Freedom of speech and the ‘Occupy’ protests: ‘narrowly tailored to further significant government interests’

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The First Amendment reflects a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open. That is because speech concerning public affairs is more than self-expression; it is the essence of self-government. Accordingly, speech on public issues occupies the highest rung of the hierarchy of First Amendment values, and is entitled to special protection.¹

This note examines the spate of recent court decisions concerning efforts by Occupy protestors in various cities of the USA to prevent the removal (or restriction) of their protests.² In general, though by no means in all cases, the courts, applying existing freedom of speech principles, have upheld the protestors’ right to protest to some extent but have placed narrow limits around the manner in which this right may be exercised. Following a short introduction (Part 1), Part 2 discusses the approach which has been taken by the courts in recent cases.³ The approach adopted contrasts sharply with the Supreme Court’s recent striking down of the limits on corporate expenditure in relation to elections (in Citizens United)⁴ and Part 3 goes on to discuss the law in relation to public protest in this broader context.

1. Freedom of speech and the right to public protest

The First Amendment to the Constitution provides that

Congress shall make no law ... 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.⁵

The Supreme Court applied this to the States holding that

... freedom of speech and of the press which are protected by the First Amendment from abridgment by Congress are among the fundamental personal rights and ‘liberties’ protected by the due process clause of the Fourteenth Amendment from impairment by the States.⁶

However, it was not until 1939 that the Supreme Court began to develop the right to freedom of speech in a meaningful way.⁷

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¹ Snyder v. Phelps, 131 S. Ct. 1207, 1215 (2011) (internal citations and punctuation omitted).
³ A listing of the cases considered is set out at annex 1 (although no doubt this is not fully comprehensive).
⁴ 558 U.S. 50 (2010).
The Court has held that the First Amendment protects the right to public protest and this has now evolved in a rather detailed manner. In addition to protecting 'literal' speech, the First Amendment protects some expressive conduct as long as it is 'sufficiently imbued with elements of communication'. However, in Clark v Community for Creative Non-Violence, the Supreme Court explained that

Expression, whether oral or written or symbolized by conduct, is subject to reasonable time, place, or manner restrictions. We have often noted that restrictions of this kind are valid, provided that they are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information.

The manner in which the lower courts interpreted these statements is considered in the next part.

In general the cases discussed below have involved attempts by the Occupy protestors to seek a preliminary injunction to prevent action by the authorities. A preliminary injunction has been described as ‘an extraordinary remedy . . . which is to be applied only in [the] limited circumstances which clearly demand it.’ The general purpose of a preliminary injunction is to ‘protect the status quo and to prevent irreparable harm during the pendency of a lawsuit ultimately to preserve the court’s ability to render a meaningful judgment on the merits.’ The Supreme Court has ruled that to qualify for injunctive relief, a plaintiff must show

a) likelihood she will succeed on the merits;

b) likelihood she will suffer irreparable harm in the absence of a preliminary injunction;

c) that the balance of equities tips in her favor; and

d) that the injunction is in the public interest.

However in practice the main focus in the recent cases was on the likelihood of success as the loss of First Amendment freedoms, even for a short period of time, constitutes an irreparable injury, the determination of where the public interest lies is dependent on the determination of the likelihood of success on the First Amendment challenge because it is

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11 Direx Israel, Ltd. v. Breakthrough Med. Corp., 952 F.2d 802, 811 (4th Cir. 1991) (internal quotation marks and citation omitted).
12 In re Microsoft Corp. Antitrust Litig., 333 F.3d 517, 525 (4th Cir. 2003).
13 It is insufficient for the moving party to show only that ‘grave or serious questions are presented’ in the litigation.
always in the public interest to protect constitutional rights, and the balance of equities
generally favors the constitutionally-protected freedom of expression.\textsuperscript{15}

Under \textit{Cornelius v. NAACP Legal Defense and Educational Fund, Inc.,} \textsuperscript{16} the court must: (1) assess whether the conduct or speech at issue is protected by the First Amendment, (2) identify the nature of the forum in order to determine the extent to which the government may limit the conduct or speech, and then (3) assess whether the justifications for restricting the conduct or speech satisfy the requisite standard.

\section*{2. The Occupy protests and the courts}

Readers will be broadly familiar with the nature of the Occupy protests from the media coverage. In general, the protests involved, ‘occupation’ of a prominent public space,\textsuperscript{17} including sleeping overnight on the spot. In many cases the state actions to counteract the protests did not involve their entire removal from the area. The authorities did not deny that the protestors had a First Amendment right to speak and assemble in the public places concerned. Rather they sought to delimit that right and the actions proposed involved, for example, the removal of

any individual associated with the ‘Occupy Columbia’ group, as well as his or her belongings, who remains on State House grounds [between the hours of 6 pm and 6 am] ... \textsuperscript{18}

In others, however, as in, for example, Boston and New York, the authorities sought to remove the protestors entirely.\textsuperscript{19}

\section*{Legal framework}

\textsuperscript{15} See, for example, \textit{Occupy Columbia}, December 16 2011 at p. 9; \textit{Occupy Minneapolis} at p. 5; \textit{Freeman v Morris}, at p. 7; \textit{Occupy Fort Meyers} at p. 8 (full citations are given in annex 1, where possible page references are given to opinions but pagination was not always available). In \textit{Occupy Sacramento} (November 4, 2011) the court emphasized the fact that the importance, in the context of a motion for a TRO, of maintaining the status quo. As the challenged ordinance had been in place for 30 years before the protests, the court distinguished the circumstances from cases where the authorities had enacted rules only after the protest began. See also \textit{Occupy Tucson} (December 22, 2011) in which a similar approach was adopted.

\textsuperscript{16} 473 U.S. 788, 797, (1985). Not all courts followed this precise structure.

\textsuperscript{17} The State House in Albany, Capitol Park in Augusta (directly in view of the Maine State Capitol building), the grounds surrounding the old County Courthouse opposite the Idaho Statehouse in Boise, Dewey Square in Boston, Courthouse Park in Fresno (which surrounds and provides access to the Fresno Superior Court); Centennial Park in Fort Meyers, plazas immediately adjacent to the Hennepin County Government Center, the sidewalk in front of Jacksonville’s City Hall, Legislative Plaza in Nashville, Zuccotti Park in New York (a privately owned public-access plaza); Washington Square Park in Rochester, Cesar Chavez Plaza in Sacramento; Civic Center Plaza in San Diego; and Viente de Agosto Park in Tucson.

\textsuperscript{18} \textit{Occupy Columbia}, December 16 2011 at p. 5. Although the focus of the authorities concern later shifted from the 24-hour occupation, to sleeping and camping on the State House grounds (p. 10) (how a 24-hour occupation might be possible without sleeping and camping was not specified).

\textsuperscript{19} For example in New York the NYPD required, via bullhorn and written notices, those occupying Zuccotti Park to remove immediately all property and leave the park on a temporary basis, and stated that if they failed to leave the park, they would be subject to arrest: \textit{Matter of Waller v City of New York, 2011 NY Slip Op 21412} (NY SC, 2011).
Applying the legal framework for analysis (set out above), the courts had to consider (1) whether the conduct or speech at issue is protected by the First Amendment, (2) to identify the nature of the forum, and then (3) assess whether the restrictions satisfied the requisite standard. In the case of time place and manner restrictions, the latter assessment involves considering whether the restriction regulates (a) the content of speech (content neutrality), whether (b) it serves a significant governmental interest, and (c) it is narrowly tailored to do so, and (d) it leaves open ample alternative channels for communication of the information. These issues are discussed below. However, given the complex nature of the law, not all the issues considered by the courts fall easily into these categories. Therefore, some specific issues (such as permitting requirements) are considered separately below.

(1) Speech and expressive conduct

Many aspects of the Occupy movement’s activities were accepted as falling within the scope of the First Amendment. For example, in *Occupy Fort Meyers*, the authorities did not dispute that rallies, marches, distribution of literature, displaying signs and posters, and engaging in conversations regarding the topics which prompted the occupation were matters of public concern well within the protection of the First Amendment. In some cases, however, the authorities sought to argue that camping and sleeping are not protected expression under the First Amendment. In *Spence v. Washington*, the Supreme Court considered two factors when determining whether conduct is symbolic expression: (1) whether the actor intends to convey a particularized message, and (2) whether there is a substantial likelihood that the message will be understood by those who view the conduct. In *Clark* the Supreme Court assumed (without so deciding) that ‘that overnight sleeping in connection with the demonstration is expressive conduct protected to some extent by the First Amendment’. Some federal and state courts, including the DC circuit in *Clark*, have suggested that camping or sleeping in a public place may amount to expressive conduct (at least in certain circumstances). The recent cases have either followed this

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20 And, to an extent, the hurried nature of the proceedings,

21 Of course, the approach adopted by the authorities varied from case to case.

22 For example, *Occupy Columbia*, December 16 2011 at p. 13.


24 At 293. The Court of Appeals had taken this view although Judge Scalia (as he then was) dissented expressly ‘to deny that sleeping is or can ever be speech for First Amendment purposes.’ *Community for Creative Non-Violence v. Watt*, 703 F.2d 586 (D.C. Cir. 1983) (Scalia, J., dissenting), rev’d, *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, (1984).

25 *Community for Creative Non-Violence v. Watt*, 703 F.2d 586 (D.C. Cir. 1983). See *Whiting v. Town of Westerly*, 942 F.2d 18, 21 (1st Cir. 1991) (‘[t]he act of sleeping in a public place, absent expressive content, is not constitutionally-protected conducted’); *State v. Sturch*, 82 Haw. 269, 921 P.2d 1170, 1176 (Haw. Ct. App. 1996) (‘no authority supporting a specific constitutional right to sleep in a public place’ unless it is expressive conduct within the ambit of the First Amendment or is protected by other fundamental rights); *United States v. Gilbert*, 920 F.2d 878, 883-84 (11th Cir. 1991) (‘We acknowledge the government’s argument that sleeping can never be expressive conduct. We refuse to decide this question, however, because the government’s policy is to permit others to sleep in the unenclosed plaza area in conjunction with demonstrations.’). But see *Vietnam Veterans Against the War/Winter Soldier Org. v. Morton*, 506 F.2d 53, 57-58 (D.C. Cir. 1974) (‘Camping [defined as sleeping or laying down bedrolls incidental to such slumber] overnight in a public park has no more relevance to free speech than say, digging latrines in a public park ...’).
approach in holding that camping and sleeping (in the context of the Occupy protest) is expressive conduct or, at least, were prepared to assume this for the purposes of the litigation.

However, in *Occupy Minneapolis*, the court was not prepared to accept that all of the restrictions at issue regulated ‘speech’. The plaintiffs had argued that the County’s decision to cut-off electricity violated their free-speech rights because ‘the use of equipment to amplify a protester’s message is an aspect of free speech.’ They relied on *Saia v. New York*, in which the Supreme Court found a city ordinance forbidding the use of loudspeakers in public places except with the permission of the Chief of Police and prescribing no standards for the exercise of this discretion was unconstitutional on its face, since it established a prior restraint on the right of free speech in violation of the First Amendment. The Supreme Court described using a loudspeaker as an ‘indispensable instrument [ ] of effective public speech.’ However, the district court distinguished this on the basis that plaintiffs’ access to electricity was not ‘indispensable’ to disseminating their message and nothing indicated that they could not ‘effectively’ express themselves absent internet access. In any event, the court ruled that government need not make its utilities available to anyone seeking to advance a message as the First Amendment did not guarantee access to property for speech activities simply because it is government-owned.

The Suffolk Superior Court in *Occupy Boston* was also prepared to accept that ‘the setting up of tents, sleeping, and governance of Dewey Square is expressive conduct and symbolic’. However, it distinguished between these ‘living activities’ and ‘the occupation, that is the seizing and holding of land of the Commonwealth’. The latter it categorized as ‘a hostile act, an assertion of possession against the rights of another’ which did ‘not carry the plaintiff’s professed message’. Applying the *Spence* test, the court concluded that, while Occupy Boston did intend to convey a message, the occupation of Dewey Park was not understood to communicate the intended message of egalitarian democracy and, thus, it did not constitute expressive conduct.

In a more nuanced approach, the district court in *Freeman v Morris*, argued that ‘occupation’ of the site, could not be considered as a unitary phenomenon, either expressive or not. The court therefore focused on three factually significant features of the case: (1) the tent city, (2) the overnight camping, and (3) the use of fire and other heating equipment on site. First, the court ruled that Occupy Augusta would likely prevail on their claim that the tent city is expressive conduct. It found that by their occupation of Capitol Park across from the Capitol, the protestors intend to convey a particularized message on behalf of those who have been unfairly excluded from participation in government and that

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26 For example, *Occupy Fort Myers* (holding that camping was symbolic conduct because ‘[t]he conduct of tenting and sleeping in the park 24 hours a day to simulate an ‘occupation’ is intended to be communicative and in context is reasonably understood by the viewer to be communicative’). Followed in *Occupy Minneapolis; Occupy Columbia* (December 16, 2011) and *Watters v Otter*.

27 334 U.S. 558 (1948)

28 Id. at 561.

29 *Occupy Minneapolis* at p. 7.

30 *Occupy Boston* (December 7, 2011). This followed an initial hearing on November 16 at which a TRO had been granted.
this message was likely understood by those viewing the tent city. Second, Occupy Augusta argued that its need to camp on site – i.e., to ‘occupy’ the park 24 hours a day, seven days a week, indefinitely into the future – was central to its message. Having reviewed the case law, the court was prepared to accept that Occupy Augusta was likely to succeed in its claim that the round-the-clock occupation with its attendant overnight camping was expressive conduct protected by the First Amendment. However, the plaintiffs did not argue that the use of fire and other heating equipment within the tent city constituted expressive conduct and, therefore, this did not fall within the scope of the First Amendment.

In *Occupy Fort Meyers* the City argued that the protestors were engaging in commercial speech by soliciting donations of money, food, and supplies. Assuming this was factually correct, which the court felt was likely, it ruled that such conduct would still fall within the protection of the First Amendment, although subject to different standards.31

(2) Nature of the fora

Generally there was little dispute that the fora concerned were ‘traditional’ public fora and, therefore, attracted a (relatively) high level of protection for free speech.32 In the case of the privately owned public space (POPS) of Zuccotti Park, the New York Supreme Court was prepared to assume that the First Amendment applied, thus avoiding having to decide whether Zuccotti Park was a traditional public forum, or a limited public forum.

(3a) Content neutrality33

To determine whether an ordinance is content-neutral, a court generally looks to the terms of the ordinance to see if the ordinance ‘distinguish[es] favored speech from disfavored speech on the basis of the ideas or views expressed.’34 Of course, the rules at issue varied from case to case but differences in judicial approach can also be identified.

In *Occupy Columbia* the district court initially ruled that the policy governing camping on the State House grounds was not a valid time, place, and manner restriction as, inter alia, it was not convinced that it was content neutral in that there was no evidence that the policy has been applied consistently to all organizations and groups seeking to use the grounds.35 However, the authorities subsequently passed an emergency regulation prohibiting use of the State House grounds and all buildings located on the grounds for camping, sleeping, or any living accommodation purposes on the basis that ‘there [was] an imminent peril to public health, safety, or welfare that require[d] promulgation of a regulation prohibiting

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32 See, for example, *Occupy Columbia* (December 16, 2011) at p. 18, *Occupy Minneapolis* at p. 8; *Freeman v Morris* at p. 13; *Occupy Boston* at p. 14.
33 Content-based regulations ‘presumptively violate’ the First Amendment: see, for example, City of Renton v. Playtime Theaters, Inc., 475 U.S. 41, 46 (1986).
35 See *Occupy Columbia*, December 16, 2011, p 23-24. The court also found that the rules were not publically accessible, did not provide clear guidance to law enforcement to ensure compliance, and to the extent they created an informal licensing or permitting scheme for use of the State House grounds, they were vague and give unbridled discretion to suppress speech on the State House grounds.
camping and sleeping on the State House grounds’. The court then found (and indeed the plaintiffs conceded) that the new regulation was content neutral as

[t]he text is broad and prohibits all individuals and groups from camping or sleeping on the State House grounds and in all buildings located on the grounds. The restriction is a regulation of conduct and does not target a particular message.

The courts have ruled that safety and sanitary concerns are content neutral. The courts also upheld set closing times applying to all; and permitting and other ordinances which did not ‘distinguish favored speech from disfavored speech on the basis of the ideas or views expressed ... ’. However, an extension of opening time which applied only to ‘sporting events, or cultural or civic activities’ was content-based and, as no compelling governmental interest had been shown, it was likely to be unconstitutional. The courts have also ruled that regulations banning all sidewalk chalking on any topic are content-neutral. In contrast, however, a ban on the hanging or posting of signs other than those ‘placed by county personnel related to county business’ was arguably not content neutral and, therefore, was restrained.

### (3b) Serving a significant governmental interest

To demonstrate a significant government interest, the authorities are not required to present detailed evidence and ‘arguments based on appeals to common sense and logic’

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36 *Occupy Columbia*, December 22, 2011, p. 5. The regulation was virtually identical to the National Park Service’s prohibition on camping in Lafayette Park, which was found to be a valid time, place, and manner restriction by the Supreme Court in *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984).

37 Ibid at p. 9. The court rejected an invitation to evaluate the motives of the legislators in considering time, place, and manner restrictions. See also *Davidovich v City of San Diego*, December 1, 2011 (‘the prohibition against unauthorized encroachments ... is content neutral because it does not single out any type of speech or provide differential treatment based on the idea expressed’); *Occupy Sacramento* (‘[the ordinance] does not make any reference to speech and it merely regulates the hours that anyone can remain or loiter in City parks’); *Miller-Jaconson v City of Rochester* (‘The subject City Code does not seek to regulate messages or distinguish between different types of speech. It simply prohibits, without regard to the identity of the user or the content of speech, anyone from using the parks during overnight hours or from camping in the parks unless a permit is obtained.’).

38 *Occupy Boston* at p. 18-19.

39 *Freeman v Morris* at p. 24 (although the hours were not being displayed at the time the protest began or even at the time of the proceedings).

40 *Occupy Fresno*.

41 *Occupy Fort Meyers* at p. 29-30. However, the victory in principle was of little benefit as the court enjoined the extension of time in its entirety.

42 *Occupy Minneapolis* at p. 10-11.

43 Ibid. To the contrary see *Occupy Sacramento* (‘Plaintiffs’ have failed to demonstrate that they are likely to be able to show that [the ordinance] is unconstitutional because the City exempts itself from its own permitting requirements and could potentially engage in viewpoint discrimination by favoring one form of speech over another. However, Plaintiffs provide no evidence to support the conclusion that the City has or is likely to engage in such viewpoint discrimination and, in any event, the Supreme Court has upheld instances where the government has favored one viewpoint over another. See *Pleasant Grove v. Summum*, 555 U.S. 460 (2009); *Rust v. Sullivan*, 500 U.S. 173 (1991)*).
may be sufficient.\footnote{See, for example, Coalition for the Abolition of Marijuana Prohibition v. City of Atlanta, 219 F.3d 1301, 1318 (11th Cir. 2000).} In \textit{Occupy Columbia}, the authorities argued that the ‘new’ regulation served a significant government interest in that camping, sleeping, or otherwise living at the State House raised an imminent peril based on increased opportunities for criminal conduct and public safety incidents attendant to such conduct, as well as the liability resulting from such incidents. The court accepted this argument without discussion.\footnote{A similar conclusion was arrived at in \textit{Occupy Minneapolis} (and indeed as that court noted was effectively dictated by \textit{Clark}). See also \textit{Davidovich v City of San Diego}, December 1, 2011; \textit{Freeman v Morris} (even though the rule against camping was only stated on the permit application rather than in the Park’s security rules); \textit{Occupy Fresno} (both facial and as-applied challenges rejected). In \textit{Occupy Sacramento} the court accepted a substantial government interest in (1) the general public’s enjoyment of park facilities; (2) the viability and maintenance of those facilities; (3) the public’s health, safety and welfare; and (4) the protection of the City’s parks and public property from overuse and unsanitary conditions. In \textit{Occupy Fort Meyers}, the protestors did not even argue the speech point, instead challenging a camping ordinance as overbroad (an arguments rejected by the court). In \textit{Henke v. Department of the Interior}, the protestors did not even make this argument accepting that it was foreclosed by \textit{Clark}.} Similarly, courts accepted that the authorities had a significant interest in banning chalking in order to control the aesthetic appearance of the area.\footnote{\textit{Occupy Minneapolis} at p. 10.} In \textit{Occupy Boston}, the court accepted the evidence of the City of Boston Fire Marshall concerning safety concerns and ruled that this justified the regulation of the expressive activities of camping and sleeping in Dewey Square. Similarly, a closing hours regulation was narrowly-tailored to meet the State’s significant interests in public safety and preservation of the public resource that is Capitol Park.\footnote{\textit{Freeman v Morris} at p. 24.} However, in \textit{Occupy Fresno}, the protestors challenged an ordinance outlawing the distribution of handbills and holding of signs. The court concluded that there was no substantial government interest in banning handbills or signs and that the ordinance did not leave open ample alternative channels of communication. It also upheld an as-applied challenge and concluded that, therefore, the ordinance was unconstitutional.

\textbf{(3c) Narrowly tailored}

To establish an ordinance is narrowly tailored, the court must determine whether there is a ‘reasonable fit’ between the governmental interests and the ordinance.\footnote{\textit{Cincinnati v. Discovery Network}, 507 U.S. 410, 416 (1993).} However, in the Occupy cases, the courts generally upheld anti-camping and sleeping regulations as narrowly tailored where they prevented the risks associated with unlimited camping and sleeping by groups engaged in expressive activities in the relevant area (without very detailed consideration of the degree of ‘fit’).\footnote{See, for example, \textit{Occupy Columbia}, \textit{Occupy Boston}, \textit{Davidovich v City of San Diego}, December 1, 2011; \textit{Occupy Sacramento}.} Nonetheless, in \textit{Watters v Otter}, the district court distinguished between the symbolic tent city erected by Occupy Boise (and staffed around the clock) and the activities of the occupants in camping, sleeping or storing camping-related personal property at the site. The court found that the Idaho law banning camping on state grounds did not allow the removal of the symbolic tent city. As it was
unlikely that the State could show that its enforcement policy was the least restrictive means to further a compelling state interest, removal of the tent city was enjoined. However, as in other cases noted, the court accepted that the ban on overnight camping was proper under *Clark*.

(3d) Alternative channels for communication

The courts also generally found that protestors had alternative channels of communication as they were not banned from remaining in an area for 24 hours but simply sleeping and camping in the area.\(^{50}\) Similarly a ban on chalking left ample alternative methods of communication including passing out flyers, carrying or wearing signs, and public speaking.\(^{51}\) In *Occupy Boston*, while accepting that Dewey Square was the ‘optimal’ location for the protest, other options were available including protesting in the square without camping there and/or camping in an alternative location.

Specific issues

As noted above, not all the issues considered by the courts can be neatly categorized under the headings outlined above and, accordingly, we look here at a number of specific issues.

Permitting and prior restraint

In *Occupy Fort Meyers*, the city had created a special events advisory board to advise in relation to ‘special events’. It was conceded that this was a content-based group which was to make content-based recommendations. However, the court concluded that the ordinance was not a violation of the First Amendment, as the Board was only an advisory body. The protestors also challenged a permitting requirement arguing that it was unconstitutional as a prior restraint on First Amendment speech.\(^{52}\) The court agreed, holding that prior restraints are presumptively unconstitutional and face strict scrutiny\(^{53}\) and concluded that the ordinance was not a valid restriction as there has been no showing of a significant governmental interest in requiring a police permit before any parade or procession on a public street or before any open-air public.\(^{54}\) However, it is not clear that the court was fully correct on this point and the application of strict scrutiny does not appear to be supported by the Eleventh Circuit precedent to which the court referred.\(^{55}\)

\(^{50}\) See *Occupy Columbia* at p. 10-11; *Davidovich v City of San Diego*.

\(^{51}\) *Occupy Minneapolis* at p. 10.

\(^{52}\) The court rejected the city’s defense that it did not enforce the ordinance arising from earlier (and unrelated) proceedings pointing out that (in the earlier case) the city had promised to repeal the ordinance but had failed to do so.

\(^{53}\) Burk v. Augusta-Richmond County, 365 F.3d 1247 (11th Cir. 2004); United States v. Frandsen, 212 F.3d 1231, 1236–37 (11th Cir. 2000); Church of Scientology Flag Serv. v. City of Clearwater, 2 F.3d 1514, 1547-48 (11th Cir. 1993).

\(^{54}\) Nor was it narrowly tailored.

\(^{55}\) Not much turned on this point as the authorities did not seek to enforce the ordinance for the reasons set out in the earlier footnote.
Fransden predates Thomas v. Chicago Park District\(^{56}\) and relied on Freedman v. Maryland\(^{57}\), which was distinguished in the latter case. Burk came after Thomas but relied on a finding that the permitting requirement at issue was content-based as it applied only to ‘public demonstration or protest’ and specifically distinguished Thomas on that point.\(^{58}\) The Fort Meyers ordinance was not so narrowly worded (applying to a ‘parade or procession upon any street of the city, and [an] open-air public meeting’) and the court (in Occupy Fort Meyers) specifically accepted that it was content-neutral.

In occupy Fresno, the protestors argued that a permitting requirement which applied to ‘the assemblage of ten or more persons by prearrangement, common design or as a result of advertising, solicitation or other promotion’ was facially unconstitutional as it did not relate to any legitimate state purpose. However, the court pointed out that the Ninth Circuit had accepted that permit requirements for traditional public fora may serve substantial government interests.\(^{59}\) The court found that the Fresno authorities had substantial interests in regulating competing uses of Courthouse Park to ensure that no ideas or viewpoints are driven from the forum; in knowing when competing uses will occur so that they can safely oversee them; and promoting public health, safety and welfare. The question for the court, therefore, was not whether a permit requirement for ten persons served a substantial government interest, but whether a permit requirement for groups of as few as ten persons was sufficiently narrowly tailored to pass constitutional muster. Following Ninth Circuit precedent which indicated that permit requirements for groups of fewer than ten individuals were likely to be constitutionally infirm, whereas those for groups of fifty or greater were likely to be narrowly tailored,\(^{60}\) the court concluded that the Fresno ordinance was not narrowly tailored, and therefore unconstitutional. However, the court rejected an as-applied challenge to the permitting requirement holding that the protestors had not shown discriminatory animus.\(^{61}\) The protestors also challenged a permitting requirement arguing that it provided unbridled discretion to the authorities to grant or deny permits to persons asking to camp or lodge but this was rejected as the court was satisfied that the ordinance provided definite and objective criteria that must be followed (by reading the relevant ordinance narrowly).\(^{62}\)


\(^{57}\) 380 U. S. 51 (1965).

\(^{58}\) Burk v. Augusta-Richmond County, 365 F.3d, 1255-56. The earlier Church of Scientology case involved the observation of a religious belief or practice and the court applied strict scrutiny to legislation that imposed a substantial burden thereto.

\(^{59}\) Santa Monica Food Not Bombs v City of Santa Monica, 450 F.3d 1022, 1033 (9th Cir. 2006).

\(^{60}\) See, for example, Grossman v. City of Portland, 33 F.3d 1202, 1204, 1207 n.13 (9th Cir. 1994); Berger v. City of Seattle, 569 F.3d 1029, 1035-36 (9th Cir. 2009); Long Beach Area Peace Network v. City of Long Beach, 574 F.3d 1011, 1034 (9th Cir. 2009).

\(^{61}\) Following Brown v City of Pittsburgh, 586 F.3d 263, 293 (3rd. Cir. 2009).

\(^{62}\) See also Occupy Sacramento (‘Neither the Director’s discretionary authority, nor the three criteria at issue ..., appear to be materially different from the type of criteria that the Supreme Court upheld in Thomas’). In Miller-Jocson vs City of Rochester, the Monroe County Supreme Court held that the ‘ordinance does not grant unlimited or impermissible discretion to the Commissioner to grant or deny permission for after hours use of the City parks ... or for camping in the parks ...’ (a rather generous conclusion on the wording).
In contrast in *Freeman v Morris*, the ordinance required a permit for ‘a demonstration of any nature’ in the Capitol area. The plaintiffs argued that the permit regime was overbroad as it applied to single protestors. The First Circuit, however, has indicated that it will not consider a regulation overbroad merely because it applies to single protestors. The protestors also argued that the ordinance gave excessive discretion to the authorities as to whether to grant a permit, relying on *Thomas v. Chicago Park District*. The court accepted that – unlike the rules at issue in *Thomas* - the Augusta ordinance did not explicitly state that the Commissioner could only deny an application if he found that the applicant will not agree to the stated rules. However, it considered that the jurisprudence required it to consider not just formally adopted regulations, but narrowing constructions and practices to which the law is ‘fairly susceptible’. The court concluded that the permit regulation, as narrowly construed and applied by the Commissioner, was content-neutral and narrowly tailored to meet the significant state interests of assuring the preservation of park facilities, preventing dangerous uses and coordinating multiple uses of the Park.

These cases show the variation in approaches between circuits with Ninth Circuit precedent implying a more rigorous scrutiny on permitting requirements applying to small numbers of protestors (in contrast to the First Circuit approach). Again, however, there are also interpretative differences between the courts. The Fort Meyers court, arguably incorrectly on the facts, applied strict scrutiny to a content-neutral requirement. In contrast, the Augusta court did not even consider whether a permitting requirement for a ‘demonstration’ was content-based and was prepared to accept ‘narrowing constructions and practices’ as adequate standards to guide an official’s decision and render that decision subject to effective judicial review.

**Overbreadth and as-applied challenge**

In *Occupy Fort Meyers*, an ordinance outlawing ‘loitering and boisterousness’ was enjoined in part as overbroad. The court found that there was no established meaning to ‘protractedly lounge’ which would advise a person of ordinary intelligence when he or she was required to vacate the seat, bench, or other area in a City park. Likewise ‘behavior tending to’ a breach of the peace had no established meaning, and would not be comprehensible to persons of ordinary intelligence.

In *Davidovich* the district court considered an as-applied challenge for vagueness and overbreadth to the San Diego Municipal Code (which it had already found to be a valid time, place and manner restriction). The court stated that

> There are two types of as-applied challenges to the constitutionality of an ordinance: a challenge based on selective enforcement and a paradigmatic challenge. In a selective enforcement challenge, an ordinance may be ‘neutral and constitutional ...
[but it] has been enforced selectively in a viewpoint discriminatory way.\textsuperscript{68} Plaintiffs are generally required to show the existence of an unconstitutional policy by extrapolating from a series of enforcement actions .... [which] demonstrate[s] that the municipality is enforcing against them a rule that is distinct from the constitutionally valid enactment.\textsuperscript{69} In a paradigmatic challenge, the plaintiff ‘argu[es] that it is unconstitutional to apply the ordinance to him because, given all the circumstances, his ability to communicate is unduly constricted.’\textsuperscript{70} ‘[W]hether the ordinance is unconstitutionally restricting [plaintiff’s] speech is ultimately a causation question based on the particular facts: Does the ordinance as applied to the actual circumstances ... foreclose ample alternative channels of communication?’\textsuperscript{71}

In that case, only a small number of cases involving enforcement were evidenced and the court found that they involved reasonable application of the ordinance. Nor had the plaintiffs’ shown that their ability to communicate their message was unduly constricted.

**Competing claims**

Although not part of the formal criteria for analysis, some courts also referred to competing claims to the public space. For example, in *Freeman v Morris*, the court stated that

> Allowing the Plaintiffs to continue indefinitely to occupy the Park would ultimately tend to suppress, rather than promote, the free exchange of ideas. As a traditional public forum, Capitol Park should be available to all comers to communicate their ideas, not just Occupy Augusta.\textsuperscript{72}

**No fundamental right to lounge**

Sadly (if somewhat inevitably), in *Occupy Fort Meyers*, the court found that no support for a ‘fundamental right to lounge’ where, when, and for as long as persons wish in a public park or to meet in a public park during hours it is closed to the public.

**Omnibus approaches**

As discussed above, the federal courts generally parsed in some detail the rules concerning free speech. However, some courts considered the issues in a manner which makes it difficult to separate out the different aspects of the law.\textsuperscript{73} The New York Supreme Court allowed the ‘temporary’ removal of protestors for cleaning of Zuccotti Park.\textsuperscript{74} The court

\textsuperscript{68} Hoye v. City of Oakland, 653 F.3d 835, 854 (9th Cir. 2011) at 854 (citation omitted).

\textsuperscript{69} Id. at 855.

\textsuperscript{70} Id. at 857.

\textsuperscript{71} Id. at 858-59.

\textsuperscript{72} At p. 27.

\textsuperscript{73} Though see the *Occupy Tucson* decision (of December 22, 2011) which devotes far more space to quoting the challenged ordinance than to legal analysis.

\textsuperscript{74} *Matter of Waller v City of New York*. 

concluded that it had not been shown that the regulations were not a reasonable time, place, and manner restrictions and stated that

To the extent that City law prohibits the erection of structures, the use of gas or other combustible materials, and the accumulation of garbage and human waste in public places, enforcement of the law and the owner’s rules appears reasonable to permit the owner to maintain its space in a hygienic, safe, and lawful condition, and to prevent it from being liable by the City or others for violations of law, or in tort. It also permits public access by those who live and work in the area who are the intended beneficiaries of this zoning bonus.

The movants have not demonstrated that they have a First Amendment right to remain in Zuccotti Park, along with their tents, structures, generators, and other installations to the exclusion of the owner’s reasonable rights and duties to maintain Zuccotti Park, or to the rights to public access of others who might wish to use the space safely. Neither have the applicants shown a right to a temporary restraining order that would restrict the City’s enforcement of law so as to promote public health and safety.

This is clearly a much less protective approach to free speech than that shown by most federal courts.\(^\text{75}\)

3. Discussion

The point was made by many of the protestors that the ‘occupation’ of the relevant area was a core part of their message. For example, the Occupy Augusta protestors (in *Freeman v Morris*) explained that the 24-hour-a-day physical occupation of Capitol Park was a core component of their message, intended to symbolize a permanent occupation that ‘challenges corporations’ permanent occupation of the government.’ They also stated that the tent city was an expression of hope for a more just, economically egalitarian society and that it functioned as a model community demonstrating their vision of such a society. But, although Occupy protestors won on some more minor issues, they lost on the ability to camp overnight – an essential part of any ‘occupation’. Although some courts allowed a symbolic ‘occupation’ – without sleeping or accoutrements – in reality these decisions generally appear to have marked the end of the actual occupations.\(^\text{76}\) Indeed this legal outcome was largely determined by the Supreme Court’s decision in *Clark v. Community for Creative Nonviolence* in which the Court upheld a decision by the National Park Service to refuse permission to protestors (concerning homelessness) to sleep overnight in a ‘symbolic tent city’ as a reasonable time, place, and manner restriction of expression.\(^\text{77}\) As correctly

\(^{75}\) Subsequent to the ruling, the protestors were expelled from Zuccotti Park and metal barricades were erected encircling the entire park. Subsequent access was permitted only through two narrow gaps in the barricades patrolled by security personnel who subjected entrants to searches of their personal belongings and other restrictive conditions, and these practices persisted for nearly two months. For subsequent proceedings concerning criminal charges brought against protestors, see *People v Nunez* 2012 NY Slip Op 22089.

\(^{76}\) Though see, for example, Boise where the occupation and legal proceedings continue at the time of writing.

predicted at the time, this decision largely marked ‘the demise of First Amendment protection for symbolic expression’. Nor was this decision a narrow one, with only Justices Marshall and Brennan dissenting. Marshall J (with whom Brennan J joined) criticized the majority on two issues. First, he criticized the majority assumption that sleeping was expressive conduct protected to some extent by the First Amendment as a way of avoiding ‘examining closely the reality of respondents' planned expression’. The minority, in contrast, would have held that ‘sleep in the context of this case is symbolic speech protected by the First Amendment’.

However, Marshall J accepted that it was still subject to reasonable time, place and manner restrictions and, indeed, accepted the standard enunciated by the majority:

[R]estrictions of this kind are valid[,] provided that they are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information.

The majority identified that the significant government interest was maintaining the parks in the heart of our Capital in an attractive and intact condition, readily available to the millions of people who wish to see and enjoy them by their presence.

The minority accepted that this interest was indeed significant but did not accept that the ban concerned would substantially further that interest.

In the Occupy cases (and in protest cases in general) the courts have been able to uphold the principles of Free Speech, for example in accepting that the protests engaged the First Amendment and that the fora involved constituted traditional public fora, but have been driven to reject the protestors’ main claim by Supreme Court precedent in Clark. Indeed, a number of courts went perhaps further than was necessary in supporting the authorities by favorable interpretation of the law and/or ordinances involved. And, in at least two cases, State courts adopted dubious interpretations of the current state of the law with the New York Superior Court allowing the protestors to be entirely removed from Zuccotti Park for ‘maintenance’ while, in a (potentially) even more sweeping ruling, the Suffolk Superior Court allowed the erection of the tent city although the Court appeared to doubt that this was required by the First Amendment: Clark, 468 U.S. at 296 (‘we seriously doubt that the First Amendment requires the Park Service to permit a demonstration in Lafayette Park and the Mall involving a 24-hour vigil and the erection of tents to accommodate 150 people’). For the background to the case see http://en.wikipedia.org/wiki/Clark_v._Community_for_Creative_Non-Violence

Community for Creative Non-Violence: First Amendment Safeguards - Their Sum Is Less Than Their Parts, 39 U. Miami L. Rev. 997 (1984-1985); D.J. Van Mark, Constitutional Law - Camping on First Amendment Rights - Clark v. Community for Creation Non-Violence, 22 Land & Water L. Rev. 567 (1987). In this case, the Park Service had allowed the erection of the tent city although the Court appeared to doubt that this was required by the First Amendment: Clark, 468 U.S. at 296 (‘we seriously doubt that the First Amendment requires the Park Service to permit a demonstration in Lafayette Park and the Mall involving a 24-hour vigil and the erection of tents to accommodate 150 people’). For the background to the case see http://en.wikipedia.org/wiki/Clark_v._Community_for_Creative_Non-Violence

At 308.

At 308. Original quote (with comma) at 293.

Waller v City of New York.
Court ruled that the ‘occupation’ (in the sense of the seizing and holding of land) did not constitute expressive conduct. ⁸⁴

There has been considerable debate about the current Supreme Court’s approach to Free Speech and whether or not it is a ‘Free Speech Court’. ⁸⁵ However, leaving aside debates about the conservative-liberal (i.e. Republican-Democrat) splits on the Supreme Court, ⁸⁶ a more fundamental distinction can be seen in the manner in which the US legal system treats corporations wishing to make a political point (as in Citizens United) ⁸⁷ and the manner in which protestors wishing to raise political alternatives are addressed. ⁸⁸

In Citizen’s United the Court ruled that a ‘prohibition on corporate independent expenditures is ... a ban on speech’. ⁸⁹ To make the point even more clearly, the Court continued

As a ‘restriction on the amount of money a person or group can spend on political communication during a campaign,’ that statute ‘necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached.’ ⁹⁰

Thus, in the context of electoral campaigns, money is speech. In contrast, an essential component of much protest activity (the ability to occupy a prominent location on a 24 hour basis) is not speech and is, at best, ‘assumed’ to be symbolic conduct (but, as Justice

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⁸⁴ Occupy Boston.


⁸⁹ Slip opinion at p. 22. See, to the contrary, Justice Sevens (concurring) in Nixon v. Shrink Mo. Gov’t PAC, 528 U.S. 377, 398 (2000) (‘Money is property; it is not speech.’).

Marshall pointed out in *Clark*, without any real examination of what is involved in the conduct in terms of freedom of speech).

Second, the ban involved in *Citizens United* was seen by the Supreme Court as not ‘merely a time, place, or manner restriction on speech. Its purpose and effect are to silence entities whose voices the Government deems to be suspect.’ Thus, again, restrictions on corporate expenditures are in a different category to restrictions on protest activities. In contrast, restrictions on core aspects of the Occupy protests (such as camping and overnight sleeping) are viewed as time, place and manner restrictions.

Third

Laws that burden political speech are ‘subject to strict scrutiny,’ which requires the Government to prove that the restriction ‘furthers a compelling interest and is narrowly tailored to achieve that interest.’

Thus, again, restrictions on corporate expenditures are in a different category to restrictions on protest activities. In contrast, restrictions on core aspects of the Occupy protests (such as camping and overnight sleeping) are viewed as time, place and manner restrictions.

Third

Laws that burden political speech are ‘subject to strict scrutiny,’ which requires the Government to prove that the restriction ‘furthers a compelling interest and is narrowly tailored to achieve that interest.’

In contrast, as we have seen, time, place and manner restrictions are subject to a much lower standard of justification.

All of this rather calls into question, the Supreme Court’s statement (again in *Citizens United*) that

> Premised on mistrust of governmental power, the First Amendment stands against attempts to disfavor certain subjects or viewpoints or to distinguish among different speakers, which may be a means to control content.

Rather the Supreme Court’s interpretation of the First Amendment precisely disfavors certain subjects and viewpoints so as to control content.

Of course, this comparison may be dismissed as overly simplistic and as incorrectly ignoring the different categories of speech which the courts have developed. But this is precisely the point that is being made here. The courts have, on the one hand, categorized (i) corporate electoral expenditures in a manner which provides the maximum level of protection and (ii) the activities of protest groups in a fashion which provides a much lower level of protection. As Chemerinsky argues (in relation to recent decisions of the Roberts Court)

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91 At p. 23.
93 At p. 24.
94 Nor is this a simple ‘conservative-liberal’ division. As we have seen, *Clark* was a 7-2 decision while *Thomas* (refusing to extend the safeguards in *Freedman v. Maryland*, 380 U. S. 51 to ‘content-neutral’ permitting of speech in a public forum) was unanimous.
95 The restrictive treatment of protest is not, of course, confined to the Occupy protest. For earlier (but recent) examples see United for Peace and Justice v. City of New York, 323 F.3d 175, 178 (2d Cir. 2003); Bl(a)ck Tea Society v. City of Boston, 378 F.3d 8 (1st Cir. 2004); Menotti v. City of Seattle, 409 F.3d 1113 (9th Cir. 2005); Citizens for Peace in Space v. City of Colo.Springs, 477 F.3d 1212 (10th Cir. 2007); Coalition to March on the RNC and Stop the War v City of St. Paul, 557 F. Supp. 2d 1014 (D. Minn. 2008); ACLU v. Denver, 569 F. Supp. 2d 1142 (D. Colo. 2008). For the (relatively) rare cases in which the protestors were (mainly) successful see, for example, Service Employee International Union 660 v. City of Los Angeles, 114 F. Supp. 2d 966 (C.D. Cal. 2000); Coalition to Protest the Democratic National Convention v. City of Boston, 327 F. Supp. 2d 61, 78, (D. Mass., 2004); Stauber v. City of New York, 2004 WL 1593870 (S.D.N.Y. 2004).
when the government is functioning as an authoritarian institution, freedom of speech always loses.96

Just one aspect of this is the striking contrast between the manner in which the law relating to freedom of speech has developed whereas that relating to freedom of assembly has been neglected.97 Abu El-Haj points out that the Supreme Court (and, indeed, academic commentators) have considered ‘the right of assembly as simply a facet of the right of free expression’.98 Indeed she argues that the substance of the right of peaceable assembly has, in fact, been narrowed compared to the nineteenth century. As Krotoszynski, and Carpenter show the Petitions Clause of the First Amendment has also fallen into desuetude.99

The striking contrast between the treatment of large corporations and protest groups would support a basic Marxist analysis of the law in capitalist society as an instrument of class power. A more nuanced account would recognize that, to be effective in the long-term, it is important that the legal system should at least appear to uphold principles such as those, in relation to freedom of expression, set out in the quotation which begins this piece. On this basis, one might suggest that (functionally) Citizens’ United is perhaps a step too far and that some rebalancing of the approach may be necessary for the US courts to appear as a credible protector of free speech. At present one might suggest that it is not the limitations on the right to freedom of speech but rather the right itself which has been ‘narrowly tailored to further significant government interests’.100


98 At p. 547.


100 One should note that, whatever its limitations, the US Constitution provides a significantly higher level of protection to protestors than does the European Convention on Human Rights: Austin v United Kingdom, 39692/09, 40713/09 and 41008/09, 15 March 2012. For recent Occupy cases in the UK (raising the ECHR) see City of London v Samede [2012] EWHC 34 (QB) upheld sub nom. Mayor, Commonalty and Citizens of London v Samede (St Paul’s Churchyard Camp Representative) [2012] EWCA Civ 160. For other recent decisions see also Hall v Mayor of London [2010] EWCA Civ 817; R McClure & Moos) v Commissioner of Police of the Metropolis [2012] EWCA Civ 12 ; R (Gallastegui) v Westminster City Council & Ors [2012] EWHC 1123. Nor do protestors appear to have been any more successful under the Canadian Charter of Rights where, although the courts accepted that limitations on protest infringed upon the protestors rights under s. 2 of the Charter (Fundamental Freedoms), this was justified under s. 1.; Batty v. City of Toronto, 2011 ONSC 6862 ; Calgary (City) v. Bullock (Occupy Calgary), 2011 ABQB 764. See also Vancouver (City) v. O’Flynn-Magee, 2011 BCSC 1647 and In the Matter of Access to the Courts of Justice, 2011 BCSC 1815.
Annex 1: List of Occupy proceedings (by city)

<table>
<thead>
<tr>
<th>Case</th>
<th>Decision date &amp; court</th>
<th>Issue</th>
<th>Outcome</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Albany</strong></td>
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<tr>
<td>Occupy Columbia v Haley</td>
<td>December 16, 2011</td>
<td>Plaintiffs’ motion for preliminary injunction to enjoin Defendants from interfering with their 24-hour occupation of the State House grounds, including sleeping on the State House grounds, and the use of sleeping bags and tents</td>
<td>Preliminary injunction enjoined Defendants (1) from enforcing any current policy (written or unwritten) prohibiting camping or sleeping on the State House grounds, and (2) from enforcing any current policy (written or unwritten), limiting access to the State House grounds after 6:00 p.m.</td>
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<tr>
<td>3:11-cv-03253</td>
<td>District Court, South Carolina, Columbia Division</td>
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<tr>
<td>2011 WL 6318587</td>
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<tr>
<td>Occupy Columbia v Haley</td>
<td>December 22, 2011</td>
<td>Motions to amend or modify injunction in the light of the adoption of an emergency regulation prohibiting use of the State House grounds and buildings for camping, sleeping, or any living accommodation purposes</td>
<td>Denied (which meant that the authorities could enforce the regulation against the protestors)</td>
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<tr>
<td>3:11-cv-03253</td>
<td>District Court, South Carolina, Columbia Division</td>
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<td><strong>Augusta</strong></td>
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<tr>
<td>Freeman v Morris</td>
<td>December 7, 2011</td>
<td>Injunction to enjoin authorities from preventing Plaintiffs from maintaining a tent city in Capitol Park in Augusta and to enjoin the Commissioner from requiring them to apply for a permit for their encampment</td>
<td>Denied</td>
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<tr>
<td>11-cv-00452</td>
<td>District Court, Maine</td>
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<td>2011 WL 6139216</td>
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<tr>
<td><strong>Boise</strong></td>
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<tr>
<td>Watters v Otter</td>
<td>February 26, 2012</td>
<td>Injunction (i) to enjoin the state from removing the symbolic tent city and (ii) to</td>
<td>Granted in part (as to (i)) and denied in part (as to (ii))</td>
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<tr>
<td>1:12-CV-76-BLW.</td>
<td>District</td>
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</table>

101 I have included here both recorded decisions even where there was no substantive outcome (e.g. a denial for procedural reasons) and substantive outcomes even where the actual decision is not (apparently) available on-line (e.g. where an earlier court decision is referred to in a later available judgment). Obviously the listing is not intended to be a blow-by-blow account of the individual proceedings.
<table>
<thead>
<tr>
<th>Location</th>
<th>Court</th>
<th>Description</th>
<th>Outcome</th>
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</thead>
<tbody>
<tr>
<td>Idaho</td>
<td>enjoin the authorities from prohibiting the occupants from camping, sleeping or storing camping-related personal property at the site.</td>
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<tr>
<td>Boston</td>
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<tr>
<td>Occupy Boston v City of Boston, 11-4152-G</td>
<td>December 7, 2011 Suffolk Superior Court</td>
<td>Preliminary injunction against removal from Dewey Square</td>
<td>Denied</td>
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<tr>
<td>Fresno</td>
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<tr>
<td>Occupy Fresno v. City of Fresno, 11-01894</td>
<td>December 13, 2011 District Court, California E.D.</td>
<td>Preliminary injunction to restrain authorities from enforcing, inter alia, permitting requirement for meetings of ten or more persons, no loitering or camping rule, distribution of handbills and holding signs</td>
<td>Granted as to definition of meeting as ten or more persons and as to distribution of handbills/holding signs. Otherwise denied.</td>
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<tr>
<td>Fort Meyers</td>
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<tr>
<td>Occupy Fort Meyers v City of Fort Meyers, 2:11-cv-00608 2011 WL 5554034</td>
<td>November 15, 2011 District Court, Florida M.D.</td>
<td>Preliminary injunction to enjoin defendants from enforcing certain provisions of the Fort Myers City Code and from issuing additional criminal penalties to plaintiffs based upon violations of these ordinances</td>
<td>Granted an part and denied in part</td>
</tr>
<tr>
<td>Hennepin</td>
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<tr>
<td>Occupy Minneapolis v County of Hennepin No. 11-3412</td>
<td>November 23, 2011 District Court, Minnesota</td>
<td>Temporary Restraining Order to restrain Defendants from restricting (1) placing structures of any kind on the Plazas; (2) using existing electrical outlets on the Plazas; (3) using sidewalk chalk on the Plazas; (4) affixing signs or posters to Plaza property; (5) leaving property 'unattended' or 'stored' on the Plazas; and (6)</td>
<td>Motion granted only as to prohibiting signs or posters from being taped or otherwise affixed to Plaza property; otherwise denied.</td>
</tr>
<tr>
<td>Location</td>
<td>Case Details</td>
<td>Date</td>
<td>Venue</td>
</tr>
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<td>--------------------------------------------</td>
</tr>
<tr>
<td>Jacksonville</td>
<td>Occupy Jacksonville v City of Jacksonville, 3:11-cv-01264</td>
<td>April 16, 2012</td>
<td>District Court Florida, M.D.</td>
</tr>
<tr>
<td>Minneapolis</td>
<td>Occupy Minneapolis v County of Hennepin, 11-3412</td>
<td>November 23, 2011</td>
<td>District Court Minneapolis</td>
</tr>
<tr>
<td>Nashville</td>
<td>Keppler v Haslam, 3:11-CV-1040</td>
<td>February 22, 2012</td>
<td>District Court Tennessee M.D.</td>
</tr>
</tbody>
</table>

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102 In Nashville there were also a number of criminal proceedings for trespassing which were dismissed by the local courts. No detailed decisions appear to be available.
<table>
<thead>
<tr>
<th>Case</th>
<th>Date</th>
<th>Court</th>
<th>Order</th>
<th>Decision</th>
</tr>
</thead>
<tbody>
<tr>
<td>Occupy Nashville v Haslam, 3:11-1037</td>
<td>October 31, 2011</td>
<td>District Court, Tennessee M.D.</td>
<td>Temporary restraining order restraining the defendants from enforcing the ‘Legislative Plaza, War Memorial Courtyard and Capitol Grounds Use Policy’ issued on October 27, 2011</td>
<td>Granted</td>
</tr>
<tr>
<td>Occupy Nashville v Haslam, 3:11-1037</td>
<td>November 17, 2011</td>
<td>District Court, Tennessee M.D.</td>
<td>Preliminary injunction restraining the defendants from enforcing the ‘Legislative Plaza, War Memorial Courtyard and Capitol Grounds Use Policy’</td>
<td>Granted</td>
</tr>
<tr>
<td>Occupy Nashville v Haslam, 3:11-1037</td>
<td>April 10, 2012</td>
<td>District Court, Tennessee M.D.</td>
<td>Settlement conference</td>
<td>‘An agreement satisfactory to both sides could not be reached’. Proceedings ongoing[^103]</td>
</tr>
</tbody>
</table>

**New York**

<table>
<thead>
<tr>
<th>Case</th>
<th>Date</th>
<th>Court</th>
<th>Order</th>
<th>Decision</th>
</tr>
</thead>
<tbody>
<tr>
<td>Matter of Waller v City of New York, 933 N.Y.S.2d 541, 2011 NY Slip Op 21412</td>
<td>November 15, 2011</td>
<td>Supreme Court, New York County</td>
<td>Temporary restraining order and/or preliminary injunction: (a) Enjoining the respondents from evicting lawful protesters from Liberty Park/Zuccotti Park; (b) Permitting all protestors to re-enter the park with tents and other gear previously utilized;</td>
<td>Denied</td>
</tr>
</tbody>
</table>

**Rochester**

<table>
<thead>
<tr>
<th>Case</th>
<th>Date</th>
<th>Court</th>
<th>Order</th>
<th>Decision</th>
</tr>
</thead>
<tbody>
<tr>
<td>Miller-Jaconson v City of Rochester, 2012/02404.</td>
<td>March 28, 2012</td>
<td>Supreme Court, Monroe</td>
<td>Preliminary injunction and declaration that City of Rochester Code – referring to closing hours and camping - is facially unconstitutional</td>
<td>Denied</td>
</tr>
</tbody>
</table>

[^103]: However, in February 2010 legislation to outlaw camping on state property was adopted by the Tennessee House of Representatives and Tennessee Senate. Most protestors left the Plaza and on March 12, 2012 State police removed the last remaining tents from the Plaza.
<table>
<thead>
<tr>
<th>County</th>
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<tbody>
<tr>
<td>Washington, DC</td>
<td>Henke v. Department of the Interior, 11-2155</td>
<td>Preliminary Injunction to block the National Park Service from evicting them from the Square (arguing that their tents are protected from seizure and destruction by the Fourth and Fifth Amendments and Eschewing any reliance on the First Amendment)</td>
<td>Denied (as they have not shown any imminent actual injury that threatens their tents and as any future closing of the Square remained too hypothetical)</td>
</tr>
<tr>
<td>Sacramento</td>
<td>Occupy Sacramento v. City of Sacramento, 2:11-cv-02873</td>
<td>TRO to restrain Chief of Police from enforcing overnight stay ordinance and from citing or arresting persons remaining in the Park after hours</td>
<td>Denied</td>
</tr>
<tr>
<td></td>
<td>October 7, 2011</td>
<td>Sacramento County Superior Court</td>
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<tr>
<td></td>
<td>November 4, 2011</td>
<td>Sacramento County Superior Court</td>
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<tr>
<td>San Diego</td>
<td>Davidovich v. City of San Diego, 11-cv-2675</td>
<td>Declaration that San Diego Municipal Code making it unlawful for any person ‘to erect, place, allow to remain, construct, establish, plant, or maintain any vegetation or object on any public street, alley, sidewalk, highway, or other public property or public right-of-way’ is void</td>
<td>Denied</td>
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<tr>
<td></td>
<td>December 1, 2011</td>
<td>Temporary Restraining Order concerning San Diego Municipal Code (see below)</td>
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<td></td>
<td>February 10, 2012</td>
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<tr>
<td>Trenton</td>
<td>Occupy Trenton v. Zawacki, C-72-11</td>
<td>November 14, 2011, Mercer County Superior Court</td>
<td>TRO to enjoin restrictions on ongoing demonstrations and seizure and confiscation of Plaintiffs’ property</td>
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<td>Tuscon</td>
<td>Occupy Tucson v. City of Tucson, 11-699</td>
<td>November 8, 2011, District Court, Arizona</td>
<td>Temporary Restraining Order and Preliminary Injunction to enjoin enforcing the provisions to prohibit the Plaintiffs from picketing, protesting, speaking, leafleting, assembling, or otherwise peacefully engaging in expressive activity</td>
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<td>Occupy Tucson v. City of Tucson, 11-699</td>
<td>December 22, 2011, District Court, Arizona</td>
<td>Temporary restraining order that will prevent the City of Tucson from forcing Plaintiffs out of park for a brief period until a hearing can be held</td>
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