 554
[14] *Id.* at 556-558, (*citing*, Simon P. Newman, *Parades and the Politics of the Street: Festive Culture in the Early American Republ*ic 46, 65-66 (1997))

possibility of large, spontaneous gatherings in the streets"[15] which were common in early American history.

Until the 19th century, a person did not need to ask permission to assemble in public places, thus exercising their First Amendment right without barriers.[16] There weren't any concrete procedures one had to follow in order to take to the streets[17]. Generally, the only rule was one had to remain "peaceable"[18], in that he or she did not breach the peace or break any criminal laws, because doing so invited the police and law to act.[19]

By the 20th century, the freedom to assemble was essentially given its own asterisk. The right to peaceably assemble without prior permission transformed into a requirement, in some instances, to obtain a permit from the government, an obligation to abide by the terms of the permit, and remain peaceable[20]. Where at one time the state, and the police by extension, could only step in when the demonstrators "actually disturb the peace or create a public nuisance", now through a series of court cases and legislation, the state can "regulate[] all public assemblies"[21]. This author posits that permitting schemes, TPM restrictions, and the conditions they impose, undercut the

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[15] *Id.*at 548
[16] Tabatha Abu El-Haj, *Article: The Neglected Right of Assembly*, 56 UCLA L. REV. 543 (2009).
[17] *Id.* El-Haj discusses the First Amendment's Assembly clause by providing an historical context of the freedom and its evolution in the United States.
[18] *Id.* at 546 defines a peaceable demonstration as one that does not "actually disturb the peace or create a public nuisance
[19] *Id.* at 561-62
[20] *Id.* at 545
[21] *Id.* at 546.

possibility for many disabled people to participate in public assembly and debate by not providing the flexibility needed for reasonable accommodations, thereby violating their First Amendment rights.

B. Forums

Government-owned property falls within one of three categories: traditional public forum, designated public forum, and nonpublic forum[22]. A nonpublic forum is not seen as the proper place for "unrestrained communication".[23] The government has the most control over restrictions in nonpublic forums because here, the government is like the owner of private land. Consider the control a private homeowner has on his own property. In other words, locations such as a military base or a federal building, for example, is to the government what a house is to a layperson. It can essentially control what can and cannot be said or done on its premises.

In a designated public forum, the government "intentionally opens a nontraditional forum" up to the public for expression.[24] The government can limit speakers or subjects but, the restriction "must be applied evenhandedly to all in similarly situated parties."[25]

Finally, the Supreme Court defines a traditional public forum a place that has been held out, by tradition itself, as a place for the exchange of ideas.[26] This includes

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[22] O'Neill, *supra* at note 12.
[23] *Paulsen v. County of Nassau*, 925 F.2d 65.
[24] *Cornelius v. NAACP Leg. Def. Fund*, 473 U.S. 788 (1985).
[25] *Perry v Perry*, 460 U.S. 37.
[26] *Cornelius*, *supra* at note 24

streets, parks, and sidewalks.[27] These are locations that have been "devoted to assembly and debate"[28]. Says the Court in Schenck v. Pro Choice Network, "[S]peech in public areas is at its most protected on public sidewalks, a prototypical example of a traditional public forum"[29].

C. Time Place Manner Restrictions

Although the forum is traditionally public, this does not mean the its use is completely unregulated. Traditional public forums can only be regulated through time, place and manner (TPM) restrictions that are content-neutral.[30] The court will consider three things. First, the courts ask whether the restriction itself is content-neutral[31], meaning that the content of the speech has no bearing on the restriction. Here, the main question will be whether the government adopted a regulation specifically to block speech because of its message. In other words, why was the regulation passed? This is not a high bar. As long as there is some purpose that is not related to the content of the speech, then it is considered neutral.[32] The government must simply be able to justify the regulation "without reference to the content of the regulated speech".[33]

If a regulation passes the first prong, the court will then determine whether the restriction is narrowly tailored to serve, not just a government interest, but a significant

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[27] O'Neill, *supra*, at note 12
[28] *Id.* citing *Paulsen v. County of Nassau*, 925 F.2d 65
[29] *Schenck v. Pro Choice Network*, (1997) 519 U.S. 357
[30] *Paulsen*, *supra* at note 23.
[31] *Ward v. Rock Against Racism*, 491 U.S. 781
[32] *Id.*
[33] *Id.*

one.[34] The Court becomes more concerned with tailoring if the restraints are over-broad and thus effects all types of demonstrations, be they political (like a protest) or celebratory (like a parade). Otherwise, TPM is generally upheld.[35] The court in Ward makes clear that TPM restrictions do not have to be the *least* restrictive or intrusive means to meeting the government interest.[36] It just needs to be narrowly tailored enough so that the regulation "promotes a substantial government interest that would be achieved less effectively absent the regulation."[37] For example, in 2017 the City of Los Angeles amended Los Angeles Municipal Code 55.07 to include regulations and restrictions on the types of items protesters may possess during a protest, rally, or demonstration.[38] The amendment states the purpose is to ensure public safety – both of civilians and law enforcement at such events[39]. The amended ordinance cites the violence that erupted in cities such as Charlottesville, St. Louis, and Berkeley during protests and demonstrations[40].

The final prong considers whether the restriction leaves open "ample alternative channels" for expression of that content."[41] It is here that governments fail to consider the disabled population because "accessible" necessarily means handicap accessible. The Court's question, then, is whether or not the speaker is provided "a forum that is

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[34] *Id.*
[35] *Id.*
[36] *Id.*
[37] *Id.* at 798
[38] see note __
[39] http://clkrep.lacity.org/onlinedocs/2017/17-1127_ord_draft_10-20-2017.pdf
[40] http://clkrep.lacity.org/onlinedocs/2017/17-1127_ord_draft_10-20-2017.pdf
[41] *Ward*, *supra* at note 31

accessible and where the intended audience is expected to pass."[42] To answer that question, the Court will look at the intended audience and how much the location actually contributes to the message. For example, if the demonstration is against police brutality and the intended audience includes members of law enforcement, then a location nearest to, if not at, a precinct or some other place likely to reach that audience may be ideal. If the goal of the protest or demonstration is to change a law the speakers feel is harmful to a segment of the population, then a likely channel for the message would be where legislators can be found. If the speaker cannot reach her intended audience, then the restriction has not left open "ample alternative channels" and "'threatens' their 'ability to communicate effectively'"[43] and so is likely to be struck down.

This was the result when the court in *Dr. Martin Luther King, Jr. Movement v. City of Chicago* (The Movement) found a suggested alternative route was insufficient.[44] In that case, when The Movement was denied a second permit for a march through a White neighborhood due to the violent reactions of bystanders during the first march, the city proposed rerouting the group through an all-Black neighborhood[45]. Since the purpose of the march was to raise awareness and to protest the violence Blacks faced when they tried to live in, and even travel through, certain neighborhoods, the court ruled

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[42] *Students Against Apartheid Coalition v. O'Neil*, 660 F.Supp. 333 (W.D. Va. 1987).
[43] O'Neill, *supra* at note 12 (quoting *City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789)
[44] 419 F.Supp 667; *cf*, *Vlasak v. Superior Court of California*, (2003) 329 F.3d 683,691 (holding LAMC 55.07 did not violate the First Amendment rights of the petitioner because she had other means of presenting "less hazardous, but still effective, ways of communicating their message were available.")
[45] *Id.*

the new proposed route defeated the purpose of the march since it would not have reached the intended audience[46].

Similarly, in *Bay Area Peace Navy v. United States*, the court found the 75-yard security zone in a naval parade violated the first amendment[47]. In that case, the security zone acted much like a buffer zone, keeping protestors from sailing their boats past invited dignitaries in the viewing stands[48]. Instead, the Government suggested land protesting[49]. The court said the whole point in sailing out on the water was to get within view of the dignitaries – the intended audience[50]. The common theme in these cases is that the alternative that was suggested significantly weakened the speaker's ability to reach the intended audience. Thus, they each failed the third prong and were struck down as unconstitutional.

Some protestors are simply unable to participate in live demonstrations or protests. As Rhys J.[51] explained in an email interview, a major problem with "in-person" protests is ensuring the "many, tiny access needs" are met[52]. These needs may be due to physical barriers, such as narrow doors, or lack of sound systems, interpreters, etc. The author acknowledges that many of these barriers can be remedied or avoided by event

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[46] *Id.*
[47] 914 F.2d 1224
[48] *Id.*
[49] *Id.*
[50] *Id.*
[51] Rhys J. (last name withheld), email interview, September 29, 2018. The author collected input and experiences of disabled people who participated or attempted to participate in public demonstrations. The interviewees were asked to share via email their specific experience as a disabled activist.
[52] *Id.*

organizers. However, due to regulations on crowd size, equipment, permitting and possible fees implemented by municipalities, organizers may be unable or even unwilling to provide such access. Because of this, many disabled protestors have moved their platform online. It is important to note that activism and advocacy done mainly online through social media sites and blogs may not constitute the "adequate alternative channel" the courts required as the third prong. There is no guarantee that the intended audience will see or hear the message. They may not even know the content exists or the online platform itself is inaccessible to the speaker (e.g. color schemes that render the pages illegible to viewers with low or no sight). Thus, the third prong should fail.

1. Permits

Requiring permits or licensing fees in advance of a march or demonstration are restrictions on the use of public forms[53]. Though a settled prior restraint[54], the Court acknowledges that it is a necessary one in aiding the government's interest in controlling "competing uses" of public forums[55]. In considering licensure requirements' constitutionality, the court considers two things: 1) the amount of discretion given to licensing officials[56]; and 2) whether the fee creates a financial barrier to the applicant/speaker[57]. This author only discusses discretion.

a. Discretion

[53] O'Neill, *supra* at note 12 (citing Eric Neisser, 74 GEO. L.J. 257 (1985); David Goldberger, 62 TEX L. REV 403 (1983)).
[54] *Forsyth County v. Nationalist Movement*, 505 U.S. 123 (1992)
[55] *Id.*
[56] *Cox v. New Hampshire*, (1941) 312 U.S. 569 (holding the permit requirements in that case were constitutional because the government, in enacting the regulation, did not leave any room for discretion.)
[57] *Lakewood v. Plain Dealer*, 486 U.S. 750 (1988); *Forsyth*, 505 U.S. 123 (1992)

While content-based regulations receive a great deal of scrutiny in the courts, examination of TPM restrictions are more relaxed. For instance, a government may restrict an event's noise levels[58], number of participants, time of day restrictions, even the size and placements of signs[59]. Not all of the time, place, manner restrictions are imposed by legislation. Some are enacted by law enforcement officials. Kevin Francis O'Neil names two categories of discretion vested in law enforcement as it pertains to demonstrations: 1) police-imposed Time Place Manner restrictions; and 2) the police power to arrest or disperse demonstrators[60]. This paper is discusses the former type of discretion.

The City of Los Angeles, for example, expressly authorizes restrictions based on time, place, and manner for demonstrations and protests.[61] Permitting is controlled by the Human Relations Commission, part of the Los Angeles Police Department for demonstrations that may interrupt "the normal use of the public streets or sidewalks" or if it takes place at or in city-owned locations.[62] The Commission acknowledged that local

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[58] *Los Angeles Municipal Code* (LAMC) § 115.02(f) (limiting the "volume, tone, and intensity" of any sound coming from amplifying equipment, such as a speaker. Specifically, it mandates that the sound cannot be audible beyond 200 feet of the sound equipment.); *see also*, LAMC § 103.111(h)(11)

[59] *LAMC* § 55.07 (prohibiting any person, during a demonstration or any other form of public assembly, from possessing specific items. This includes any length of wood more than one-fourth inch thick and more than two inches in length).

[60] O'Neill, *supra* at note 12

[61] "The Board may condition the issuance of a permit by imposing reasonable requirements concerning the time, place, and manner of the Event, as necessary to protect the safety of all persons and property, provided that the conditions shall not unreasonably restrict the right of free speech." *LAMC* § 103.111(h)

[62] Human Relations Commission, *Your Rights to Demonstrate and Protest*, THE CITY OF LOS ANGELES, retrieved from http://assets.lapdonline.org/assets/pdf/demonstration.pdf,

law enforcement or other government officials may "place non-discriminatory and narrowly drawn 'time, place and manner' restrictions on the exercise of First Amendment rights."[63] One thing to note is that the City expressly provides an exception for mobility aids such as walkers and canes that may otherwise be a violation of the ordinance.[64]

Decisions on permit applications are made by the Los Angeles Police Department's Special Event Permit Unit, or SEPU, and are based on an evaluation of "the benefit" and "effect" of the event on participants and the surrounding area[65]. The LA Board of Police Commissioners will also consider other factors, including the applicant's "history and experience, and the history and experience of [its] organization, in putting on this event or other events."[66] A review of the LAPD's application and informational page did not reveal the rubric the SEPU uses in making these decisions. Therefore, it is vague and ambiguous.

Consequently, the Los Angeles Police Department has broad discretion. Courts have upheld discretionary police-imposed restrictions where the restrictions are necessary to ensure public safety.[67] In *Grider v. Abramson*, a KKK rally and an concurrent

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on 10/01/2018. This pamphlet provides the public with general information about their rights and limitations during demonstrations and protests.

[63] *Id.*

[64] "Nothing in this section shall prohibit an individual from carrying a cane or using a walker or other device necessary for providing mobility so that the person may participate in a public protest, demonstration, rally, picket line or public assembly." *LAMC* § 55.07(d)

[65] *Special Events Permit Unit and Permit Application Information,* http://www.lapdonline.org/search_results/content_basic_view/6521

[66] *Id.*

[67] *Grider v. Abramson*, No. 98-5282, 1999 WL 398010 (June 18, 1999), aff'g 994 F. Supp. 840 (W.D. Ky 1998).

opposition rally took place in Louisville, Kentucky[68]. Police set up buffer zones and metal detectors that all participants were required to go through[69]. They also kept the opposing crowds separate from each other[70]. Plaintiffs argued the restrictions violated the First Amendment's protection of free speech, association, and assembly[71]. However, the court said the "imposition upon their free association rights was trivial when juxtaposed against the compelling state interest in separating the two mutually antagonist and potentially hostile congregations."[72] Furthermore, separating the crowds, it said, "encouraged" speech because it lessened intimidation.[73]

The court in Grider called the restrictions, part of an emergency crowd control plan, trivial. However, it is safe to assume that participant who could not go through a metal detector, or be search with a wand would be barred from participating in the rally. If the participant was able to proceed pass the metal detectors, he or she would then be required to gather behind a buffer zone. These buffer zones may be set up in such a way that is inaccessible to those with mobility impairments, or the participants are so closely packed in that it may harm those with other visible or invisible disabilities. These two regulations exclude those members of the disabled population who are not able to do one or both. The case made no mention of any exceptions or reasonable accommodations made for people with disabilities. Therefore, regulations, such as those in Grider,

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[68] *Id.*
[69] *Id.*
[70] *Id.*
[71] *Id.*
[72] *Id.*
[73] *Id.*

effectively prevent people with disabilities from participating in the regulated event based solely on the fact that they are disabled. Since these regulations are implemented by the state or state actors, it flies in the face of the First Amendment which protects the populace against such infringements.

The SEPU in Los Angeles recommends that a map of the suggested event route should be provided and the mapped route must match the route that was described on the application[74]. However, it is unclear whether organizers are able to alter the approved route. Therefore, it is possible that, as the march/protest progresses, the route is not accessible for those with different disabilities. For instance, there may be a lack of curb cuts or steep inclines. Organizers may not be able to preemptively change the route before the march, or alter it as the march progresses. Those people affected by the barriers would be unable to participate in the demonstration, which again infringes on their constitutionally protected rights and freedoms.

In New York City, one only needs a permit from the New York City Department of Parks and Recreation if they intend to use amplified sound on public property, the event will include more than 20 people in a City park, or organizers want to march in a public street[75]. On its face, this regulation appears reasonable and nondiscriminatory. It is reasonable to control the noise in a metro area such as New York City. NYC Dept. of Parks and Recreation acknowledges that access for disabled people is "critical" and encourages applicants and permit holders to provide information about accessibility of

[74] http://assets.lapdonline.org/assets/pdf/special-event-app.pdf
[75] https://www1.nyc.gov/site/nypd/services/law-enforcement/permits-licenses-permits.page

the venue and other accommodations[76]. However, there is no mention of access and reasonable accommodations granted by the Parks Department if they exercise discretion on the location of processions that begin, end, or pass through a public park or sound levels. The regulation also appears to leave little flexibility. For instance, if an organizer needs a permit because of amplified sound, that part of the application may be restricted or denied without consideration of potential deaf or hard of hearing participants. While they may be able to physically attend the event, they may not be able to fully participate because he or she is not receiving the same information or message, again violating his or her First Amendment rights.

Permitting commissions also have the discretion to relegate participants to buffer zones. Buffer zones, or free speech zones, are one of the ways in which the rights of disabled people are violated, even if unwittingly. A buffer zone is an area set aside for protestors near the intended audience, but often out of earshot or line of site.[77] These are set up in the name of public safety.[78] However, these buffer zones often do not take into consideration accessibility issues for disabled people. For example, in *ACLU of Colo v.*

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[76] https://nyceventpermits.nyc.gov/Parks/

[77] *Protest Buffer Zone*, ACLU (nd) https://www.aclu.org/issues/free-speech/rights-protesters/protest-buffer-zone

[78] *Schenck v. Pro-Choice Network*, (1997) 519 U.S. 357 (ruling a "floating buffer zone" around an abortion clinic's clientele is unconstitutional, while a "fixed buffer zone" around its building is acceptable.); *see also*, *Concerned Jewish Youth v. McGuire*, (1980) 621 F. 2d 471 (upholding the use of a bullpen across the street from an embassy.); *International Society for Krishna Consciousness, Inc. v. City of NY*, (1980) 504 F.Supp 118 (upheld police-imposed TPM regulation barring demonstrators from being on the sidewalk immediately next to the U.N.'s visitors' gate but allowed them to be on the opposite side of the street.)

City[79], the city and county of Denver placed restrictions on demonstrators during the Democratic National Convention which relegated them to a "free speech zone" about two football fields away from the DNC location[80]. They erected concrete barriers that were "topped with chain link fences on three sides" with the fourth side, facing the convention center, "open to view"[81]. There is no mention in the case regarding entrance to the zones or whether those with disabilities were provided an alternative to the concrete enclosures.

The plaintiffs in *United for Peace & Justice v. City of New York*[82] (UFPJ) challenged the City's parade regulations after they were initially denied a permit for their protest on the cusp of the impending war in Iraq[83]. The NYPD denied the permit but, then eventually agreed to negotiate alternative routes[84]. However, those negotiations did not happen as the NYPD ultimately denied a marching permit altogether and instead approved a stationary demonstration[85]. UFPJ sought a preliminary injunction to march past the United Nations.

After applying a TPM analysis, the court was not convinced that UFPJ proved a likely success on the merits, a requirement for injunctive belief, because the restriction was content-neutral, narrowly tailored, and there were adequate alternatives for UFPJ to get their message out[86]. The NYPD offered an area "in close proximity to the United

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[79] *ACLU of Colo v. City*, (2008) 569 F. Supp. 2d 1151
[80] *Id.*
[81] El-Haj, supra at 551-552
[82] *United for Peace & Justice v. City of New York* 243 F. Supp. 2d 19 (2003)
[83] *Id.*
[84] *Id.*
[85] *Id.*
[86] *Id.* at 22-24

Nations."[87] Besides, the court said, a "[p]laintiff is not entitled 'access to every or even the best channels or locations for their expression.'"[88] The court, however, did not consider the conditions the protestors would be subjected to if they wanted to be a part of the demonstration[89]. First, the police set up metal pens into which participants were corralled, which were closed when full[90]. There were no reentries and portable toilets were not allowed[91]. The author describes some of the pens as being overcrowded and thus, causing participants to be "pushed up against the side of the metal barricades…"[92]. Second, the police erected a "maze of barricades" that served as a blockade to the many demonstrators[93].

These cases focused on the distance the restrictions placed between the protestors and the intended audience. However, case law is silent regarding the implications these restrictions have on those with disabilities. For example, bullpens and zones may be inaccessible due to a lack of curb cuts, steep inclines, or, like in ACLU of Colorado,

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[87] *Id.* at 29
[88] *United for Peace & Justice v. City of New York*, (2003) 243 F. Supp. 2d 19, 30 (quoting *Carew-Reid v. Metropolitan Transp. Auth.*, 903 F.2d 914, 919 (2d Cir. 1990)).
[89] Nick Suplina, *NOTE: Crowd Control: The Troubling Mix of First Amendment Law, Political Demonstrations, and Terrorism*, 73 GEO. WASH. L. REV. 395 (2006) (citing N.Y. Civil Liberties Union, Arresting Protest 23 (2003), https://www.nyclu.org/sites/default/files/nyclu_arresting_protest.pdf). The Author cites at least three different articles discussing the negotiations and conditions the day of the demonstration led by UFPJ. Surprisingly, a word search, in the one article available to view, for "disabled" or "disability" did not reveal any discussions on how such barriers affect the first amendment rights of the disabled. However, the NYCLU article does include quote a woman in wheelchair who recounted how the police broker her wheelchair. (NYCLU, p 17).
[90] *Id.*
[91] *Id.* at 416-17
[92] *Id.* at 417
[93] *Id.*

mandate participants be placed in a bullpen. The court in Grider would likely call the burden on speech trivial, and the court in Ward would state that the regulations do not need to be the lease restrictive. Nevertheless, the regulations are more than an inconvenience that incidentally burdens speech of people with disabilities. They instead, silence a population because of inaccessibility.

These types of controls pose a barrier to disabled participants who rely on mobility aids, other medical devices, or have invisible disabilities. Nicole S[94]. recalls attending a political debate at which she was "pinned up next to a garbage can." She arrived at the debate late due to nonphysical barriers such as poor signage and a lack of accessible parking. Experiences like the one mentioned lead Nicole to "lose all interest in … doing any further marches or protests in [her] area." Another disabled protester, Greg H.[95], discussed how his want of activism is sometimes overpowered by anxiety due in part to large numbers of people in a crowded space. Being enclosed in a bullpen with limited ingress and regress can pose health risks, either physical or mental health-related, to the disabled protestor. In both of these examples, the person had to make decisions to exercise their fundamental right to free speech or be inactive due to the lack of the accessibility or flexibility of the regulations.

Unfortunately, the courts generally do not see barriers to access as a violation of the First Amendment. Courts appear to be more concerned with content-neutrality. The Ward court insists that whatever barrier or hardship the restriction poses on the speaker,

[94] Nicole S. (last name withheld), email interview (September 23, 2018).
[95] Greg H. (last name withheld), email interview (September 23, 2018).

however, is purely "incidental" if the restriction is content-neutral[96]. What none of these cases consider is whether the proposed route or the alternative suggestion, or the restrictions on signage, noise level, or location designated by the deciding party, limit the ability of the disabled to participate, or take into consideration universal access. Consequently, the barriers and hardships imposed on a person with a disability through time, place, and manner regulations are contrary to the protections of the Americans with Disabilities Act of 1990.

II. Americans with Disabilities Act and Universal Design

A. Americans with Disabilities Act[97]

In 1990, President Bush signed the Americans with Disabilities Act (ADA) into law[98]. The ADA prohibits state and local governments from discriminating against people with disabilities in "places of public accommodation" and in "important areas of American life."[99] A person has a disability, under the American with Disabilities Act of 1990 (the ADA) if there is some type of physical or mental impairment that has an affect on major activities of daily living[100] or she is perceived to have such an impairment[101]. The Americans with Disability Act does not provide an itemization of what these

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[96] *Ward*, supra at 792
[97] 42 U.S. Code § 12102–65
[98] Title III, retrieved on 09/28/2018 from, https://www.ada.gov/regs2010/titleIII_2010/titleIII_2010_regulations.pdf
[99] *Id.* at page 2, retrieved on 09/28/2018 from, https://www.ada.gov/regs2010/titleIII_2010/titleIII_2010_regulations.pdf; see also, Title II § 35.130
[100] 42 U.S. Code § 12102(1).
[101] 42 U.S. Code § 12102(3).

impairments may be, but it defines major life activities. So, if there is a substantial limitation in the areas such as personal care, reading, communicating, mobility, or some bodily function, or the perception that such an impairment is present, for example, then the person is disabled.[102]

Title II of the ADA, codified at 28 CFR Part 35, defines a public entity as "[a]ny State or local government" or a "department, agency, … or other instrumentality of a state … or local government."[103] A public entity under this definition necessarily includes state legislatures and city councils that pass protest and demonstration regulations. It also includes police departments that are empowered to implement restrictions and make permitting decisions. A facility, as defined by the ADA and for the purposes of this paper, include sites, roads, [side]walks, etc.[104]

Adam Samaha explains how the UN General Assembly emphasizes the importance for "accessibility to the … social…and cultural environment" to be accessible so that people with disabilities may "fully enjoy all human rights and fundamental freedoms"[105]. Without a doubt, these rights and freedoms include those included in the First Amendment. Mary Cossley explains the "'main thrust of policy under a social

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[102] 42 U.S. Code § 12102(2), (3).
[103] Americans with Disabilities Act Title II Regulations § 35.104 Definitions (1).
[104] *Id.*. "Facility means all or any portion of buildings, structures, sites, …, roads, walks, passageways, parking lots, or other real […] property, including the site where the building, property, [or] structure, … is located."
[105] Adam M. Samaha, Article, *What good is the social model of disability?*. 74 U. CHI. L. REV. 1251 (2007). at 1252, *citing*, Convention on the Rights of Persons with Disabilities, *Preamble*, UNITED NATIONS (2006) http://www.un.org/disabilities/documents/convention/convoptprot-e.pdf.

model of disability is to get rid of disability by "rehabilitating" the social and physical structures and systems that serve to impose disadvantages on persons with impairments'"[106]. Time, place, and manner restrictions and the permitting scheme are example of such social structures that exacerbate disability, while participating in demonstrations and protests are a part of the social and cultural environment in the United States. This author suggests that removing barriers, whether they are social, physical, political, or otherwise, will not eradicate disability as Crossley suggests, but doing so will enhance the quality of life and public involvement of disabled people in society.

The ADA provides that a public entity cannot limit a disabled person's "enjoyment of any right … enjoyed by others receiving the aid, benefit, or service."[107] Furthermore, when choosing locations for a site or a facility, the public entity cannot choose one that would exclude disabled people or deny them the benefits of the site or location.[108] Finally, the public entity must make "reasonable modifications in policies, practices, or procedures …to avoid discrimination"[109] These are the reasonable accommodations required under the ADA. With this in mind, it stands to reason that a public entity, such as the different permitting commissions, must ensure that when regulating protests, they do not exclude people with disabilities.

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[106] *Id.* at 1268, *quoting*, Crossly, 74 NOTRE DAME L REV 621, 658 and 35 RUTGERS L J 861 at 877-78.
[107] Americans with Disabilities Act Title II Regulations § 35.130(b)(1)(iv)
[108] Americans with Disabilities Act Title II Regulations§ 35.130(b)(4)(i)
[109] Americans with Disabilities Act Title II Regulations§ 35.130(b)(7)(i)

If deafness affects hearing, blindness affects sight, or missing limbs affect mobility[110], for example, then that person's disability qualifies them for reasonable accommodations as mandated by the Americans with Disabilities Act. Public entities such as city legislatures and police departments have an obligation to modify their policies in order to reduce or eliminate discrimination against and exclusion of disabled people. When approving or choosing a location for the demonstrations these entities must take into consideration its ADA compliance either in its decision for the location or the accommodations it can offer. This includes modifying time, place, and manner restrictions on protesting and demonstrations so that individuals and organizations may use whatever equipment is necessary to ensure participants and speakers are accommodated. This may include relaxing restrictions on sound amplifying equipment, stages or use of buffer zones. The ADA states that people with disabilities, or PWDs, are a unique group of people that have been the subject of "purposeful unequal treatment" and lack political power due to beliefs of their ability that are not truly indicative of their ability"[111]. This author contends that to gain political power certainly includes the ability to exercise one's First Amendment rights.

B. Universal Design

Universal Design (UD) is a type of methodology that can be used to meet the needs of all people, regardless of disability or ability. It is based on seven principles that

[110] Americans with Disabilities Act Title II Regulations § 35.108(d)(2)(iii)(A)-(D)
[111] Adrienne Asch, *Critical Race Theory, Feminism, and Disability: Reflections on Social Justice and Personal Identity*. 62 OHIO ST. L.J. 391; ADA 42 USC 12111(a)(7) (1994).

would decrease or eliminate the need for adaptation or specialized design. They are: (1) equitable use; (2) flexibility in use; (3) simple and intuitive use; (4) perceptible information; (5) tolerance for error; (6) low physical effort; and (7) size and space for approach and use, such that there is enough room for "approach, reach, manipulation, and use regardless of user's body size, posture, or mobility"[112].

First, equitable use means that designs are "useful and marketable to people with diverse abilities."[113] In other words, the means of use of the structure should be the same for everyone or at least provide an equitable means of use for those who need it.[114] Designers should also refrain from "segregating or stigmatizing an users."[115] Next, flexibility in use encourages designs that "accommodates a wide range of individual preferences and abilities"[116] by, for example, giving the user a choice in how they use the structure or design. The third principle, simple and intuitive use, calls for the design to be as easy to understand as possible.[117] This includes avoiding pointlessly complex designs and consistency. Next, perceptible information means "the design communicates necessary information effectively to the user, regardless of ambient conditions or the user's sensory abilities." This may include being compatible with the different "techniques or devices used by people with sensory limitations."[118] The fifth principle

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[112] *Universal Design: What is it?*, (nd), U.S. GENERAL SERVICES ADMINISTRATION, https://www.section508.gov/blog/Universal-Design-What-is-it
[113] *The 7 Principles*, NATIONAL DISABILITY AUTHORITY (nd), retrieved from http://universaldesign.ie/What-is-Universal-Design/The-7-Principles/
[114] *Id.*
[115] *Id.*
[116] *Id.*
[117] *Id.*
[118] *Id.*

suggest that designs should allow for tolerance for error. Designs should "minimizes hazards and the adverse consequences of accidental or unintended actions." The next principle, low physical effort, calls for designs that allow the user to use as little effort as possible, or at the very least no more than he or she would under normal circumstances. Finally, the design should consider a standing or seated user's line of site by avoiding obstructions where possible and allowing for enough space for the use of mobility aids.

Examples of UD include curb cuts, automatic doors that do not require a push button, and step-less entry ways. It may also include scrolling marquees and sound systems for messages and announcements or a product that is simply-designed. The purpose is to benefit as many as possible and avoid the need to retrofit or modify the design at a later time.

Some protest groups like ADAPT coordinate their own in-person demonstrations. ADAPT is a disability activist group who stage demonstrations around the nation[119]. Members and organizers understand that the locations they need to appear may not be accessible and so, they make their own preparations. ADAPT community member Ericka J. explains, "If we are aware of an access need, we try to accommodate that any which way we can. We travel with interpreters, equipment like wheelchairs and hoyers [lifts]…".[120]

But, there is only so much an organizer can do to prepare for disabled participants without the risk of excluding some disabilities in their effort to include disabilities while

[119] *Free Our People – ADAPT* (2018), ADAPT, retrieved from http://adapt.org
[120] Ericka J. (last name withheld), email interview October 3, 2018.

also adhering to permitting requirements and other regulations. The need for organizers to anticipate access needs and subsequently provide their own accommodations shifts the burden from the government to those who need the modifications. It unduly burdens the disabled speaker.

III. Universally Designed Legislation

Legislation that is "universally designed" may eliminate the risk of burdening disabled speakers and protest organizers by incorporating into the statutes language that is either inclusive or provides exceptions for the disabled population. This means the types of restrictions and regulations in city codes should consider the seven principles of UD discussed above. They should be equitable, flexible, and simple. The regulations and restrictions must consider how all the people who are governed by them will be affected. For example, LACM 55.07 provides an exception for mobility aides that would otherwise be banned from protests because of the materials used. Ideally, these statutes would be written in such a way that there are few reasons to need to modify it in the future. It would be flexible, equitable, and simple from its inception.

Regulations must include perceptible information and allow for tolerance of error. This may be as simple as the language used to write the regulation and how it is disseminated to the public. Because protest legislation is not a physical structure like a building, the minimization of hazards has to take into account the potential dangers to participants. Again, this would include flexibility for the participants and organizers in choosing or relocating their event, or not requiring special permits for sound amplification or platforms. For example, an organizer or other participant may need to

carry a loud speaker or signs in order to transmit instructions to the crowd or announce physical barriers as they appear.

Once implemented, the legislation should require low physical effort on the part of the speaker. This again speaks to the pre-event permitting and the discretion of the permitting authority to reroute marches or deny locations. If an organizer is required to give a mapped route and description of the planned route in the application process, then in rerouting, the permitting authority needs to take into account the barriers to accessibility. The new route or location should be as or more accessible than the previously selected one while still giving the speaker access to the intended audience. This needs to be a requirement written into regulations.

The regulations should account for size and space for approach and use. In this way, the regulations and restrictions are, for example, written in a less complex manner and so is easily comprehendible. The restrictions do not inhibit a participant's involvement by restricting the use of technology or other aids that would make the message of the speaker hard to hear, see, or reach.

In 2017, the Census Bureau's American Community Survey (ACS) reported that nearly 41 million people in the United States have a disability[121]. Since the ACS only reported "uninstitutionalized" disabled people, this number is likely much higher[122]. As noted by Ann Coulter, there are no asterisks in the First Amendment. However, for the

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[121] *American Community Survey 1-Year Estimates* (2018), U.S. CENSUS BUREAU, 2017, https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ACS_15_1YR_S1810&prodType=table

[122] *Id.*

over 12% of the population that is disabled, the time, place and manner restrictions that do not account for the disabled population place a bold asterisk on the First Amendment, that is, the government must not violate a person's freedom of speech, unless that person is disabled[123]. If law and policy makers consider these seven principles, it is likely that the 12% of the population that are identified as disabled may be better able to exercise their freedoms of speech and assembly, as opposed to relegated to platforms where they are less able to spread their message or consume the message of others.

[123] Bruce Darling, *Ann Coulter, the Constitution and Disability Rights*, DISABILITY INTEGRATION ACT (nd). http://www.disabilityintegrationact.org/ann-coulter-the-constitution-and-disability-rights/. Darling is an ADAPT community member and writer, asserts there is not asterisk that says "unless you're disabled."