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Protest, Policing, and The Petition Clause: A Review Of Ronald Krotoszynski's Reclaiming The Petition Clause

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PROTEST, POLICING, AND THE PETITION CLAUSE: A REVIEW
OF RONALD KROTOSZYNSKI'S *RECLAIMING THE PETITION
CLAUSE*

*Christina E. Wells**

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I. SECURITY, DIGNITY, AND FREE EXPRESSION

Although freedom of expression is accepted as foundational to most liberal democracies, the United States is widely considered a “recalcitrant outlier” regarding the considerable strength of First Amendment protections provided under the U.S. Constitution.¹ With regard to protests in particular, the United States Supreme Court’s free speech doctrine forces government officials to provide sufficient space for protest activities and bars censorship of their messages.² In fact, there is a long history of collective dissent in the United States, ranging from the anti-slavery, women’s suffrage, and civil rights movements to the modern “Tea Party” and “Occupy” movements. Most recently, the protests arising out of the deaths of Michael Brown and Eric Garner at the hands of the police exemplify this history.³ Arguably, then, the Court’s strong protection of protestors has been a success.

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1. Frederick Schauer, *The Exceptional First Amendment*, in AMERICAN EXCEPTIONALISM AND HUMAN RIGHTS 29, 30 (Michael Ignatieff ed., 2005).

2. Forsyth Cnty. v. Nationalist Movement, 505 U.S. 123, 134–35 (1992); Texas v. Johnson, 491 U.S. 397, 414 (1989); Brandenburg v. Ohio, 395 U.S. 444, 447–48 (1969); Gregory v. City of Chicago, 394 U.S. 111, 124–25 (1969) (Black, J., concurring); Cox v. Louisiana, 379 U.S. 536, 552 (1965); Edwards v. South Carolina, 372 U.S. 229, 237–38 (1963); Terminiello v. City of Chicago, 337 U.S. 1, 28–29 (1949).

3. See, e.g., Ben Kesling, *In St. Louis, Protesters Plan an Orderly Response to Indictment News: Organizers Encourage Crowds to Focus on Constructive Issues, Not Let Violence Overshadow Demands*, WALL ST. J. (Nov. 16, 2014, 5:52 PM), <http://www.wsj.com/articles/in-st-louis-protesters-plan-an-orderly-response-to-indictment-news-1416178350>; Daniel Politi, *Tens of Thousands Take to the Streets to Protest Police Shootings of Unarmed Black Men*, SLATE (Dec. 14, 2014, 11:13 AM),

Despite this long tradition of collective dissent, Professor Krotoszynski's book, *Reclaiming the Petition Clause: Seditious Libel, "Offensive" Protest, and the Right to Petition the Government for Redress of Grievances*, reveals that peaceful protestors in the United States are increasingly subjected to restrictive government regulations.⁴ Such regulations include using cages to contain protestors, forming massive walls of police between protestors and others, requiring protestors to use isolated protest zones, and using military tactics to break up protests. Courts have routinely upheld these restrictions, effectively deferring to officials' claims that security concerns justified their actions.⁵

Given the First Amendment's arguable protection of protestors, what is the source of such judicial deference? Krotoszynski rightly locates it in the Supreme Court's jurisprudence regarding content-neutral time, place, and manner restrictions of speech.⁶ Earlier Supreme Court decisions protecting protestors involved government regulations aimed at the allegedly dangerous content of certain protests.⁷ But the Supreme Court's jurisprudence is now too hostile toward content-based regulations for them to be a viable means of regulating protestors.⁸ That same jurisprudence is far more forgiving of content-neutral time, place, and manner regulations as long as they do not completely suppress speech. Thus, government officials need only create, as they did in the scenarios discussed in Krotoszynski's book, a broad regulation of *all* protestors that appears to leave some means of protest available (even if only in a cage). After that, a public safety or national security rationale often satisfies a court. *Reclaiming the Petition Clause* thus concludes that the invocation of security interests is often pretextual or unjustified and serves as a "cellophane wrapper" insulating government officials from criticism.⁹

Krotoszynski also recognizes that there are potential justifications for such an approach, especially when one looks to other countries, which recognize a stronger dignity interest in individual protection from certain speech.¹⁰ For example, Article I of the German Constitution recognizes that "Human dignity shall be inviolable. To respect and protect it shall be the

http://www.slate.com/blogs/the_slatest/2014/12/14/tens_of_thousands_protest_police_shootings_of_unarmed_black_men.html.

4. See generally RONALD J. KROTOSZYNSKI, JR., *RECLAIMING THE PETITION CLAUSE: SEDITIOUS LIBEL, "OFFENSIVE" PROTEST, AND THE RIGHT TO PETITION THE GOVERNMENT FOR A REDRESS OF GRIEVANCES* (2012).

5. *Id.* at 31–50.

6. *Id.* at 23–31.

7. See, e.g., *Dennis v. United States*, 341 U.S. 494 (1951).

8. See, e.g., *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992) (noting that "[c]ontent-based regulations [of speech] are presumptively invalid" and subject to strict scrutiny).

9. KROTOSZYNSKI, *supra* note 4, at 55–70.

10. *Id.* at 70–78.

duty of all state authority.”¹¹ Even government officials claim this dignity interest. Thus, the German Federal Constitutional Court found that it justified a ban on distributions of humiliating portrayals of an official as a sex-crazed animal.¹² Such a ruling stands in stark contrast to U.S. law, which holds that public officials must endure “‘vehement, caustic, and sometimes unpleasantly sharp attacks’” in order to protect robust political debate.¹³

In addition, Krotoszynski notes that because Germany is a “militant democracy,” the German constitution does not protect speech “aimed at the destruction of democratic self-governance.”¹⁴ Thus, when otherwise protected political speech, such as ridiculing the flag or other important national symbols, potentially undermines democratic order, the Constitutional Court intimates it can be regulated.¹⁵ As one commentator has explained Germany’s approach,

The attack on the symbol—the flag—is understood to include an attack on the symbolized—the free democratic basic order. In this situation, the concept of militant democracy requires the state to defend itself. Thus, the state has an interest—if not a duty—to outlaw flag desecration. To formulate this idea differently, the German flag case presupposes that the state can protect itself against seditious libel [i.e., the crime of criticizing the government].¹⁶

As Krotoszynski notes, neither the concepts of “militant democracy” nor individual dignity can serve as an official basis of the U.S. court decisions.¹⁷ These concepts find little support in the U.S. law of free

11. GRUNDGESETZ FÜR DIE BUNDESREPUBLIK DEUTSCHLAND [GRUNDGESETZ] [GG] [BASIC LAW], May 23, 1949, BGBl. I, art. 1 (Ger.). See also DONALD P. KOMMERS, THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY 32 (2d ed. 1997) (“The principle of human dignity, as the Constitutional Court has repeatedly emphasized, is the highest value of the Basic Law, the ultimate basis of the constitutional order . . .”).

12. Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] June 3, 1987, 75 ENTSCHIEDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 369 (Ger.) [Strauss Caricature Case].

13. *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 51 (1988) (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964)).

14. KROTOSZYNSKI, *supra* note 4, at 71.

15. See, e.g., Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] March 7, 1990, 81 ENTSCHIEDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 278 (Ger.) [Flag Desecration Case].

16. Ute Krüdewagen, *Political Symbols in Two Constitutional Orders: The Flag Desecration Decisions of the United States Supreme Court and the German Federal Constitutional Court*, 19 ARIZ. J. INT’L & COMP. L. 679, 709 (2002).

17. KROTOSZYNSKI, *supra* note 4, at 72.

expression.¹⁸ Furthermore, in *New York Times v. Sullivan*, the Supreme Court, after surveying the U.S.'s somewhat ugly history with seditious libel, declared it to be flatly inconsistent with the First Amendment.¹⁹ Thus, the Supreme Court noted that "concern for the dignity and reputation" of government officials, even though accompanied by "'half-truths' and 'misinformation,'" could not justify regulating speech "critical of the official conduct of public officials."²⁰ Since *Sullivan*, the Court has been antagonistic toward attempts to prosecute seditious libel, especially when it involves content-based regulations of political speech.²¹ But *Reclaiming the Petition Clause*'s most significant insight is that judicial deference to content-neutral regulations grounded in ephemeral security concerns effectively revives the defunct crime of seditious libel. Although modern restrictions on protestors may not be as "outrageous" as obvious seditious libel prosecutions, their motivation is the same—"avoidance of public embarrassment . . . [as] are the effects of the restrictions on the marketplace of ideas. Democracy suffers whenever government succeeds in banishing its critics from public view, regardless of the precise means deployed to achieve this purpose."²²

The Supreme Court's recent decision in *Wood v. Moss*²³ supports Krotoszynski's insight. In *Moss*, the Court concluded that the doctrine of qualified immunity barred a damages lawsuit against Secret Service agents who admittedly treated pro-Bush and anti-Bush demonstrators differently. According to the Court, the anti-Bush protestors could prevail in their lawsuit only if there existed "'no objectively reasonable security rationale' for [the agents'] conduct, [and the agents] acted solely to inhibit the expression of disfavored views."²⁴ The anti-Bush protestors had alleged a pattern of ill treatment by the Secret Service over time, which the lower court believed showed sufficient potential viewpoint discrimination to overcome a motion to dismiss the complaint and allow the issue to go to trial.²⁵ The Supreme Court, however, did not believe that the agents' actions were an attempt to suppress the protestors' viewpoints as opposed

18. See generally *Boos v. Barry*, 485 U.S. 312 (1988) (rejecting the dignity interest of diplomatic officials as an interest justifying the regulation of expression).

19. *New York Times Co. v. Sullivan*, 376 U.S. 254, 276 (1964). For a discussion of the history of seditious libel in the United States, see Christina E. Wells, *Lies, Honor, and the Government's Good Name: Seditious Libel and the Stolen Valor Act*, 59 UCLA L. REV. DISC. 136, 146–151 (2012).

20. *Sullivan*, 376 U.S. at 268, 272–73 (citing *Pennekamp v. Florida*, 328 U.S. 331, 342, 343, n.5, 345 (1946); *Bridges v. California*, 314 U.S. 252 (1941)).

21. KROTOSZYNSKI, *supra* note 4, at 39–41.

22. *Id.* at 78.

23. 134 S. Ct. 2056 (2014).

24. *Id.* at 2069.

25. *Moss v. U.S. Secret Serv.*, 675 F.3d 1213, 1222–23 (9th Cir. 2012), *rev'd sub nom.* *Wood v. Moss*, 134 S. Ct. 2056.

to an attempt to protect the “Nation’s ‘valid, even . . . overwhelming, interest in protecting the safety of its Chief Executive.’”²⁶ Accordingly, qualified immunity protected the agents from a lawsuit altogether. After *Moss*, national security is paramount, trumping all but the most unjustified attempts to censor speech. Of course, with security as a reason to regulate, one must question whether officials are ever unjustified in suppressing protests. Security may thus continue to serve as a “cellophane wrapper,” effectively allowing restriction of protestors critical of the government.

II. REVIVING THE PETITION CLAUSE

Because the Supreme Court’s routine free speech jurisprudence seems to have failed protestors, *Reclaiming the Petition Clause* proposes other means to protect them from censorship. Specifically, the book locates protestors’ rights partly in the Petition Clause of the First Amendment to the U.S. Constitution, which protects “the right of the people . . . to petition the Government for a redress of grievances.”²⁷ The right to petition government officials directly was once considered foundational and a precursor to the rights of speech and assembly in both the U.S. and England,²⁸ from which much U.S. legal tradition derives. As a method of protecting citizens’ direct access to and engagement with government officials, the right to petition was “central to the success of the project of democratic self-government.”²⁹ Krotoszynski ably demonstrates that early forms of petitioning had distinct overtones of collective action, involving such activities as mass meetings, protests and distribution of circulars to rally the public to support particular important causes.³⁰ This historical entanglement of the right to protest and the right to petition thus makes Krotoszynski’s linkage of them logical. Unfortunately, the U.S. Supreme Court has shown little inclination to recognize the right to petition as separate from the broader right to free expression.³¹ As a result, protestors are not treated as presenting grievances to government officials but rather as engaging in generic expressive activity subject to the somewhat tepid time, place, and manner regulations described above.

Krotoszynski argues for reviving the petition right and using it to protect “petitioning” protest activity, which he defines as collective expressive action with the object of changing a policy or practice of government officials and which also engenders a wide consideration of the

26. *Wood*, 134 S. Ct. at 2067 (quoting *Watts v. United States*, 394 U.S. 705, 707 (1969)).

27. U.S. CONST. amend. I.

28. KROTOSZYNSKI, *supra* note 4, at 81–135.

29. *Id.* at 153.

30. *Id.* at 90.

31. *Id.* at 157–62.

policy question within the community.³² Krotoszynski argues that petitioning protestors fundamentally have the right to be free from seditious libel prosecutions as well as an affirmative right to be heard.³³ To ensure these fundamental aspects of the petitioning right, he argues for a judicial presumption “in favor of [petitioning protestors’] access to government officials . . . at least from the vantage point of traditional public forums.”³⁴ Although he notes that “government officials should have some discretion to structure how this access will occur,” Krotoszynski posits that petitioning protests should receive consideration for their preferred means of expression.³⁵ Finally, Krotoszynski argues judges should not allow government officials to use illusory or unproven security concerns to suppress protests simply because protestors are critical of government policies.³⁶ He does not discard security as an important interest; rather, he notes that more careful judicial scrutiny of such justifications is in order.³⁷

III. BEYOND JUDICIAL REVIEW OF PROTESTS

Krotoszynski’s book is an important contribution to the emerging literature on protests. His focus on judges’ failure to rein in excessive government restrictions on protestors and his proposal to solve the problem make sense given that strong judicial review largely shapes the United States’ system of freedom of expression (and contributes to its free speech exceptionalism).³⁸ Certainly, judicial deference to current governmental abuse of time, place, and manner regulations is problematic. It signals to officials that they need merely provide minimal rationales for their actions and allows surreptitious censorship. Ultimately, weak judicial review undermines core concepts underlying the Supreme Court’s free speech jurisprudence, such as its antipathy toward seditious libel.

Despite the book’s insights, it only partly identifies and resolves the problems associated with regulating protests. Weak judicial review of time, place, and manner requirements is not the sole problem affecting protestors in the United States; nor will strengthening such review solve the problems Krotoszynski identifies. Rather, a variety of governmental tactics involving protestors—tactics that are used worldwide and not exceptional to the United States—elude effective judicial review. Until we come to grips with these types of restrictions on protestors, focusing only on strengthening

32. *Id.* at 164–66.

33. *Id.* at 166.

34. *Id.*

35. *Id.* at 166–67.

36. *Id.* at 169–70.

37. *Id.* at 172–73.

38. Schauer, *supra* note 1, at 50.

judicial review within the Court's existing free speech framework is merely a temporary and unduly narrow fix.

For example, aggressive police responses have a significant effect on protestors regardless of available judicial review. A report authored by International Network of Civil Liberties Organizations recently surveyed government responses to mass protests in nine countries, including the United States, Israel, Canada, Argentina, Egypt, Hungary, Kenya, South Africa, and the United Kingdom. The report identified similarities across governmental responses, which included widespread use of excessive force against peaceful demonstrators, unsupported claims that the police response was required to quell violence or incitement to violence, and mass arrests of peaceful protestors.³⁹ Similar research suggests the use of increasingly aggressive or military-style tactics by police in the United States in response to generally peaceful protests.⁴⁰ Such tactics chill speech by instilling fear of bodily harm in protestors and by the "intensive violations of personal integrity that [excessive force] necessarily involves."⁴¹

Even in the United States, where protestors can challenge illegal arrests, courts often have few opportunities to assess whether protestors' *free speech* rights are violated. In the United States, police often arrest protestors not for their expression but for other minor crimes, such as jaywalking or trespass.⁴² Such arrests allow police to control protestors without actually arresting them for their expressive activity. Courts analyze protestors' challenges to police action in these cases almost exclusively under the Fourth Amendment to the U.S. Constitution. Hence, judges seek to determine whether police had "probable cause" to arrest a protestor or whether the police used excessive force in effectuating an arrest. Both standards are deferential and favor the government.⁴³ They also rarely invoke questions regarding the burden that the arrest poses on the protestors' free expression rights. Accordingly, across jurisdictions, police,

39. See generally INTERNATIONAL NETWORK OF CIVIL LIBERTIES ORGANIZATIONS, "TAKE BACK THE STREETS": REPRESSION AND CRIMINALIZATION OF PROTEST AROUND THE WORLD (2013), available at https://www.aclu.org/files/assets/global_protest_suppression_report_incl.pdf. Amnesty International also recently issued a report documenting similar abuse in Brazil during protests leading up to the World Cup. See AMNESTY INTERNATIONAL, "THEY USE A STRATEGY OF FEAR": PROTECTING THE RIGHT TO PROTEST IN BRAZIL (2014), available at <https://www.amnesty.org/en/documents/AMR19/005/2014/en/>.

40. See Alicia A. D'Addario, *Policing Protest: Protecting Dissent and Preventing Violence Through First and Fourth Amendment Law*, 31 N.Y.U. REV. L. & SOC. CHANGE 97, 97–98 (2006); John Noakes & Patrick F. Gillham, *Aspects of the 'New Penology' in the Police Response to Major Political Protests in the United States, 1999–2000*, in THE POLICING OF TRANSNATIONAL PROTEST 97, 108 (Donnatella Della Porta et al. eds., 2006); Jerome H. Skolnick, *Democratic Policing Confronts Terror and Protest*, 33 SYRACUSE J. INT'L L. & COM. 191, 204–09 (2005).

41. D'Addario, *supra* note 40, at 110.

42. See Noakes & Gillham, *supra* note 40, at 113.

43. See D'Addario, *supra* note 40, at 114–16.

rather than judges, are primarily responsible for decisions to quell peaceful protest.

Furthermore, in many situations protestors may have no opportunity to challenge their arrests at all. In situations involving arrests of protestors for disorderly conduct or similar protest-related crimes, prosecutors often dismiss criminal charges against protestors soon after their arrest. Such dismissals may leave protestors with little incentive to bring time-consuming and burdensome lawsuits challenging the free speech violations that occurred as a result of policing tactics. Dismissals may have their own chilling effect if they are conditioned on the protestor's good behavior for a certain period of time.⁴⁴ The requirement that a protestor remain free of arrest for several months in order to prevent reinstatement of charges is likely to deter them from engaging in protest activity, where they may be arrested again (even if pretextually). Just as surely as a prosecution for seditious libel, these tactics chill free expression. But Krotoszynski's proposal does not clearly remedy either of these situations since it focuses primarily on rectifying the Supreme Court's approach to review of content-neutral time, place, and manner restrictions.

Other police activities regarding protestors can have similarly chilling effects. For example, officials in various countries, including the United States, use surveillance to target and counter peaceful protestors.⁴⁵ Accordingly, law enforcement officials thwart protests by engaging in online surveillance to gather information about the protestors, using it to facilitate pretextual arrests, and participating in coercive information gathering through individual interrogations of protestors.⁴⁶ In addition, many journalists covering protests have been harassed or arrested.⁴⁷ Under existing law, surveillance rarely violates protestors' First Amendment rights.⁴⁸ And the legal issues surrounding arrests of journalists are only now being clarified in the United States.⁴⁹ Surveillance of protestors and arrests

44. Victoria Cavaliere, *Charges Dismissed in Last Cases from Occupy Wall Street March*, REUTERS (Oct. 8, 2013, 5:42 PM), <http://www.reuters.com/article/2013/10/08/us-usa-occupy-cases-idUSBRE99713H20131008> (noting that over half of the 2,600 people arrested agreed to dismissal conditioned on their not being arrested again within six months).

45. See Sarah Joseph, *Social Media, Political Change, and Human Rights*, 35 B.C. INT'L & COMP. L. REV. 145, 167–68 (2012) (discussing surveillance of Middle East uprisings in 2011).

46. See Noakes & Gillham, *supra* note 40, at 110–11; Joseph Goldstein, *Police Warrant Squads Were Used to Monitor Wall Street Protestors, Suspects Say*, N.Y. TIMES, May 3, 2012, at A29.

47. See, e.g., NEW YORK CIVIL LIBERTIES UNION, FREE SPEECH THREAT ASSESSMENT # 1: POLICING PROTEST IN NEW YORK CITY 1–2 (2012), available at http://www.nyclu.org/files/free_speech_threat_assessment_report_080712_part1.pdf.

48. See *Laird v. Tatum*, 408 U.S. 1, 11–14 (1972).

49. Compare *ACLU of Ill. v. Alvarez*, 679 F.3d 583 (7th Cir. 2012) (striking down Illinois wiretapping law as applied to person taking photos of police activity in public place), and *Glik v. Cunniffe*, 655 F.3d 78 (1st Cir. 2011) (rejecting police officers' qualified immunity defense to a civil rights lawsuit arising from the officers' arrest of a citizen attempting to film their actions in a public

of journalists are likely to chill protest activity or at the very least manipulate the public's access to protestors' messages. Nevertheless, Krotoszynski's proposal, which focuses primarily on judicial review of direct restrictions to protestors' rights, does not clearly remedy these problems.

The protests erupting in Ferguson, Missouri, in August 2014 after the police shooting of Michael Brown exemplify the shortcomings of Krotoszynski's proposal. Although the protests were initially largely peaceful,⁵⁰ they were met with heavy-handed police tactics, ranging from a demand that protestors demonstrate in a "respectful manner" to use of tear gas, rubber bullets and snipers.⁵¹ The ACLU eventually won a restraining order against the County of St. Louis, but it did not cover any of these tactics. Rather, it prohibited implementation of an identifiable policy barring protestors from congregating for more than five seconds in any one place.⁵² Such a policy is the kind of official action to which judicial review is suited but the restraining order did not (and likely could not have) prevented the tactics described above because they are part of the current landscape of discretionary policing. Similarly, numerous reports of arrested journalists have surfaced during the Ferguson protests,⁵³ despite the existence of an ACLU lawsuit and eventual signed agreement with the County of St. Louis noting that "the media and members of the public have a right to record public events without abridgement unless it obstructs the activity or threatens the safety of others, or physically interferes with the ability of law enforcement officers to perform their duties."⁵⁴ Again, Professor Krotoszynski's proposal for judicial review, while workable in the context of direct restrictions such as the five-second policy, does not clearly help in the murky area of information gathering.

park), with *Kelly v. Borough of Carlisle*, 622 F.3d 248 (3d Cir. 2010) (finding police officers had qualified immunity to civil suit brought by individual arrested for recording a traffic stop).

50. For a brief description of the timeline and evolution of the Ferguson protests, see *Abdullah v. County of St. Louis, Mo.*, No. 4:14CV1436 CDP, 2014 WL 4979314, at *1-4 (E.D. Mo. Oct. 6, 2014) (order granting preliminary injunction).

51. Dahlia Lithwick & Daria Roithmayr, *Ferguson's Constitutional Crisis: On the Streets of Missouri, It's Not Just the First Amendment That's Being Violated*, SLATE (Aug. 20, 2014, 7:45 PM), http://www.slate.com/articles/news_and_politics/jurisprudence/2014/08/ferguson_s_constitutional_crisis_first_amendment_violations_are_only_part.html; John Nichols, *The Constitutional Crisis in Ferguson, Missouri*, THE NATION (Aug. 14, 2014, 2:09 PM), <http://www.thenation.com/blog/181145/police-overreaction-has-become-constitutional-crisis-ferguson-missouri#>.

52. *Abdullah*, 2014 WL 4979314, at *10.

53. Kurtis Lee, *Journalist Trey Yingst Arrested During Ferguson, Mo., Protests*, L.A. TIMES (Nov. 23, 2014, 4:48 PM), <http://www.latimes.com/nation/nationnow/la-na-nn-ferguson-reporter-arrest-20141123-story.html>.

54. *Hussein v. Cnty. of St. Louis*, No. 4:14-CV-1410-JAR (E.D. Mo. Aug. 15, 2014) (agreement), available at http://www.aclu-mo.org/download_file/view_inline/1263/535/.

IV. CONCLUSION

None of this is meant to denigrate the value of Professor Krotoszynski's insights or his proposal. It is extraordinarily important to have a strong system of judicial review if a system of free expression is to thrive.⁵⁵ *Reclaiming the Petition Clause* also begins an important discussion regarding the role of seditious libel in regulating protestors and its relationship to judicial review. Worldwide trends, however, suggest that the locus of control regarding regulation of protestors has shifted from judges to law enforcement officials. Although judicial deference within the current structure of free speech doctrine may account for some of this shift in the United States, other factors beyond judicial doctrine are also at work. United States free speech law, and specifically our approach to judicial review, must explicitly account for such things as surveillance, pretextual arrests, arrests of journalists, and other tactics that interfere with protestors' expression. Simply tweaking the level of review associated with the Court's current standards will solve only part of the problem.

55. Schauer, *supra* note 1, at 50 (noting that protection of free expression "is likely to be stronger, controlling for all other variables, in those countries in which the traditions of judicial review and judicial supremacy are longer and stronger").