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A Sign of the Times: The United States Supreme Court Effectively Abolishes the Narrowly Tailored Requirement for Time, Place and Manner Restrictions

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A SIGN OF THE TIMES: THE UNITED STATES SUPREME COURT EFFECTIVELY ABOLISHES THE NARROWLY TAILORED REQUIREMENT FOR TIME, PLACE AND MANNER RESTRICTIONS

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I. INTRODUCTION

Accentuating how freedom of speech is deeply embedded in the historical tradition of the United States, Justice Benjamin Cardozo characterized this right anchored in the First Amendment to the United States Constitution as "the indispensable condition, of nearly every other form of freedom."[1] Since 1791[2] when the First Amendment was affixed to the Constitution,[3] and continuing through the last two hundred years, this

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1. Palko v. Connecticut, 302 U.S. 319, 327 (1937), *overruled on other grounds by* Benton v. Maryland, 395 U.S. 784 (1969). Expressed otherwise, Thomas Jefferson propounded that "the only security of all, is in a free press. The force of public opinion cannot be resisted, when permitted freely to be expressed. The agitation it produces must be submitted to. It is necessary to keep the waters pure." Letter from Thomas Jefferson to Lafayette (Nov. 4, 1823), *in* 7 WRITINGS OF THOMAS JEFFERSON 325 (Washington ed.) (Henry A. Washington ed. 1861).

2. First Amendment concerns were deeply rooted in American society before the adoption of the Bill of Rights. As Justice Douglas stated:

> The importance of free discussion in all areas was well perceived in this country before our constitutional scheme was formulated. In a letter sent to the inhabitants of Quebec in 1774, the Continental Congress spoke of "five great rights," stating in part: "The last right we shall mention, regards the freedom of the press. The importance of this consists, *besides the advancement of truth, science, morality, and arts in general*, in its diffusion of liberal sentiments on the administration of Government . . . ."

Old Dominion Branch No. 496, Nat'l Ass'n of Letter Carriers v. Austin, 418 U.S. 264, 288 n.2 (1974) (Douglas, J., concurring) (quoting 1 JOURNALS OF THE CONTINENTAL CONGRESS 1774-1789, at 108 (Ford ed. 1904) (emphasis added by Douglas, J.)).

3. The First Amendment to the United States Constitution states that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of Grievances." U.S. CONST. amend. I.

pronouncement rings with such a basal truth that this freedom has subsequently been demanded by the citizens of all free nations.[4]

The United States Supreme Court has recognized the special place that freedom of speech occupies in the constitutional framework.[5] Accordingly, the Court has continuously applied close scrutiny to governmental actions that infringe upon free speech.[6] The Court has also recognized that the First Amendment protects many different media forms beyond basic oral and written communication.[7] One medium that has received constitutional protection is expression through music.[8]

Recently, in *Ward v. Rock Against Racism*,[9] the Supreme Court was presented with the question of whether a city could control the sound system used by musicians playing in the city's public park without violating the First Amendment.[10] The Court upheld the New York City regulation that required bands to use both the city's own sound system and sound engineer when playing in Central Park.[11] The city's purpose in

4. *See, e.g.*, CAN. CONST. (Constitution Act, 1982) pt. I (Canadian Charter of Rights and Freedoms), § 2(b); GRUNDGESETZ [Constitution][GG] tit. I, art. 5 (F.R.G.); COSTITUZIONE [Constitution][Cost.] pt. I, tit. 1, art. 21 (Italy); MONACO CONST. tit. III, art. 23. As the Supreme Court stated in one of its earliest cases on First Amendment issues, "freedom of speech and of the press are elements of liberty all will acclaim. Indeed, they are so intimate to liberty in every one's convictions—we may say feelings—that there is an instinctive and instant revolt from any limitation of them." Schaefer v. United States, 251 U.S. 466, 474 (1920) (nevertheless holding speech at issue not protected by First Amendment).

5. The special place is that freedom of speech is intended to protect novel and unconventional ideas even if they might be disturbing. Freedom of speech is essential to having an informed public. Therefore, state power to abridge this freedom must be the exception, not the rule. *See, e.g.*, Martin v. City of Struthers, 319 U.S. 141 (1943) (reversing, as violation of freedom of speech, conviction under ordinance forbidding any person from canvassing residences for purpose of distributing handbills or circulars); Schneider v. State, 308 U.S. 147 (1939) (reversing state conviction under ordinance intended to keep streets clean, where defendant was charged with handing out literature on public street); Herndon v. Lowry, 301 U.S. 242 (1937) (reversing, as violation of freedom of speech, conviction under state statute that was construed to criminalize soliciting members for political party, which arguably advocated ultimately resorting to violence in indefinite future against organized government); Fiske v. Kansas, 274 U.S. 380 (1927) (reversing, as violation of due process, conviction under state statute that criminalized advocating crime, physical violence, arson, destruction of property, sabotage, or other unlawful acts, where defendant was charged with securing members in organization whose constitution advocated that working class should act to abolish wage system).

6. *See infra* notes 127-35 and accompanying text.

7. *E.g.*, Texas v. Johnson, 491 U.S. 397 (1989) (flag burning); Kingsley Int'l Pictures Corp. v. Regents of the Univ., 360 U.S. 684 (1959) (motion pictures).

8. Ward v. Rock Against Racism, 491 U.S. 781, 790 (1989) ("Music . . . is protected under the First Amendment."); Cinevision Corp. v. City of Burbank, 745 F.2d 560, 569 (9th Cir. 1984) ("[L]ive musical expression is protected under the First Amendment.").

9. 491 U.S. 781 (1989).

10. *Id.* at 784.

11. *Id.* at 803.

enacting the statute was noise level control and assurance of quality sound.[12]

The critical issue in *Ward* was whether the regulation was a permissible time, place and manner restriction.[13] Justice Kennedy, writing for a majority of the Court, applied minimal scrutiny to the city's regulation.[14] As a result, the Court upheld the regulation, holding that the city's method of regulating the noise was narrowly tailored to serve the regulation's purposes.[15] The majority's analysis adopted language from recent Supreme Court cases that gave the narrowly tailored requirement little, if any, force.[16]

In contrast, the Supreme Court has traditionally subjected governmental regulations to greater scrutiny when deciding whether such regulations are narrowly tailored to their governmental purposes.[17] However, the phrasing of this higher degree of scrutiny has taken on differing forms and meanings in separate high court opinions. As a result, the Court in *Ward* exacerbated an internal conflict between the Court's earlier and more recent decisions regarding the standard of scrutiny to be applied to time, place and manner restrictions. The older standard questioned the degree of the legislation's spill-over effect onto

12. *See id.* at 787.

13. *Id.* at 789.

14. *See id.* at 798-99; *see also infra* notes 74-99 and accompanying text.

15. *Ward*, 491 U.S. at 803; *see infra* notes 77-99 and accompanying text.

16. *Ward*, 491 U.S. at 798-99; *see* United States v. Albertini, 472 U.S. 675, 689 (1985) (noting narrowly tailored requirement satisfied "so long as the . . . regulation promotes a substantial governmental interest that would be achieved less effectively absent the regulation"); Clark v. Community for Creative Non-Violence, 468 U.S. 288, 298 n.8 (1984) ("[I]f the time, place, or manner restriction . . . sufficiently and narrowly serves a substantial enough governmental interest to escape First Amendment condemnation, it is untenable to invalidate it.").

17. *See infra* notes 244-54 and accompanying text. The lower federal courts have also applied varying degrees of scrutiny for the narrowly tailored requirement. At one extreme, the Third Circuit has found this requirement satisfied so long as the regulation leaves open "ample alternative channels of communication." Tacynec v. City of Philadelphia, 687 F.2d 793, 798 (3d Cir. 1982) (quoting Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748 (1976)), *cert. denied*, 459 U.S. 1172 (1983). At the other end of the spectrum, the Eighth Circuit has required that a time, place or manner regulation be sufficiently narrow that it uses the least restrictive means available to achieve the government's substantial interest. Association of Community Orgs. for Reform Now v. City of Frontenac, 714 F.2d 813, 818 (8th Cir. 1983); *accord* New York City Unemployed & Welfare Council v. Brezenoff, 677 F.2d 232, 237-39 (2d Cir. 1982).

untargeted activities[18] whereas the newer standard appears not to examine the spill-over effect at all.[19]

This Article discusses how the majority and dissenting opinions in *Ward v. Rock Against Racism* take conflicting positions on the standard the narrowly tailored requirement should be allotted in the context of First Amendment analysis.[20] This Article then analyzes the obvious flaw in the *Ward* majority's application of the narrowly tailored standard:[21] in applying this newer standard, the Supreme Court has effectively deleted the narrowly tailored requirement from the appropriate analysis of time, place and manner regulations.[22] Finally, this Article proposes a middle-of-the-road approach, an analysis which the Court has historically applied in First Amendment cases.[23]

II. STATEMENT OF THE CASE

A. Facts

Rock Against Racism (RAR) is an association that describes itself as "dedicated to the espousal and promotion of anti-racist views."[24] One of RAR's principal methods for expressing its anti-racist viewpoints is through rock concerts.[25] At these concerts, speakers who represent groups opposed to racism are given the opportunity to state their views.[26] RAR sponsored annual concerts from 1979 through 1986 at the Naumberg Acoustic Bandshell in New York City.[27] The Naumberg Acoustic Bandshell (bandshell) is an open air amphitheater in the southeast portion of New York City's Central Park.[28] According to the dis-

18. United States v. Grace, 461 U.S. 171 (1983) (invalidating ban on any flag, banner or device used to publicize any party, organization or movement on public sidewalk outside Supreme Court building as unreasonable place restriction).

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

20. *See infra* notes 74-123 and accompanying text.

21. *See infra* notes 322-30, 372-79 and accompanying text.

22. *See infra* notes 322-30 and accompanying text.

23. *See infra* notes 332-71 and accompanying text.

24. Rock Against Racism v. Ward, 658 F. Supp. 1346, 1348 (S.D.N.Y. 1987), *aff'd in part, rev'd in part*, 848 F.2d 367 (2d Cir. 1988), *rev'd*, 491 U.S. 781 (1989).

25. Rock Against Racism v. Ward , 848 F.2d 367, 368 (2d Cir. 1988), *rev'd*, 491 U.S. 781 (1989).

26. *Id.*

27. Ward v. Rock Against Racism, 491 U.S. 781, 784-85 (1989).

28. *Id.* The bandshell is located approximately ten blocks north of the park's southern boundary at Fifty-Ninth Street. It faces west, away from the park's peripheral border and surrounding Central Park West residences. *Id.* The bandshell consists of a raised stage extending out from an acoustic shell, which faces a "well-defined paved 'concertground,' which is in turn surrounded by grassy areas, slight elevations, and trees." *Rock Against Racism*, 658 F. Supp. at 1351. A grassy area called the Sheep Meadow lies to the west of the concertground.

trict court in *Ward*, the bandshell was "one of the most popular and heavily used outdoor entertainment facilities in Central Park."[29]

New York City requires a permit for the use of the bandshell.[30] Between 1979 and 1983 the city received complaints about excessive noise at RAR's concerts from park users and residents living near the park.[31] Before RAR's 1984 concert the city told RAR that its event permit would be revoked if specified volume levels were exceeded.[32] When the sound levels exceeded the specified level at a 1984 concert, two citations were issued to RAR and the electric power to the amplifiers was shut off.[33] In 1985 when RAR agreed to abide by the city's volume limits, the city allowed the association to put on its concert.[34] This concert was performed without any noise complaints.[35]

In March of 1986 the city's Department of Parks established mandatory procedures for granting concert permits[36] to any sponsor who applied for permission to hold an event at the bandshell.[37] These guidelines set out the city's policy on twelve subjects, including sound amplification.[38] The city's purpose in establishing the guidelines was to assist sponsors "in understanding their responsibilities; to prevent overuse, crowding, security problems and excessive noise; and to avoid conflicts with other users of Central Park."[39]

The sound amplification provisions for the bandshell required that all event sponsors use "a sound system and sound engineer supplied by the city, and no other equipment."[40] As a result, "the volume, the sound 'mix,' and the overall sound quality" were under the physical control of a

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Ward, 491 U.S. at 784. This grassy area is a city-designated quiet area for passive recreations such as reclining, walking and reading. *Id.*

29. *Rock Against Racism*, 658 F. Supp. at 1351.

30. *Rock Against Racism*, 848 F.2d at 368.

31. *Ward*, 491 U.S. at 785.

32. *Id.*

33. *Id.*

34. *Id.*

35. Rock Against Racism v. Ward, 636 F. Supp. 178, 179 (S.D.N.Y. 1986).

36. *Rock Against Racism*, 848 F.2d at 368 n.1 (quoting CITY OF NEW YORK PARKS & RECREATION, USE GUIDELINES FOR THE NAUMBERG BANDSHELL IN CENTRAL PARK (1986)), *rev'd*, 491 U.S. 781 (1989).

37. *Id.* at 368.

38. *Id.*; *Rock Against Racism*, 658 F. Supp. at 1349-50. The eleven other subjects included: (1) permits; (2) hours and dates of use; (3) attendance; (4) insurance; (5) vehicles; (6) concession of goods; (7) revenue; (8) safety; (9) portable toilets; (10) cleanup; and (11) evaluation. *Rock Against Racism*, 848 F.2d at 368; *Rock Against Racism*, 658 F. Supp. at 1349-50.

39. *Rock Against Racism*, 658 F. Supp. at 1350; *see also Rock Against Racism*, 848 F.2d at 370 (describing city's purpose as to prevent offensive intrusion of noise from bandshell).

40. *Rock Against Racism*, 848 F.2d at 368. New York City's use guideline for sound amplification states:

city-supplied sound company and sound engineer.[41] Thus, the sound engineer could "control what the audience hear[d], . . . including both the volume and the aesthetic result."[42]

B. Procedural History

1. The district courts

After RAR learned that it would have to comply with the city's new guidelines at its annual concert in May of 1986, it sought a preliminary injunction to prevent enforcement of the guidelines.[43] RAR alleged that the guideline's sound amplification requirements violated its First Amendment rights,[44] arguing that New York did not have a substantial interest in requiring RAR to abandon its own sound system.[45]

Recognizing that "live musical expression is protected by the First

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SOUND AMPLIFICATION

To provide the best sound for all events Department of Parks and Recreation has leased a sound amplification system designed for the specific demands of the Central Park Bandshell. To insure appropriate sound quality balanced with respect for nearby residential neighbors and the mayorally decreed quiet zone of Sheep Meadow, all sponsors may use only the Department of Parks and Recreation sound system. DEPARTMENT OF PARKS AND RECREATION IS TO BE THE SOLE AND ONLY PROVIDER OF SOUND AMPLIFICATION, INCLUDING THOUGH NOT LIMITED TO AMPLIFIERS, SPEAKERS, MONITORS, MICROPHONES, AND PROCESSORS. Clarity of sound results from a combination of amplification equipment and a sound technician's familiarity and proficiency with that system. Department of Parks and Recreation will employ a professional sound technician [who] will be fully versed in sound bounce patterns, daily air currents, and sound skipping within the Park. The sound technician must also consider the Bandshell's proximity to Sheep Meadow, activities at Bethesda Terrace, and the New York City Department of Environmental Protection recommendations.

Id. at 368-69 n.1 (quoting CITY OF NEW YORK PARKS & RECREATION, USE GUIDELINES FOR THE NAUMBERG BANDSHELL IN CENTRAL PARK (1986)). New York City contracted with a private firm called New York Sound to provide the sound system and the sound engineers needed for such musical events. *Rock Against Racism*, 658 F. Supp. at 1352.

41. *Rock Against Racism*, 848 F.2d at 369. During an event, a sound engineer presided over a mixing board which controlled inputs from each instrument and performer. These inputs included the sound levels, the bass and the treble coming from each source of sound. This sound engineer would continually manipulate various controls on the mixing board to provide the desired sound mix and volume. *Id.*

42. *Id.*

43. Rock Against Racism v. Ward, 636 F. Supp. 178, 179 (S.D.N.Y. 1986).

44. *Id.*; *see* U.S. CONST. amend. I. RAR also sought the injunction on the grounds that the requirements for a processing fee, clean-up bond and liability insurance, as well as the limited number of hours that the bandshell was to be used under the guidelines were unconstitutional. *Rock Against Racism*, 636 F. Supp. at 179-81. The district court granted an injunction to prevent the imposition of the sound amplification and time restraints, while upholding the guideline's processing fee, clean-up bond and liability insurance requirements. *Id.*

45. *Rock Against Racism*, 636 F. Supp. at 179. In the prior year's concert, the city had allowed RAR to use its own sound system and sound engineers and there had been no problems with the sound quality or decibel level. *Id.*

Amendment,"[46] the district court granted the injunction to prevent the city from requiring RAR to use a city-controlled and -employed sound company.[47] The court found that the city did not have a substantial governmental interest in making RAR use the city-appointed sound system.[48] It noted that RAR had acknowledged and followed the city's sound regulations the previous year, and that there was no reason to assume that it would not do so again.[49] As a result, RAR was allowed to use its own sound system and engineers during its 1986 concert.[50]

After this concert, RAR sought a declaratory judgment to strike down the guideline as facially invalid because it operated as a prior restraint on free speech.[51] RAR also claimed that numerous other provisions in the guidelines violated its First Amendment rights.[52] The same district court that previously had granted the preliminary injunction prior to the 1986 concert found that the sound amplification provisions did not violate the First Amendment.[53]

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46. *Id.* (quoting Cinevision Corp. v. City of Burbank, 745 F.2d 560, 569 (9th Cir. 1984), *cert. denied*, 471 U.S. 1054 (1985)). The Supreme Court in *Ward v. Rock Against Racism* recognized that music is "one of the oldest forms of human expression," and stated that music "is protected under the first amendment." 491 U.S. 781, 790 (1989); *accord* Calish v. City of Bridgeport, 788 F.2d 80, 82 (2d Cir. 1986) (stating "musical entertainment is a form of protected speech"); Reed v. Village of Shorewood, 704 F.2d 943, 950 (7th Cir. 1983) ("[E]ven if the music had no political message—even if it had no words—[the government] would have to produce a strong justification for . . . repressing a form of 'speech.' "); Tacynec v. City of Philadelphia, 687 F.2d 793, 796 (3d Cir. 1982) (noting band's performance form of expressive entertainment protected by First Amendment).

47. *Rock Against Racism*, 636 F. Supp. at 179.

48. *Id.*

49. *Id.* For a discussion of the level of constitutional scrutiny to which a statute challenged under the First Amendment is subject, see *infra* notes 124-35 and accompanying text.

50. The district court stressed that First Amendment protection extends to "not only the words and songs presented but also the sound which actually emanates from the amplification system. That sound may be substantially affected by the amplification system itself and who controls it. To paraphrase the old song: 'The music goes round and round, but it comes out *here*.' " *Rock Against Racism*, 636 F. Supp. at 179 (quoting a popular song circa 1935).

51. Rock Against Racism v. Ward, 658 F. Supp. 1346, 1350 (S.D.N.Y. 1987), *aff'd in part, rev'd in part*, 848 F.2d 367 (2d Cir. 1988), *rev'd*, 491 U.S. 781, 788 (1989). Facial attacks on laws are sustained only if the law is invalid *in toto* and therefore incapable of any valid application. Steffel v. Thompson, 415 U.S. 452, 474 (1974). Prior restraints are acts that prevent speech before it occurs, as opposed to those that punish for speech after it occurs and violate some governmental requirement. Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 556-57 (1976); Near v. Minnesota, 283 U.S. 697, 713-14 (1931).

52. *Rock Against Racism*, 658 F. Supp. at 1349 n.1. The provisions complained of included those governing the permits, hours and dates of use, attendance, insurance, vehicles and revenues. *Id.* at 1349-50.

53. *Id.* at 1353. The district court, however, found that a number of other provisions in the guidelines were unconstitutional, including: (1) the user fee for the sound amplification system; (2) the provisions governing hours of use of the Bandshell; (3) the provision limiting

In a brief opinion, the court stated that "reduction of noise, particularly in a noise polluted city like New York, is a particularly compelling government interest."[54] The court concluded that the regulations were "sufficiently narrowly tailored" to meet the city's interest in regulating noise, but stated that the city's previous effort of pulling the plug when sound became too loud was not an appropriate alternative method of meeting the city's objective.[55] The court found it unnecessary to inquire into whether the city could use any less intrusive, more narrowly tailored means to accomplish its noise limiting objective.[56]

The district court framed the First Amendment issue differently than the reviewing courts that have subsequently addressed this matter. It held that RAR did not have a First Amendment right to own the sound amplification system used when it performed in Central Park.[57] Thus, the court concluded that "the sound amplification guidelines are constitutional because they do not impinge upon a protected right."[58]

2. The court of appeals

On appeal, the Second Circuit Court of Appeals reversed the district court's decision and held the sound amplification guidelines to be unconstitutional.[59] The Second Circuit found that "[t]he required use of the city's system and technician forces each performer and sponsor to filter its sound quality, tone, mix, and other aesthetic factors through the city's technician and sound system,"[60] and that "[i]n the highly subjective realm of music, legitimate regulation of noise levels does not justify standardization."[61]

The court stressed that in traditional public forums such as parks[62] "the government's ability to permissibly restrict expressive conduct is very limited."[63] As a result, the Second Circuit applied a standard in

attendance; (4) the provision requiring insurance; and (5) the provision prohibiting solicitation for funds and revenue. *Id.* at 1355-59.

54. *Id.* at 1352-53 (quoting Weil v. McClough, 618 F. Supp. 1294, 1296 (S.D.N.Y. 1985)).

55. *Id.* at 1353.

56. *See id.* at 1353-54.

57. *Id.* at 1353.

58. *Id.*

59. Rock Against Racism v. Ward, 848 F.2d 367, 372 (2d Cir. 1988), *rev'd*, 491 U.S. 781 (1989).

60. *Id.*

61. *Id.*

62. See *infra* notes 172-73, 180-201 and accompanying text for a definition and discussion of traditional public forums.

63. *Rock Against Racism*, 848 F.2d at 369 (quoting United States v. Grace, 461 U.S. 171, 177 (1983)).

which "the method and extent of such regulation must be reasonable, that is, it must be the least intrusive upon the freedom of expression as is reasonably necessary to achieve a legitimate purpose of the regulation."[64]

The court listed a number of less intrusive alternatives that the city could have pursued to accomplish its objective, but chose not to implement.[65] For example, the city could have installed a volume limiting device controlled by the city during concerts.[66] The sponsor's sound system could have been operated by the city's sound engineers.[67] Additionally, a maximum decibel level of sound[68] could have been negotiated with the event's sponsor for each event.[69] Finally, the court concluded that "[t]here is nothing in the record to suggest that the city cannot devise methods to control the volume, even in the face of noncooperation, without requiring the use of a designated sound system operated by the city's technician."[70]

3. The United States Supreme Court

The United States Supreme Court reversed the Second Circuit Court of Appeals as to the sound amplification provision.[71] The Court criticized the court of appeals' stringent application of the narrowly tailored requirement for governmental actions that intrude on protected speech.[72] Justice Kennedy, writing for the five-justice majority, stated that the Second Circuit erred in "sifting through all the available or imagined alternative means of regulating sound volume in order to determine whether the city's solution was 'the least intrusive means' of achieving the desired end."[73]

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64. *Id.* at 370 (citing United States v. O'Brien, 391 U.S. 367, 377 (1968)).

65. *Id.* at 371.

66. *Id.*

67. *Id.*

68. A decibel is "a unit for measuring the relative loudness of sounds." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 585 (1986).

69. *Rock Against Racism*, 848 F.2d at 371.

70. *Id.* at 372.

71. Ward v. Rock Against Racism, 491 U.S. 781, 803 (1989). Justice Kennedy wrote the majority opinion in which Chief Justice Rehnquist and Justices White, O'Connor and Scalia joined. *Id.* at 783. Justice Blackmun concurred in the judgment without writing a separate opinion. *Id.* at 803 (Blackmun, J., concurring).

72. *Id.* at 797-98.

73. *Id.* at 797 (quoting Rock Against Racism v. Ward, 848 F.2d 367, 371 (2d Cir. 1988), *rev'd*, 491 U.S. 781 (1989)).

III. REASONING OF THE COURT

A. *Justice Kennedy's Majority Opinion*

Justice Kennedy's majority opinion held that restrictions on the time, place or manner of protected speech were not invalid " 'simply because there is some imaginable alternative that might be less burdensome on speech.' "[74] He relied almost exclusively on language found in *Clark v. Community for Creative Non-Violence*.[75] In *Clark* the Supreme Court held that "[w]e are unmoved by the Court of Appeals' view that the challenged regulation is unnecessary, and hence invalid, because there are less speech-restrictive alternatives that could have satisfied the Government interest."[76]

The majority opinion in *Ward* used varying phrases to describe the narrow tailoring standard and how it should be applied. At one point the Court stated that "the requirement of narrow tailoring is satisfied 'so long as the . . . regulation promotes a substantial government interest that would be achieved less effectively absent the regulation.' "[77] In another passage, the majority reasoned that "[s]o long as the means chosen are not substantially broader than necessary to achieve the government's

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74. *Id.* (quoting United States v. Albertini, 472 U.S. 675, 689 (1985)). The majority deemed the least-restrictive-alternative analysis to be appropriate only when dealing with content-based regulations on speech. *Id.* at 798 n.6. Justice Kennedy distinguished the Court's opinion in Boos v. Barry, 485 U.S. 312, 329 (1988), where the Court concluded that "the government regulation at issue was 'not narrowly tailored; a less restrictive alternative is readily available,' " on the basis that *Boos* involved a content-based restriction on speech. *Ward*, 491 U.S. at 798 n.6. Justice Kennedy further stated:

> While time, place, or manner regulations must also be "narrowly tailored" in order to survive First Amendment challenge, we have never applied strict scrutiny in this context. As a result, the same degree of tailoring is not required of these regulations, and least-restrictive-alternative analysis is wholly out of place.

Id.

75. 468 U.S. 288 (1984); *Ward*, 491 U.S. at 805 n.3 (Marshall, J., dissenting).

76. *Clark*, 468 U.S. at 299. In *Clark* the Court addressed a time, place and manner restriction that banned demonstrators from sleeping in National Parks in the heart of Washington, D.C. *Id.* at 294, 298-99. These demonstrators had gathered to emphasize the plight of the nation's homeless. *Id.* at 291-92. A National Parks policy prohibited sleeping, setting up tents, storing belongings or cooking upon park premises in an effort to prevent damage to the parks. *Id.* at 290-91. The Park Service allowed the demonstrators to set up symbolic tent cities in the area, but refused to let the participants sleep on the site. *Id.* at 292. The Court's only analysis under the narrowly tailored standard was that "[t]here is no gainsaying that preventing overnight sleeping [in the park] will avoid a measure of actual or threatened damage to Lafayette Park and the Mall." *Id.* at 299. The Court then concluded that "[t]he Court of Appeals' suggestions that the Park Service minimize the possible injury by reducing the size, duration, or frequency of demonstrations would still curtail the total allowable expression in which demonstrators could engage." *Id.* The Court, however, cited no authority for the manner in which it applied the narrowly tailored standard.

77. *Ward*, 491 U.S. at 799 (quoting United States v. Albertini, 472 U.S. 675, 689 (1985)).

interest, . . . the regulation will not be invalid simply because a court concludes that the government's interest could be adequately served by some less-speech-restrictive alternative."[78]

The majority found that New York City had two objectives in requiring users of the bandshell to use its own sound system and engineer. First, the city had an interest in limiting the sound volume at bandshell events.[79] Second, the city had an interest in ensuring " 'that the sound amplification was sufficient to reach all listeners within the defined concertground' "[80]—a problem the Court found the city had experienced in the past when promoters, other than RAR, had used inadequate sound engineers.[81]

In addressing the city's sound control interest, the Court stated that the Second Circuit had "erred in failing to defer to the city's reasonable determination that its interest in controlling volume would be best served by requiring bandshell performers to utilize the city's sound technician."[82] It noted that the city's interest in limiting sound volume was served directly and effectively through the required use of the city's engineer and sound system.[83] The Court concluded that without this requirement, the city's interest would not have been served as well, pointing to past complaints about excessive volume at RAR's concerts.[84]

The Court also remarked that the city's interest in providing adequate sound to all listeners "supports the city's choice of regulatory methods."[85] Although RAR had not provided inadequate sound systems at any of its previous concerts, other bandshell performers had.[86] "[T]he validity of the regulation depends on the relation it bears to the overall problem the government seeks to correct, not on the extent to which it furthers the government's interests in an individual case."[87] Pointing to this objective, the Court noted that the city's interest in providing ample sound "would be served less effectively without the sound amplification guideline than with it."[88]

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78. *Id.* at 800.
79. *Id.* at 792, 797.
80. *Id.* at 800-01 (quoting Rock Against Racism v. Ward, 658 F. Supp. 1346, 1352 (S.D.N.Y. 1987), *aff'd in part, rev'd in part*, 848 F.2d 367 (2d Cir. 1988), *rev'd*, 491 U.S. 781 (1989)).
81. *Id.* at 801.
82. *Id.* at 800.
83. *Id.*
84. *Id.*
85. *Id.* at 801.
86. *Id.*
87. *Id.*
88. *Id.*

Justice Kennedy rejected RAR's claim that the sound amplification provision "sweeps far more broadly than is necessary to further the city's legitimate concern with sound volume" by placing control of the sound mix and volume in the hands of the city's engineer and sound system.[89] He stated that the city's requirements did not have a negative effect on the bandshell performers' ability to achieve the quality of sound desired.[90] Nevertheless, Justice Kennedy pointed out that if the bandshell requirements did have such a negative effect, then RAR's "concerns would have considerable force."[91]

The Court quoted from the district court's opinion which indicated that the city's sound engineer allowed the sponsors of bandshell events to control the sound mix.[92] The Court also noted that there was no indication that the city's engineers were incapable of implementing a sponsor's desired mix.[93] From these findings, the majority deduced a two-step conclusion.

First, the Court concluded that the city's guideline had no "material impact on any performer's ability to exercise complete artistic control over sound quality."[94] Second, "[s]ince the guideline allows the city to control volume without interfering with the performer's desired sound mix, . . . it satisfies the requirement of narrow tailoring."[95] The majority noted that "[t]he alternative regulatory methods hypothesized by the court of appeals reflect nothing more than a disagreement with the city over how much control of volume is appropriate or how that level of control is to be achieved."[96]

Although the Supreme Court held that the guideline was a narrowly tailored means of accomplishing the city's interest in curbing excessive noise from and around Central Park, it warned that "this standard does not mean that a time, place, or manner regulation may [constitutionally]

89. *Id.*

90. *Id.* at 802.

91. *Id.* at 801.

92. *Id.* at 802 (quoting Rock Against Racism v. Ward, 658 F. Supp. 1346, 1352 (S.D.N.Y. 1987), *aff'd in part, rev'd in part*, 848 F.2d 367 (2d Cir. 1988), *rev'd*, 491 U.S. 781 (1989)). Justice Kennedy stated "that pursuant to city policy, the city's sound technician 'give[s] the sponsor autonomy with respect to the sound mix . . . [and] does all that he can to accommodate the sponsor's desires in those regards.' " *Id.* (quoting Rock Against Racism v. Ward, 658 F. Supp. 1346, 1352 (S.D.N.Y. 1987), *aff'd in part, rev'd in part*, 848 F.2d 367 (2d Cir. 1988), *rev'd*, 491 U.S. 781 (1989)).

93. *Id.*

94. *Id.*

95. *Id.*

96. *Id.* at 800.

burden substantially more speech than is necessary."[97] In seeking to establish a standard that determines how much scrutiny should be applied for the requirement of narrow tailoring, the Court stated that "[w]hile time, place, or manner regulations must also be 'narrowly tailored' in order to survive [a] First Amendment challenge, we have never applied strict scrutiny in this context."[98] In concluding its analysis, the majority held that the guideline was not substantially broader than necessary to achieve the city's interest and thus satisfied the Court's interpretation of the narrowly tailored means requirement.[99]

B. Justice Marshall's Dissenting Opinion

Justice Marshall, joined by Justices Brennan and Stevens, dissented from the majority opinion.[100] The dissent expressed two major concerns. First, Justice Marshall stated that the narrowly tailored test required the "least intrusive" restriction necessary to protect the governmental interest.[101] Second, he viewed New York City's sound amplification guidelines to be an impermissible prior restraint on speech.[102] Under both rationales, the dissenters believed that the guidelines were unconstitutional.[103]

Justice Marshall supported the overall requirements articulated by the majority for assessing the constitutionality of sound control guidelines. He agreed that a "time, place, and manner regulation of expression must be content-neutral, serve a significant government interest, be narrowly tailored to serve that interest, and leave open ample alternative channels of communication."[104] However, he disagreed with "the majority's serious distortion of the narrow tailoring requirement."[105]

Justice Marshall further stated that prior Supreme Court cases "have not, as the majority asserts, 'clearly' rejected a less restrictive alternative test."[106] To the contrary, during the Court's 1988 term the Court found that a statute is narrowly tailored only "if it targets and eliminates no more than the exact source of the 'evil' it seeks to remedy."[107] The

97. *Id.* at 799.
98. *Id.* at 798-99 n.6 (explaining Boos v. Barry, 485 U.S. 312 (1988)).
99. *Id.* at 803.
100. *Id.* (Marshall, J., dissenting).
101. *Id.* (Marshall, J., dissenting).
102. *Id.* (Marshall, J., dissenting).
103. *Id.* (Marshall, J., dissenting).
104. *Id.* at 804 (Marshall, J., dissenting).
105. *Id.* (Marshall, J., dissenting).
106. *Id.* (Marshall, J., dissenting).
107. *Id.* (Marshall, J., dissenting) (quoting Frisby v. Schultz, 487 U.S. 474, 485 (1988)).

dissent cited two other cases in which the Court had applied the narrowly tailored requirement using this higher form of alternative methods scrutiny.[108] Justice Marshall asserted that the majority took prior case language out of context when it cited cases in support of its standard.[109]

Justice Marshall feared the potential of future limitations on speech if the majority's lack of scrutiny, when using the narrowly tailored requirement, became followed precedent.[110] He believed that the court of appeals had reasoned properly in examining how much control the city was to maintain over volume and how the city was to achieve this control.[111] The majority's reasoning that the courts should "defer to the city's reasonable determination" was inappropriate.[112] Justice Marshall concluded, "the majority thus instructs courts to refrain from examining how much speech may be restricted . . . [which leaves me] at a loss to understand how a court can ascertain whether the government has adopted a regulation that burdens substantially more speech than is necessary."[113]

According to Justice Marshall's analysis of what narrowly tailored requires, the guidelines "could not possibly survive constitutional scrutiny."[114] He stressed that New York City's "interest in avoiding loud sounds cannot justify giving government total control over sound equipment . . . [because the] goal[] can be effectively and less intrusively served by directly punishing the evil—the persons responsible for excessive sounds."[115] Supporting his point, Justice Marshall noted that New York

108. *Id.* at 805 (Marshall, J., dissenting) (citing Martin v. City of Struthers, 319 U.S. 141 (1943); Schneider v. State, 308 U.S. 147 (1939)). In *Schneider* the Court invalidated a ban limiting handbill distribution on public streets, despite the fact that it was an effective way of minimizing litter. 308 U.S. 147, 162 (1939). The Court concluded that to punish those who actually litter was a much less intrusive means to serve the statute's purpose. *Id.* at 162-63. Similarly, in *Martin v. City of Struthers* the Court invalidated a ban on door-to-door distributions of handbills because directly punishing fraudulent solicitation was a less intrusive means of serving the government's interest in preventing fraud. 319 U.S. 141, 148-49 (1943).

109. *Ward*, 491 U.S. at 804-05 (Marshall, J., dissenting). Justice Marshall argued that the cases which Justice Kennedy cited in support of his standard for narrow tailoring did not involve traditional public forums—like Central Park—which have been traditionally dedicated to free expression. *Id.* at 805 n.2 (Marshall, J., dissenting). Instead, they involved situations where speech historically has been afforded less protection. *Id.* at 804-05 nn.1 & 2 (Marshall, J., dissenting); *see, e.g.*, Renton v. Playtime Theatres, Inc., 475 U.S. 41, 49 & n.2 (1986) (noting speech includes sexually explicit materials in adult movie theater); United States v. Albertini, 472 U.S. 675, 687 (1985) (noting speech on military base afforded less protection).

110. *Ward*, 491 U.S. at 806-07 (Marshall, J., dissenting).

111. *Id.* (Marshall, J., dissenting).

112. *Id.* (Marshall, J., dissenting).

113. *Id.* at 807 (Marshall, J., dissenting).

114. *Id.* (Marshall, J., dissenting).

115. *Id.* (Marshall, J., dissenting).

City has a statute which punishes excessive noise that the city does not enforce.[116]

The second critical issue raised by the dissenting opinion involved the doctrine of prior restraints.[117] The dissenters believed that the "government's exclusive control of the means of communication enable[s] public officials to censor speech in advance of its expression."[118] The dissent stated that the two major requirements to uphold the validity of prior restraints were not met in this case.[119]

First, the dissent found no " 'narrowly drawn, reasonable and definite standards' " in the guidelines.[120] Rather, Justice Marshall found that the goals of the guidelines were ill defined and did not place a "limitation on the city's discretion."[121] Second, Justice Marshall reasoned that, by the nature of the continuous hands-on censorship made by the city's sound engineers at concerts through their control of the music's sound, it would be impossible to make " 'an almost immediate judicial determination' " of whether the city's actions violated the First Amendment.[122] As a result, the dissenters concluded that "the Guidelines constitute a quintessential, and unconstitutional, prior restraint."[123]

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116. *Id.* (Marshall, J., dissenting).

117. *Id.* at 808 (Marshall, J., dissenting). Prior restraints on speech have generally been considered by the Court as a greater threat to the First Amendment than subsequent punishment. *See* Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 559 (1976) ("[P]rior restraints on speech and publication are the most serious and the least tolerable infringement on First Amendment rights."); Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 70 (1963) ("Any system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity."); Near v. Minnesota, 283 U.S. 697, 716 (1931) (First Amendment "has meant, principally although not exclusively, immunity from previous restraints or censorship.").

118. *Ward*, 491 U.S. at 808 (Marshall, J., dissenting).

119. *Id.* at 809 (Marshall, J., dissenting); *see infra* notes 120-23 and accompanying text.

120. *Ward*, 491 U.S. at 809 (Marshall, J., dissenting) (quoting Niemotko v. Maryland, 340 U.S. 268, 271 (1951)).

121. *Id.* at 810 (Marshall, J., dissenting).

122. *Id.* at 809 (Marshall, J., dissenting) (quoting Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 70 (1963)). The Supreme Court has required that for a prior restraint to be upheld, there must be an almost immediate judicial determination that the restricted material was unprotected by the First Amendment. *See Bantam*, 372 U.S. at 70; *see also* Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 560 (1975). Justice Marshall believed that each time the city made slight variations over a performer's sound, be it either in the quality or its volume, the government was restraining the performer's speech. *Ward*, 491 U.S. at 811 (Marshall, J., dissenting). Since such sound controls would necessarily be altered many times during each performance at the bandshell, a court could not make such an immediate determination for each action taken by the city.

123. *Ward*, 491 U.S. at 812 (Marshall, J., dissenting).

IV. ANALYSIS

The First Amendment to the United States Constitution commands that "Congress shall make no law . . . abridging the freedom of speech."[124] This prohibition has been held to apply to state governments through the Fourteenth Amendment.[125] Despite the phrasing of the First Amendment as a seemingly absolute and direct ban on governmental regulations that restrict free speech, the United States Supreme Court has not applied it in a literal fashion.[126] The Court has employed instead a number of tests to determine whether the government has violated First Amendment commands when regulating speech.[127] The appropriate test depends upon the type of speech being regulated and the type of

124. U.S. CONST. amend. I.

125. U.S. CONST. amend. XIV; *see, e.g.*, Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748, 749 n.1 (1976).

126. The Court has repeatedly stated that the history of the First Amendment indicates that it "was not intended to protect every utterance." Roth v. United States, 354 U.S. 476, 483 (1957); *accord* Seattle Times Co. v. Rhinehart, 467 U.S. 20, 31 (1984) (holding information received by newspaper-petitioner solely through civil discovery process not protected); Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 557 (1976) (holding confessions or admissions made by accused to law enforcement officers or third parties not protected); Jones v. Opelika, 316 U.S. 584, 593 (1942), *vacated on other grounds*, 319 U.S. 103 (1943) (upholding ordinance requiring licensing for various businesses, including book and pamphlet sellers); Gitlow v. New York, 268 U.S. 652, 666-67 (1925) (upholding statute prohibiting communication advocating overthrow of government by force); Toledo Newspaper Co. v. United States, 247 U.S. 402, 419-20 (1918) (holding utterance advocating overthrow of government by force not protected by First Amendment); Robertson v. Baldwin, 165 U.S. 275, 281 (1897) (noting First Amendment does not protect libel, blasphemies or publications injurious to public morals). Justice Frankfurter reaffirmed this idea when he stated, "[t]he soil in which the Bill of Rights grew was not a soil of arid pedantry. The historic antecedents of the First Amendment preclude the notion that its purpose was to give unqualified immunity to every expression that touched on matters within the range of political interest." Dennis v. United States, 341 U.S. 494, 521 (1951) (Frankfurter, J., concurring).

127. *See, e.g.*, Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) (noting speech not protected by First Amendment if it advocates use of force or crime, if advocacy is "directed to inciting or producing imminent lawless action" and is "likely to incite or produce such action"); *Roth*, 354 U.S. at 485 (noting obscenity, which is not protected by First Amendment, is determined by whether average person, applying contemporary community standards would find that material, taken as whole, appeals to prurient interest); Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942) (holding no First Amendment protection for "fighting words" which by their very utterance inflict injury or tend to incite immediate breach of peace).

regulation at issue.[128] These tests balance the First Amendment rights of the speaker against the government's interest in regulating the speech.[129]

The Supreme Court's standard of scrutiny in First Amendment cases also depends upon the particular facts of the case before the Court.[130] However, the Court has been noticeably equivocal in deciding cases involving free speech. As Justice Black noted, the "Court, to be sure, has had its difficulties and sharp differences of opinion in deciding the precise boundaries dividing what is constitutionally permissible and impermissible in [the First Amendment] field."[131]

First Amendment questions concerning abridgement of speech generally require a three-part analysis.[132] First, the speech affected by the challenged regulation must be identified as being either protected or unprotected by the First Amendment.[133] Second, the type of forum in which the speech occurred must be determined because the degree to which the government may limit or infringe the speech depends upon this determination.[134] Third, the government's manner of and justifica-

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128. These tests are all based on *United States v. O'Brien*, wherein Chief Justice Warren formulated the following rule:

> [W]e think it clear that a government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.

391 U.S. 367, 377 (1968).

129. *Id.* at 376-77. In Whitney v. California, 274 U.S. 357 (1927), Justice Brandeis eloquently summarized the foundational beliefs, desires and purposes which drove the people of the United States in 1791 to adopt the First Amendment:

> Those who won our independence believed that the final end of the State was to make men free to develop their faculties; and that in its government the deliberative forces should prevail over the arbitrary. They valued liberty both as an ends and as a means. They believed liberty to be the secret of happiness and courage to be the secret of liberty. They believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth; that without free speech and assembly discussion would be futile; that with them, discussion affords ordinarily adequate protection against the dissemination of noxious doctrine, that the greatest menace to freedom is an inert people; that public discussion is a political duty; and that this should be a fundamental principle of the American government.

Id. at 375 (Brandeis, J., concurring).

130. *See* Young v. American Mini Theatres, 427 U.S. 50, 65 (1976); Cohen v. California, 403 U.S. 15, 19-22 (1971).

131. Gregory v. City of Chicago, 394 U.S. 111, 114 (1969) (Black, J., concurring).

132. *See, e.g.*, Cornelius v. NAACP Legal Defense & Educ. Fund, 473 U.S. 788, 799-800 (1985); Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 44 (1983); Consolidated Edison Co. v. Public Serv. Comm'n, 447 U.S. 530, 535 (1980).

133. *See* Roth v. United States, 354 U.S. 476, 481 (1957).

134. *Perry Educ. Ass'n*, 460 U.S. at 44-46.

tions for restricting the speech must satisfy the standards applicable to the particular speech and forum involved.[135]

A. *The Nature of the Speech*

In the initial step of First Amendment analysis, a court determines whether a particular expression or activity deserves protection.[136] Using the terms "pure speech,"[137] "speech plus,"[138] "symbolic speech,"[139] and "unprotected speech,"[140] the Court has delineated a sliding scale approach to First Amendment protection.[141] Sometimes the Court expressly recognizes that it is applying a sliding scale approach;[142]

135. *See, e.g., Cornelius*, 473 U.S. at 799-800.

136. *See* New York v. Ferber, 458 U.S. 747, 764 (1982) (holding statute prohibiting distribution of material depicting sexual performance by children under sixteen did not violate First Amendment as applied to bookstore proprietor who sold films of young boys masturbating); Abood v. Detroit Bd. of Educ., 431 U.S. 209, 230 (1977) (holding public employee has First Amendment right to freely express views, in public or private, regarding union representation); Brandenburg v. Ohio, 395 U.S. 444, 449 (1969) (holding unconstitutional statute which punished persons who advocated violence as means of accomplishing political reform); Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 390, 394 (1969) (noting fairness doctrine and personal attack rules, which require representative viewpoint to be aired, are consistent with purposes of First Amendment); United Mine Workers v. Illinois Bar Ass'n, 389 U.S. 217, 223 (1967) (holding speech designed solely to compensate victims of industrial accidents protected); New York Times Co. v. Sullivan, 376 U.S. 254, 279-80 (1964) (noting false statements, made without "actual malice," criticizing public official's official conduct are protected); NAACP v. Alabama, 357 U.S. 449, 460 (1958) (noting freedom to engage in association for advancement of ideas and beliefs is protected); *Roth*, 354 U.S. at 485 (holding obscenity is not protected speech); Thomas v. Collins, 323 U.S. 516, 532 (1945) (holding speech urging workers to join union is protected).

137. *See* Tinker v. Des Moines Indep. Community Sch. Dist., 393 U.S. 503, 508 (1969) (discussing high school students wearing black armbands to protest Vietnam war).

138. *See* Teamsters Union v. Hanke, 339 U.S. 470, 474 (1950) (discussing labor picketing).

139. *See* Stromberg v. California, 283 U.S. 359, 363 (1931) (discussing public display of " 'any flag, badge, banner, or device . . . as a sign, symbol or emblem of opposition to organized government' ").

140. *See* Chaplinsky v. New Hampshire, 315 U.S. 568, 571-72 (1942) (discussing those expressions which by their "very utterance inflict injury").

141. *See* T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943, 967 (1987). This article discusses how the Court has employed different balancing methods to analyze various constitutional adjudication issues, including the First Amendment. *Id.* at 943-45. The time, place and manner doctrine is such a balancing test. Clark v. Community for Creative Non-Violence, 468 U.S. 288, 293 (1984) (holding restrictions on oral and written expressions valid if they are content-neutral, narrowly tailored to serve significant government interest and leave open alternative channels to communicate information).

142. *See, e.g.*, Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 758 (1985) (Powell, J.) (recognizing that not all speech is of equal First Amendment importance); FCC v. Pacifica Found., 438 U.S. 726, 746 (1978) (Stevens, J.) (suggesting that dirty words are lower on constitutional hierarchy of protected speech); Young v. American Mini Theatres, Inc., 427 U.S. 50, 70 (1976) (same for adult movies).

however, the Court's typical technique is to be silent on this issue.[143] The Court has afforded each of these four categories varying levels of First Amendment protection.[144]

1. Levels of First Amendment speech

The Court has traditionally awarded "pure speech" the highest protection under the First Amendment.[145] Pure speech has been generally defined as communicative expression in a pure state without physical activity.[146] An example of this would be a political speech given by a candidate for office.[147]

"Speech plus" is a hybrid mixture of speech and activity. The Court has also afforded it a high degree of First Amendment protection.[148] However, this type of speech is not afforded the same degree of protection as pure speech.[149] One example of "speech plus" is picketing.[150]

"Symbolic speech" includes communicative activities that involve no verbal expression.[151] The acts of saluting a flag,[152] displaying a flag,[153] protesting through sit-ins,[154] and symbolic demonstrations[155] are

143. *See, e.g.*, Tashjian v. Republican Party, 479 U.S. 208, 213-25 (1987) (invalidating state law requiring voters in political party primaries to be party members); FCC v. League of Women Voters, 468 U.S. 364 (1984) (finding speech burdened "entitled to most exacting degree of First Amendment protection," but Court looked at interests of public and broadcasters in each case).

144. *See infra* notes 145-60 and accompanying text.

145. *See* Tinker v. Des Moines Indep. Community Sch. Dist., 393 U.S. 503, 505-06 (1969); Susan J. Rice, Note, *The Search for Valid Governmental Regulations: A Review of the Judicial Response to Municipal Policies Regarding First Amendment Activities*, 63 NOTRE DAME L. REV. 561, 563 (1988).

146. *Tinker*, 393 U.S. at 505, 508; Rice, *supra* note 145, at 563.

147. *See, e.g.*, Terminiello v. Chicago, 337 U.S. 1 (1949) (speech may not be restricted because ideas offend audience).

148. Local 391, Int'l Bhd. of Teamsters v. City of Rocky Mountain, 672 F.2d 376, 380-81 (4th Cir. 1982) (picketing protected by First Amendment as "hybrid . . . intermingling of speech and conduct").

149. *Id.*

150. *See id.* at 379-80.

151. West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 632 (1943) (holding "the flag salute is a form of utterance" and striking down state law requiring children in public schools to salute flag and pledge allegiance).

152. *See id.* at 632-33.

153. Stromberg v. California, 283 U.S. 359, 369 (1931) (holding display of communist flag in opposition to government is means of free political expression).

154. Brown v. Louisiana, 383 U.S. 131, 141-42 (1966) (holding sit-in by African-Americans at public library is protected expression of protest against segregated educational system).

155. Clark v. Community for Creative Non-Violence, 468 U.S. 288, 294 (1984) (holding sleep-in at park in Washington, D.C. to demonstrate concerns for homeless is protected speech).

considered to be part of this category. The Court has afforded less protection to this category than it has to "speech plus."[156]

"Unprotected speech" was defined by the Supreme Court in *Chaplinsky v. New Hampshire*.[157] The *Chaplinsky* holding delineated the Court's well-established position that lewd, obscene, libelous and fighting words warrant no constitutional protection.[158] The Court reasoned that "such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality."[159] Thus, how the Supreme Court characterizes the expression pursuant to the above categories strongly influences whether the governmental infringement on the expression will be constitutional.[160]

2. The nature of the speech at issue in *Ward v. Rock Against Racism*

Although the majority opinion in *Ward v. Rock Against Racism*[161] did not expressly categorize RAR's music, it did recognize, as courts have in the past, that "speech" includes musical expression for First Amendment purposes.[162] Since music, including rock and roll songs, is made up of sounds emanating from the spoken voice and instruments, music should be placed on the pure speech echelon. Further, RAR's music was political in nature[163] and apparently contained no obscene or nonvalued lyrics that would lower its value.[164]

Unlike "speech plus," which involves some physical activity other than the creation of a sound, music is wholly comprised of sound. Although rock concerts involve more than just sound,[165] sound was the

156. *See Clark*, 468 U.S. at 299; *Brown*, 383 U.S. at 142; *Stromberg*, 283 U.S. at 369.

157. 315 U.S. 568, 571-72 (1942); Rice, *supra* note 145, at 565-66.

158. *Chaplinsky*, 315 U.S. at 572; Rice, *supra* note 145, at 565-66.

159. *Chaplinsky*, 315 U.S. at 572. Since *Chaplinsky*, the Court has found other forms of expression to be outside First Amendment protection. *See* New York v. Ferber, 458 U.S. 747, 764 (1982) (child pornography); Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) (action that incites violence); Roth v. United States, 354 U.S. 476, 485 (1957) (obscenity); Rice, *supra* note 145, at 566.

160. Rice, *supra* note 145, at 563 (addressing local government problem of determining boundary that First Amendment imposes upon regulations).

161. 491 U.S. 781 (1989).

162. *Id.* at 790; *see* Cinevision Corp. v. City of Burbank, 745 F.2d 560, 567 (9th Cir. 1984).

163. *Ward*, 491 U.S. at 784 (noting RAR's political "message" was expression of anti-racist views).

164. *Id.* at 790.

165. Rock concerts often involve intricate light shows, dancing and theatrical-like performances. Patricia L. Brawn, *Pop; Video and Theatre Shape a New Madonna*, N.Y. TIMES, June 17, 1990, § 2, at 8.

only part of RAR's show that New York City sought to control.[166] Under the city's guideline, the music performed and the speeches given in RAR's show would be forced to be filtered through the amplifiers and engineer controls operated by a city-designated party.[167] Political speeches are classic examples of speech not involving physical action.[168] It would appear then that courts would afford the singing of political songs and playing of political music[169] the same protection. In fact, RAR's music and speeches had political content.[170]

Moreover, music in general does not fall into the classification of symbolic speech, because music by its very nature involves verbal expression or nonspeech.[171] Thus, the Court in *Ward* should have afforded RAR's speech the highest possible protection. Even if RAR's concerts are viewed as "speech plus" because of the physical nature of rock concerts, in light of RAR's political message RAR's concerts still should have, at a minimum, received substantial First Amendment protection.

B. The Type of Forum

The type of forum in which the speech takes place is another factor to consider in First Amendment analysis.[172] The Supreme Court has traditionally recognized four different types of forums: (1) traditional pub-

166. *Ward*, 491 U.S. at 785, 790.

167. *Id.* at 787 & n.2.

168. *See* Buckley v. Valeo, 424 U.S. 1, 16 (1976).

169. Similar to public speeches, songs on musical records often contain political messages. *See, e.g.*, N.W.A., STRAIGHT OUTTA COMPTON (Ruthless Records 1989) (condemning police discrimination and misconduct); TRACY CHAPMAN, TRACY CHAPMAN (Elecktra/Asylum Records 1988) (expounding plight of economically underprivileged); PRINCE, CONTROVERSY (Warner Brothers 1981) (expressing need for communication between United States of America and former Union of Soviet Socialist Republics).

170. *Ward*, 491 U.S. at 784.

171. Although some music is incitory or equals fighting words, and thus receives little or no First Amendment protection, this was apparently not the case with RAR's music. *See id.*

172. *See supra* note 134 and accompanying text.

lic forums,[173] (2) limited public forums,[174] (3) nonpublic forums,[175] and (4) private property.[176] The classification of these forums focuses on the character of the property at issue.[177] If the property where the speech is made is a "traditional" or "limited" public forum, the government's ability to regulate speech is subject to strict constitutional scrutiny.[178] Conversely, if it is made in a nonpublic forum or on private property, the government's regulation is not so closely scrutinized.[179] Thus, the classification into which a court places a forum is crucial in determining the degree of protection a court will afford the speech.

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173. Traditional public forums are those government-held properties that have traditionally been open to the public for expressive activities. Streets, sidewalks and public parks are all examples of classic traditional public forums. *See* Boos v. Barry, 485 U.S. 312, 318 (1988) (striking down ban on displaying signs on streets surrounding foreign embassies because streets are traditional public forums); United States v. Grace, 461 U.S. 171, 177 (1983) (noting sidewalks surrounding building housing Supreme Court traditional public forums); Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 47 (1983) (noting public school mail facilities not public forum); Hague v. Committee for Indus. Org., 307 U.S. 496, 515-16 (1939) (noting public parks and streets are traditional public forums).

174. The limited public forum is one which the government has designated for use by the public for a particular expressive activity. *See Perry*, 460 U.S. at 45-46 n.7; *see also* Widmar v. Vincent, 454 U.S. 263, 267-68 & n.5 (1981) (noting university meeting facility limited public forum); Heffron v. International Soc'y for Krishna Consciousness, 452 U.S. 640, 655 (1981) (noting temporary fair grounds are limited public forums); City of Madison Joint Sch. Dist. No. 8 v. Wisconsin Employment Relations Comm'n, 429 U.S. 167, 174-76 (1976) (noting school board meeting is limited public forum).

175. Government-held property that is neither a traditional public forum nor a limited public forum is a nonpublic forum. *See* Cornelius v. NAACP Legal Defense & Educ. Fund, 473 U.S. 788, 799-800 (1985); *Perry*, 460 U.S. at 46. For examples of nonpublic forums see *Cornelius*, 473 U.S. at 806 (holding solicitation newsletter to be nonpublic forum); United States v. Albertini, 472 U.S. 675, 686 (1985) (noting military base is nonpublic forum); *Perry*, 460 U.S. at 46 (noting public school's mail facility is nonpublic forum). Because New York City permitted concerts at the bandshell, and Central Park's physical layout as a park, the bandshell was clearly not a nonpublic forum or private property. A discussion of these forums is beyond the scope of this Article.

176. Private property has occasionally been viewed to be open to the public for First Amendment speech. *See, e.g.*, Pruneyard Shopping Ctr. v. Robins, 447 U.S. 74, 85-88 (1980) (finding First Amendment right to access privately owned shopping center); Hudgens v. NLRB, 424 U.S. 507, 520-21 (1976) (rejecting First Amendment right to access privately owned shopping center); Lloyd Corp. v. Tanner, 407 U.S. 551, 570 (1972) (finding no First Amendment right of access to privately owned mall); Marsh v. Alabama, 326 U.S. 501, 504-05 (1946) (finding First Amendment right to distribute leaflets on sidewalks of company-owned town).

177. *Perry*, 460 U.S. at 44.

178. *See, e.g.*, United States v. Grace, 461 U.S. 171, 177 (1983) (holding unconstitutional statute banning specified communicative activities, such as parades, demonstrations, and public displays of flags or banners, when applied to sidewalk in front of United States Supreme Court).

179. *See, e.g.*, *Cornelius*, 473 U.S. at 818.

1. Traditional and limited public forums

Traditional public forums are those properties which "by long tradition or by government fiat have been devoted to assembly and debate."[180] In *Hague v. Committee for Industrial Organization*[181] Justice Roberts set forth the current, well-settled principle that public parks are traditional public forums because they are held in trust for the public and have traditionally been used for assembly, communication and public discussion.[182] "Traditional public forum property occupies a special position in terms of First Amendment protection"[183] so that the government faces an especially heavy burden when infringing upon speech in this forum.[184] The government's "ability to permissibly restrict expressive conduct [in this area] is very limited"[185] or "sharply circumscribed."[186]

As Justice Roberts stated in *Hague*, traditional public forums exist "[w]herever the title of streets and *parks* may rest."[187] From *Hague* until the present time, the Court has consistently held that "[s]treets, parks and sidewalks are examples of traditional public forums."[188]

In recent years, the Supreme Court has continued to exemplify the importance of the traditional public forum in varying situations. In *Boos v. Barry*[189] the Court held unconstitutional a government statute prohibiting signs from being displayed on public streets and sidewalks.[190] The

180. *Perry*, 460 U.S. at 45.

181. 307 U.S. 496 (1939).

182. *Id.* at 515. In his frequently quoted opinion, Justice Roberts described the parameters and purpose of the traditional public forum classification:

> Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions. Such use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens. The privilege of a citizen of the United States to use the streets and parks for communication of views on national questions may be regulated in the interest of all; it is not absolute, but relative, and must be exercised in subordination to the general comfort and convenience, and in consonance with peace and good order; but it must not, in the guise of regulation, be abridged or denied.

Id. at 515-16.

183. *Grace*, 461 U.S. at 180.

184. *E.g.*, Hague v. Committee for Indus. Org., 307 U.S. 496, 515-16 (1939) (opinion of Roberts, J., joined by Black, J.) (noting right to use streets and parks for purpose of assembly and communications, though not absolute, "must not in the guise of regulation be abridged or denied").

185. *Grace*, 461 U.S. at 177.

186. Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983).

187. *Hague*, 307 U.S. at 515 (opinion of Roberts, J., joined by Black, J.) (emphasis added).

188. Irish Subcomm. v. Rhode Island Heritage Comm'n, 646 F. Supp. 347, 352 (D.R.I. 1986).

189. 485 U.S. 312 (1988).

190. *Id.* at 334.

ordinance had banned all signs critical of foreign governments from being shown on public sidewalks within five hundred feet of foreign embassies.[191] The Court noted that the statute "bars such speech on public streets and sidewalks, traditional public fora that 'time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions.' "[192] The Court continued to hold that such places "occupy a 'special position in terms of First Amendment protection.' "[193]

Similarly, in *United States v. Grace*[194] the Court struck down a statute that prohibited activities on the streets and sidewalks surrounding the United States Supreme Court building.[195] The statute made it unlawful for anyone "to parade, stand, or move in processions or assemblages in the Supreme Court Building or grounds," or "to display therein any flag, banner, or device designed or adapted to bring into public notice any party, organization, or movement."[196] One individual was threatened with arrest for distributing leaflets on the sidewalk in front of the court building.[197] Another individual was threatened with arrest for displaying a picket sign bearing the text of the First Amendment.[198]

The Court in *Grace* ruled that the forum involved was a traditional public forum,[199] stating that " 'public places' historically associated with the free exercise of expressive activities, such as streets, sidewalks, and parks, are considered, without more, to be 'public forums.' "[200] In concluding its discussion on the effect of such a classification, it held that "[i]n such places, the government's ability to permissibly restrict expressive conduct is very limited."[201]

In contrast to traditional public forums, government can create a limited forum. Limited public forums are those governmental properties that the government has opened to the public for expressive activity.[202] As long as these areas are open to the public, the government is subject to the same standards as traditional public forums.[203] This occurs even

191. *Id.* at 315.
192. *Id.* at 318 (quoting Hague v. Committee for Indus. Org., 307 U.S. 496, 515 (1939)).
193. *Id.* (quoting United States v. Grace, 461 U.S. 171, 180 (1983)).
194. 461 U.S. 171 (1983).
195. *Id.* at 183.
196. *Id.* at 175.
197. *Id.* at 173-74.
198. *Id.* at 174.
199. *Id.* at 177.
200. *Id.*
201. *Id.*
202. Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983).
203. *Id.* at 46.

though the government was not required to allow access to the property in the first place.[204]

Thus, in both traditional public forums and limited public forums "all parties have a constitutional right of access and the State must demonstrate compelling reasons for restricting access."[205] The state cannot prohibit all types of speech in these forums.[206] In limited public forums, governments may draw distinctions based upon the specific purpose for which the property is used[207] and in doing so give speakers with similar characteristics access.[208]

2. Type of forum at issue in *Ward v. Rock Against Racism*

In *Ward v. Rock Against Racism*[209] the Supreme Court dealt with a traditional public forum. The bandshell was located in New York City's Central Park, a park open for the public's general use.[210] Central Park had been "used for the purposes of assembly, communicating thoughts between citizens, and discussing public questions"[211] and was therefore a classical traditional public forum.

Unlike the opinions in *Boos v. Barry*[212] and *United States v. Grace*,[213] the Court in *Ward* made no mention of the weight given when the forum at issue is a traditional public forum. Justice Kennedy's majority opinion noted that "the bandshell is a public forum for performances in which the government's right to regulate expression is subject to the protections of the First Amendment."[214] He did not, however, elaborate on or give respect to this factor beyond this singular notation. The bandshell's characterization as a traditional public forum should have been an influential component in the First Amendment analysis, rather than a cursory note buried in the opinion's text. Surprisingly, Justice Marshall's dissenting opinion also failed to address this factor.[215]

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204. *Id.* ("Although a State is not required to indefinitely retain the open character of the [limited public forum] facility, as long as it does so it is bound by the same standards as apply in a traditional public forum.").

205. *Id.* at 55.

206. *Id.* at 45 (citing Carey v. Brown, 447 U.S. 455, 461 (1980)).

207. *Id.* at 55; *see* United States v. Albertini, 472 U.S. 675, 686 (1985); United States Postal Serv. v. Greenburgh Civic Ass'ns, 453 U.S. 114, 130 n.6 (1981).

208. United States v. Grace, 461 U.S. 171, 177-78 (1983); *Perry*, 460 U.S. at 55.

209. 491 U.S. 781 (1989).

210. *See supra* notes 28-29 and accompanying text.

211. Hague v. Committee for Indus. Org., 307 U.S. 496, 515 (1939).

212. 485 U.S. 312 (1988).

213. 461 U.S. 171 (1983).

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

215. *Id.* at 803-12 (Marshall, J., dissenting).

C. The Time, Place and Manner Analysis

In a traditional public forum the state may not prohibit all expressive activity.[216] The state may, however, regulate speech in accordance with one of two sets of criteria.[217] First, if the state is regulating the speech based upon its content, such regulation will be unconstitutional unless the state shows that it "is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end."[218] This high standard is based on the rationale that the government should not be able to regulate the content of individual speech.[219] A different test is applied, however, if the state is not regulating the speech because of its content, but is only attempting to regulate the time, place or manner of the speech.[220]

The Supreme Court has held that "the First Amendment does not guarantee the right to communicate one's views at all times and places or in any manner that may be desired. . . . [But instead] the activities of . . . those . . . protected by the First Amendment are subject to reasonable time, place and manner restrictions."[221] The Court has generally held that time, place and manner restrictions 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."[222]

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216. Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983).

217. *See, e.g., id.* at 45 ("For the State to enforce a content-based exclusion it must show that its regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end" whereas content-neutral restrictions must only be "narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication."); United States Postal Serv. v. Council of Greenburgh Civic Ass'ns, 453 U.S. 114, 132 (1981) (noting that "[t]his Court has long recognized the validity of reasonable time, place, and manner regulations . . . so long as the regulation is content-neutral" but that "if a governmental regulation is based on the content of the speech or the message, that action must be scrutinized more carefully.").

218. *Perry*, 460 U.S. at 45; *see also* Carey v. Brown, 447 U.S. 455, 461-62 (1980) (holding strict scrutiny standard applies to content-based restrictions).

219. *See Council of Greenburgh*, 453 U.S. at 132; Consolidated Edison Co. v. Public Serv. Comm'n, 447 U.S. 530, 536 (1980); Niemotko v. Maryland, 340 U.S. 268, 282 (1951) (Frankfurter, J., concurring).

220. *See infra* note 222.

221. Heffron v. International Soc'y for Krishna Consciousness, 452 U.S. 640, 647 (1981).

222. Clark v. Community for Creative Non-Violence, 468 U.S. 288, 293 (1984). This standard has been reiterated by the Court in numerous opinions. *See, e.g.,* City Council of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789, 808 (1984); United States v. Grace, 461 U.S. 171, 177 (1983); *Perry*, 460 U.S. at 45-46; *Heffron*, 452 U.S. at 647-48; *Consolidated Edison Co.*, 447 U.S. at 535; Virginia Pharmacy Bd. v. Virginia Citizens Consumer Council, 425 U.S. 748, 771 (1976).

Under this framework, the first step in any First Amendment analysis is to determine whether the state restriction is content-based or content-neutral.[223] If the restriction is found to be content-neutral, then the court must determine whether the restriction serves a significant[224] or substantial[225] governmental interest. Even if the regulation is found to serve such an interest, the regulation must also be narrowly tailored to serve that interest.[226] Whether the narrowly tailored requirement should be judged by relatively demanding or lax standards also must be determined.[227] Finally, if the government's content-neutral regulation has passed the hurdles of the preceding requirements, it still must leave the speaker with one or more alternative channels of communication.[228]

1. Content neutrality

The primary question in determining content neutrality in time, place and manner cases is whether the government has adopted a regulation because it disagrees with the message conveyed.[229] In *Ward v. Rock Against Racism*[230] both the majority[231] and dissenting[232] opinions concluded that New York City's sound guideline was "indisputably"[233] con-

223. *See, e.g., Perry*, 460 U.S. at 45; Geoffrey R. Stone, *Content-Neutral Restrictions*, 54 U. CHI. L. REV. 46, 115-17 (1987) (discussing distinction between content-neutral and content-based).

224. *Clark*, 468 U.S. at 293 (stating that required governmental interest must be "significant").

225. City of Renton v. Playtime Theatres, 475 U.S. 41, 47 (1986) (stating that required governmental interest must be "substantial").

226. *Clark*, 468 U.S. at 293.

227. *See infra* notes 244-92 and accompanying text.

228. In other words, even if the content-neutral governmental restriction is narrowly tailored to serve a significant governmental interest, the speaker must have other means through which to convey the message. *See Clark*, 468 U.S. at 295 (noting regulation against sleeping in park did not prevent communication of plight of homeless in other ways, e.g., symbolic tent city, signs, etc. allowed to remain in park overnight); City Council of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789, 812 (1984) (noting regulation banning posting of signs on public property does not affect right to speak and distribute literature at same location); Heffron v. International Soc'y for Krishna Consciousness, 452 U.S. 640, 654-55 (1981) (noting regulation precluding distribution of literature and solicitation of donations among crowd at state fair does not prevent doing so from fixed location or orally propagating views without passing out literature or requesting donations); United States v. O'Brien, 391 U.S. 367, 382 (1968) (implying that regulation illegalizing burning of draft card does not preclude otherwise expressing opposition to government).

229. Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989). For a discussion on the manner in which the Court distinguishes content-neutral regulations from content-based regulations, see LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 12-3 (2d ed. 1988).

230. 491 U.S. 781 (1989).

231. *Id.* at 791-92.

232. *Id.* at 804 (Marshall, J., dissenting).

233. *Id.* (Marshall, J., dissenting).

tent-neutral because it sought to control only the sound level of the music at the bandshell. Because the regulations applied to all users of the bandshell who used sound systems for musical performances, the city's justification and purpose for the guideline was found to " 'ha[ve] nothing to do with [the music's] content.' "[234] Instead, the regulations appear to have been adopted to regulate only the sound level for the benefit of the health and welfare of the city and park residents. Thus, it appears that the majority was correct in rejecting RAR's assertion that the regulations were content-based.[235]

2. Substantial interest

Both the majority and dissent in *Ward* agreed that New York City " 'ha[d] a substantial interest in protecting its citizens from unwelcome noise,' "[236] in issuing its regulations. Many cases have held that the government may act to protect even such traditional public forums as city streets and parks from excessive noise.[237] New York City is one of the most congested cities in the world, with hundreds of skyscrapers built alongside others.[238] Millions of people inhabit the small island of Manhattan[239] requiring the noise levels to be kept at habitable levels. With Central Park's location in the center of New York City,[240] it is directly surrounded by hundreds of residential apartments. Thus, New York City had a strong interest in the health, benefit and pleasure of the city's citizens by controlling any potential excessive noises that could come from the bandshell.[241]

The "city's interest in ensuring the sufficiency of sound amplifica-

234. *Id.* at 792 (quoting Boos v. Barry, 485 U.S. 312, 320 (1988)).

235. Justice Kennedy rejected RAR's assertion that the city's second justification for requiring the use of its own sound system—to ensure the quality of the sound—was content-based. *Id.* at 792-93. The majority opinion noted that "[t]he city ha[d] disclaimed in express terms any interest in imposing its own view of appropriate sound mix on performers." *Id.* at 792. Along this line, the Court noted that the district court had found that the city "requires its sound technician to defer to the wishes of event sponsors concerning sound mix." *Id.*

236. *Id.* at 796 (quoting City Council of Los Angeles v. Taxpayers for Vincent, 466 U.S. at 789, 806 (1984)); *see id.* at 803 (Marshall, J., dissenting).

237. Clark v. Community for Creative Non-Violence, 468 U.S. 288, 296 (1984) (noting government had substantial interest in keeping national parks in attractive and intact condition for public to enjoy); Brown v. Louisiana, 383 U.S. 131, 142-43 (1966) (implying that government could keep disorderly people from participating in sit-in, considering traditional library requires quiet); Kovacs v. Cooper, 336 U.S. 77, 86-87 (1949) (sound trucks banned from public streets); *id.* at 96-97 (Frankfurter, J., concurring); *id.* at 97 (Jackson, J., concurring).

238. *See* 24 ENCYCLOPAEDIA BRITANNICA 865, 868-69 (15th ed. 1988).

239. 24 *id.* at 869.

240. 24 *id.* at 867-68.

241. Ward v. Rock Against Racism, 491 U.S. 781, 796-97 (1989).

tion" also contributed to the Court's finding that the city had a substantial interest in enforcing its guidelines.[242] The Court correctly noted that "[t]he city enjoys a substantial interest in ensuring the ability of its citizens to enjoy whatever benefits the city parks have to offer, from amplified music to silent meditation."[243] Thus, the city had an established need to ensure that the sound system at the bandshell provided controlled, quality sound to be enjoyed by the park's listeners.

3. Narrowly tailored

Time, place and manner restrictions must not only serve some substantial or significant interest, but they must do so in a way that is narrowly tailored to serve that interest.[244] It is on this point that the majority and dissenting opinions in *Ward* are at odds. Prior to the decision in *Ward*, the Supreme Court had provided inconsistent guidance in explaining the parameters of the narrowly tailored requirement.[245] This indecisiveness is typified in the two contrasting viewpoints enunciated by Justice Kennedy's majority and Justice Marshall's dissenting opinions in *Ward*.

Although the Supreme Court has consistently demanded " 'narrow tailoring' . . . within the area of content-neutral regulations, it is not clear what level of exactitude is appropriate."[246] The Supreme Court uses three primary methods of interpreting the narrowly tailored requirement. Some cases have stated that the government regulation must be the least restrictive of means that would enforce the government's objectives.[247] Justice Marshall adopted this approach in his dissenting opinion in *Ward*

242. *Id.*

243. *Id.* at 797; *see also* Clark v. Community for Creative Non-Violence, 468 U.S. 288, 296 (1984) (noting government had substantial interest in keeping national parks in attractive and intact condition).

244. *Clark*, 468 U.S. at 293; City Council of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789, 808, 812 (1984); Heffron v. International Soc'y for Krishna Consciousness, 452 U.S. 640, 647-48 (1981); SDJ, Inc. v. City of Houston, 837 F.2d 1268, 1275-76 (5th Cir. 1988), *cert. denied*, 489 U.S. 1052 (1989).

245. *See generally SDJ*, 837 F.2d at 1275-76 (discussing Court's apparent variations for requirements of narrow tailoring); Stone, *supra* note 223, at 46 (discussing various levels of review applied to content-neutral regulations).

246. *SDJ*, 837 F.2d at 1275.

247. *See* City of Watseka v. Illinois Pub. Action Council, 796 F.2d 1547, 1553 (7th Cir. 1986), *aff'd mem.*, 479 U.S. 1048 (1987); *see also* Association of Community Org. for Reform Now v. City of Frontenac, 714 F.2d 813, 818-19 (8th Cir. 1983) (noting ban on door-to-door solicitation during business hours not least restrictive means of achieving government purpose); New York City Unemployed & Welfare Council v. Brezenoff, 677 F.2d 232, 237-38 (2d Cir. 1982) (noting regulation confining representatives of organizations wishing to distribute leaflets at City Income Maintenance Centers to specific area was least restrictive method of achieving government purpose).

v. Rock Against Racism.[248] Although the precise phrasing of this standard implies an absolute, non-balancing type of test, it has not normally been applied by the courts in such a manner.[249]

In direct conflict with these decisions, others have applied the narrowly tailored rule as requiring only that the regulation strike the precise evil to be prevented, without looking to any spill-over effect that the legislation has on untargeted activities.[250] This phrasing of the narrowly tailored test effectively delegates the narrowly tailored analysis to the legislature, with little further scrutiny by the courts. Justice Kennedy followed such an approach in the *Ward* majority opinion.[251]

The third interpretation of narrowly tailored is a middle-of-the-road approach that appears to have been the historical approach applied by the Supreme Court.[252] This approach requires weighing any infringement on the First Amendment with the government's substantial interest.[253] This test does not reach a predetermined result without the need for balancing. Instead, it requires that a judge actually assess and evaluate whether the government's action is narrowly tailored to the purpose for which it was enacted.[254]

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248. 491 U.S. 781, 804-07 (1989) (Marshall, J., dissenting).

249. *See, e.g.*, Sable Communications v. FCC, 492 U.S. 115, 124-27 (1989) (statute prohibiting indecent telephone communications declared constitutional after balancing compelling state interest against impingement upon First Amendment freedoms); City Council of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789, 799 (1984) (in analyzing whether statute is narrowly tailored, court must weigh likelihood that statute itself will inhibit free expression); Shelton v. Tucker, 364 U.S. 479, 490 (1960) (invalidating law requiring teacher to compile list of all organizations affiliated with in last five years, where legitimate governmental objectives could be achieved by less restrictive alternatives); Martin v. City of Struthers, 319 U.S. 141, 148-49 (1943) (weighing civil rights interests of individual against general interest of community in determining if statute violated First Amendment); Schneider v. State, 308 U.S. 147, 164 (1939) (invalidating restrictions on distribution of circulars, where valid governmental purposes could be at least approximately achieved by less restrictive alternatives).

250. *See, e.g.*, United States v. Albertini, 472 U.S. 675, 689 (1985) (noting regulation controlling access to military base not invalid simply because there might be less burdensome alternative).

251. *Ward*, 491 U.S. at 798-99.

252. *See infra* notes 333-71 and accompanying text.

253. *See, e.g.*, *Martin*, 319 U.S. at 143.

254. *See, e.g.*, Rust v. Sullivan, 111 S. Ct. 1759, 1784 (1991) (Blackmun, J., dissenting) (noting failure to balance free speech interests claimed by Title X physicians against governmental interest in suppressing speech is failure by Court to fulfill its duty to implement protection of First Amendment); NAACP v. Alabama, 377 U.S. 288, 307-08 (1964) ("[E]ven though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved.") (quoting Shelton v. Tucks, 364 U.S. 479, 488 (1960)); Schneider v. State, 308 U.S. 147, 161 (1939) (courts must weigh circumstances and appraise substantiality of reasons advanced in support of regulating free enjoyment of rights).

a. the least restrictive means standards

On a limited number of occasions, the Supreme Court has applied a harshly-phrased requirement that necessitates government regulation to be the "least speech-restrictive means" to achieve its purpose.[255] Justice Marshall adopted this approach in his dissenting opinion in *Ward v. Rock Against Racism*.[256] The terms used in this interpretation of the narrowly tailored requirement appear to require that the government legislate in an exacting manner. However, the courts generally have not applied this phrase in such a strict fashion.

The least restrictive means test can be criticized as being virtually impossible to meet because of its stringent nature.[257] That a court "can always point out that the government has failed to take some further issue or objection into consideration, thereby second-guessing a complex policy decision undertaken by an elected body familiar with relevant local circumstances" is of concern.[258]

This fear, however, has proven to be largely unfounded because courts have not second-guessed the legislature's decision with such exactitude. They have scrutinized the government's regulations but have insisted only that the government use narrowly tailored means, not perfect means.[259]

In *Heffron v. International Society for Krishna Consciousness*[260] the

255. *See, e.g.*, Village of Schaumburg v. Citizens For a Better Env't, 444 U.S. 620, 637 (1980) (government can only serve legitimate interest by narrowly drawn regulations that do not unnecessarily interfere with First Amendment rights); Robert M. Bastress, Jr., Note, *The Less Restrictive Alternative in Constitutional Adjudication: An Analysis, A Justification, and Some Criteria*, 27 VAND. L. REV. 971, 973-1016 (1974) (discussing least restrictive means test in varying situations); *see also* Young v. American Mini Theatres, 427 U.S. 50, 63 n.18 (1976) (Stevens, J., plurality) (reasonable time, place and manner restrictions permitted where regulations necessary to further significant government interests).

256. 491 U.S. 781, 804-05 (1989) (Marshall, J., dissenting).

257. *See* City of Watseka v. Illinois Pub. Action Council, 796 F.2d 1547, 1564 (7th Cir. 1986) (Coffey, J., dissenting), *aff'd mem.*, 479 U.S. 1048 (1987); R. George Wright, *The Unnecessary Complexity of Free Speech Law and the Central Importance of Alternative Speech Channels*, 9 PACE L. REV. 57, 71 (1989).

258. Wright, *supra* note 257, at 71. For arguable examples of this judicial second-guessing, see *City of Watseka*, 796 F.2d at 1555-56; Association of Community Org. for Reform Now v. City of Frontenac, 714 F.2d 813, 818 (8th Cir. 1983).

259. *See* Students Against Apartheid Coalition v. O'Neil, 838 F.2d 735, 736-37 (4th Cir. 1988) (per curiam) (anti-apartheid shacks may be barred from university's campus without court questioning whether aesthetic interests could equally be served by allowing them to remain there for temporary period); New York City Unemployed & Welfare Council v. Brenzenoff, 677 F.2d 232, 238 (2d Cir. 1982) (noting government successfully met stringent "least restrictive means" test). See also notes 244-54 for a discussion of the least restrictive means test.

260. 452 U.S. 640 (1981).

Court ruled on the constitutionality of a rule that forbade the distribution of leaflets by unlicensed persons at state fairs.[261] A group espousing the view of the Krishna religion did not attain the required permit.[262] In an effort to have the requirement struck down, the group filed suit asserting that the rule violated their First Amendment rights.[263] Because the licensing requirement was applied evenhandedly to all persons and organizations, the regulation, as in *Ward*, was found to be content-neutral.[264] The Court found that the state had a significant interest in maintaining the orderly movement of the crowd at the fair because of the enormous variety of goods, services and entertainment exhibited at the fair.[265]

In applying the narrowly tailored requirement, however, the Court used language that indicated a "least restrictive means" requirement. The Court stated that "we cannot agree [that the rule] . . . is an unnecessary regulation because the State could avoid the threat to its interest . . . by less restrictive means, such as penalizing disorder or disruption, limiting the number of solicitors, or putting more narrowly drawn restrictions" on the Krishna group.[266] The Court reasoned that these less restrictive means could not accomplish what the state rule did.[267] Thus, the Court appeared to agree that the proper standard to apply was the least restrictive means standard. The Court, however, disagreed with the state court's application of the standard to the facts of the case and upheld the state statute.[268]

The Court reached a contrary result in *Village of Schaumburg v. Citizens for a Better Environment*,[269] where it also appeared to use a least restrictive means analysis.[270] A village ordinance prohibited door-to-door and on-street solicitation of contributions by charitable organizations that did not use at least seventy-five percent of their receipts for charitable purposes.[271] The rationale behind this rule was to protect "the public from fraud, crime and undue annoyance."[272]

The Court in *Schaumburg* held that "[t]hese interests are indeed substantial, but they are only peripherally promoted by the 75-percent

261. *Id.* at 654.
262. *See id.* at 643-45.
263. *Id.* at 644.
264. *Id.*
265. *Id.* at 650.
266. *Id.* at 654.
267. *Id.*
268. *Id.*
269. 444 U.S. 620 (1980).
270. *Id.* at 637.
271. *Id.* at 624.
272. *Id.*

requirement and could be sufficiently served by measures less destructive of First Amendment interests."[273] The Court reasoned that many charitable organizations engage in a great deal of research, advocacy and public education that usurps their finances for salaries and other overhead.[274] In addition, the village was held to have other more narrowly tailored means to accomplish its goals.[275] For instance, the village could have punished organizations that made fraudulent representations.[276] The village also could have made efforts to promote public disclosure of the finances of all charitable organizations.[277] For these reasons the Court struck down the village's ordinance.[278]

Other recent Supreme Court decisions also have apparently interpreted the narrowly tailored standard to require the least restrictive means. In *Frisby v. Schultz*[279] the Court held constitutional a city ordinance that forbade the picketing of all residences.[280] The primary purpose of this ban was to ensure the enjoyment, privacy and tranquility associated with homes.[281] Individuals intending to picket a particular home in the state brought suit alleging that the statute violated the First Amendment.[282]

The Court in *Frisby* held that a "statute is narrowly tailored if it targets and eliminates no more than the exact source of the 'evil' it seeks to remedy."[283] This degree of exactness appears to be quite similar to, if not the same as, the least restrictive means standard. The phrase "no more than the exact source of the evil" requires a remedy perfectly tailored to the government's interest, one that could only be satisfied by the

273. *Id.* at 636.

274. *Id.*

275. The Court stressed that:

> [The Village could not] lump such organizations [spending less than seventy-five percent of their receipts for a charitable purpose] with those that in fact are using the charitable label as a cloak for profit-making and refuse to employ more precise measures to separate one kind from the other. The Village may serve its legitimate interests, but it must do so by narrowly drawn regulations designed to serve those interests without unnecessarily interfering with First Amendment freedoms.

Id. at 637. The Court in *Schaumburg* quoted from NAACP v. Button, 371 U.S. 415 (1963), wherein the Court held that "[b]road prophylactic rules in the area of free expression are suspect. Precision of regulation must be the touchstone." *Schaumburg*, 444 U.S. at 637 (quoting NAACP v. Button, 371 U.S. 415, 438 (1963)).

276. *Schaumburg*, 444 U.S. at 637.

277. *Id.* at 638.

278. *Id.* at 639.

279. 487 U.S. 474 (1988).

280. *Id.* at 488.

281. *Id.* at 477.

282. *Id.* at 476-77.

283. *Id.* at 485.

regulation or statute at issue. The Court clarified its meaning when it stated that a "complete ban can be narrowly tailored, but only if each activity within the proscription's scope is an appropriately targeted evil."[284]

In applying this stringent standard in *Frisby*, the Court discussed how the ordinance eliminated only the negative effects of picketing on households.[285] Nothing short of eliminating the picketing would have eliminated the negative effects the statute was attempting to prevent. The Court held that both the physical and psychological tensions and pressures caused by picketing could not have been stopped in any other manner than with its complete ban.[286] The Court noted that limiting the number of picketers would not work because "even a solitary picket can invade residential privacy."[287] The Court concluded that "[t]he offensive and disturbing nature of the form of the communication banned by the [city] ordinance thus can scarcely be questioned."[288]

In applying the least restrictive means standard, the particular speech restriction is still often upheld despite the existence of a conceivably less restrictive alternative, contrary to Justice Kennedy's implicit belief in the majority opinion in *Ward v. Rock Against Racism*.[289] Even the district court in *Rock Against Racism v. Ward*,[290] which upheld the city's regulations, recognized the existence of this line of precedent requiring "the absence of less restrictive alternatives" to validate governmental actions that infringe upon the First Amendment.[291] Thus, there is histori-

284. *Id.* For this proposition the Court in *Frisby* cited City Council v. Taxpayers for Vincent, 466 U.S. 789 (1984), a recent case where the Court upheld another content-neutral restriction. *Frisby*, 487 U.S. at 485-86 (citing City Council v. Taxpayers for Vincent, 466 U.S. 789, 810 (1984)). In *Taxpayers for Vincent* the Court upheld an ordinance that banned all signs on public property because of aesthetic interests. *Taxpayers for Vincent*, 466 U.S. at 817. The Court held that the complete prohibition was narrowly tailored because the "substantive evil—visual blight—[was] not merely a possible by-product of the activity, but [was] created by the medium of expression itself." *Id.* at 810.

285. *Frisby*, 487 U.S. at 486-87.

286. *Id.*

287. *Id.* at 487.

288. *Id.*

289. 491 U.S. 781, 797 (1989); *see, e.g.*, United States v. Albertini, 472 U.S. 675, 688-89 (1985).

290. 658 F. Supp. 1346 (S.D.N.Y. 1987), *aff'd in part, rev'd in part*, 848 F.2d 367 (2d Cir. 1988), *rev'd*, 491 U.S. 781 (1989).

291. *Id.* at 1351; *see* Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45-46 (1983) (noting content-based exclusion requires regulation be necessary to serve compelling state interest narrowly drawn to achieve end); Cox v. New Hampshire, 312 U.S. 569, 574 (1941) (question in any particular case is whether local government control is exerted so as not to deny or unwarrantly abridge the rights of assembly and expression of thought); Schneider v. State, 308 U.S. 147, 161-64 (1939) ("[A]s cases arise, the delicate and difficult task falls upon

cal precedent for the extreme "least restrictive means" approach advocated by Justice Marshall in his dissenting opinion in *Ward*.[292]

b. *the standard applied in* Clark v. Community for Creative Non-Violence *and* Ward v. Rock Against Racism

The Supreme Court majority in *Ward* ignored the precedent requiring governmental action to be the least intrusive means when determining whether it was narrowly tailored to its objective.[293] Inexplicably, the Court expressly stated that the "less-restrictive-alternative analysis . . . has never been a part of the inquiry into the validity of a time, place, and manner regulation."[294]

The Court's analysis of precedent extended only to *Clark v. Community for Creative Non-Violence*.[295] In that case, the government forbade demonstrators from sleeping in a national park to protect the park's property.[296] The demonstrators wanted to sleep in two parks in Washington, D.C. to demonstrate the plight of the homeless.[297] The Court held that the government's regulation did not violate the First Amendment, thereby reversing the court of appeals' decision.[298]

The Supreme Court in *Clark* ruled that the government had a substantial interest in protecting the parks and that its ban was narrowly tailored to that interest.[299] The Second Circuit Court of Appeals had ruled that the government did have a substantial interest, but that there were more narrowly tailored means available to protect that interest.[300] The court of appeals suggested that the government "minimize the possi-

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the courts to weigh the circumstances and to appraise the substantiality of the reasons advanced in support of the regulation of the free enjoyment of the rights."). Although the district court mentioned this as a requirement for validating governmental actions that infringe on protected First Amendment speech, it ignored "the absence of less restrictive alternatives" in its subsequent analysis. *Rock Against Racism*, 658 F. Supp. at 1353; *see also* TRIBE, *supra* note 229, § 12-23, at 985 (noting less restrictive alternative analysis valid in deciding whether regulation too constricting upon speakers).

292. *Ward*, 491 U.S. at 804 (Marshall, J., dissenting).

293. *Id.* at 798.

294. *Id.* at 797 (quoting Regan v. Time, Inc., 468 U.S. 641, 657 (1984) (White, J., plurality)).

295. 468 U.S. 288 (1984). See *supra* notes 74-99 and accompanying text for the majority's analysis.

296. *Clark*, 468 U.S. at 296.

297. *Id.* at 295.

298. *Id.* at 299.

299. *Id.* at 296.

300. *Id.* at 299.

ble injury [to the parks] by reducing the size, duration, or frequency of demonstrations."[301]

The Supreme Court rejected this analysis, gave no substantial analysis for the narrowly tailored requirement, and effectively abolished the narrowly tailored requirement for all practical purposes.[302] The Court did nothing more than state that the court of appeals' "suggestions represent no more than a disagreement with the [government] over how much protection the core parks require or how an acceptable level of preservation is to be attained."[303] The *Clark* opinion did not question whether the statute at issue was overly inclusive—whether it was not narrowly tailored to suit its specific purpose. The opinion criticized the Second Circuit's inquiry into whether the statute was overinclusive, indicating that the majority of the justices do not approve of giving any specific meaning to the narrowly tailored requirement. The Supreme Court later applied this same shallow analysis to the narrowly tailored standard in *Ward v. Rock Against Racism*,[304] as discussed above.[305]

This analysis was also applied in the criminal law context in *United States v. Albertini*,[306] a second opinion from which Justice Kennedy adopted much of his interpretation of the narrowly tailored standard in *Ward*.[307] In *Albertini*, a case decided just five years before *Ward*, a federal statute had made it unlawful for a person to enter a military base after having been barred from it by a commanding officer.[308] After unlawfully gaining access to some secret military documents on a particular base, the defendant Albertini was barred under the statute.[309] Nine years later, Albertini returned to the base during an open-house to engage in a peaceful demonstration criticizing the nuclear arms race.[310] Albertini was then ejected from the military base and was prosecuted for violating the statute.[311]

The Court in *Albertini* held that the statute did not violate the defendant's First Amendment rights.[312] First, it noted that the military

301. *Id.*
302. *See id.*
303. *Id.*
304. 491 U.S. 781 (1989).
305. *See supra* notes 73-99 and accompanying text.
306. 472 U.S. 675 (1985).
307. *See Ward*, 491 U.S. at 797; *see supra* notes 74, 77.
308. *Albertini*, 472 U.S. at 677.
309. *Id.* at 677-78.
310. *Id.* at 678.
311. *Id.* at 679.
312. *Id.* at 690.

base was not a public forum.[313] Second, it held that the statute promoted the government's interest in "assuring the security of military installations."[314] Finally, it reasoned that the military need not allow barred individuals onto its bases to see if they will conduct themselves properly during open-houses.[315] In conclusion, the Court adopted the laissez-faire analysis applied in *Clark v. Community for Creative Non-Violence*[316] and stated that it was not "disposed to conclude that [the First Amendment] assigns to the judiciary the authority to manage military facilities throughout the Nation."[317]

4. Alternative channels

The final requirement for valid time, place and manner restrictions is that they leave open ample alternative channels of communication.[318] The majority of the Court in *Ward v. Rock Against Racism*[319] held that the city's guideline complied with this requirement:

> [T]he guideline continues to permit expressive activity in the bandshell, and has no effect on the quantity or content of that expression beyond regulating the extent of amplification. That the city's limitations on volume may reduce to some degree the potential audience for respondent's speech is of no consequence, for there has been no showing that the remaining avenues of communication are inadequate.[320]

Justice Marshall's dissenting opinion did not address this issue, apparently because Marshall already found the guideline in violation of the First Amendment on the two grounds that it was not narrowly tailored and that it was an impermissible prior restraint.[321]

V. THE *WARD* STANDARD RENDERS MINIMAL FIRST AMENDMENT PROTECTION IN TIME, PLACE AND MANNER CASES

The formulation of the narrowly tailored requirement applied in

313. *Id.* at 686.
314. *Id.* at 689.
315. *Id.*
316. 468 U.S. 288 (1984).
317. *Albertini*, 472 U.S. at 689.
318. United States v. Grace, 461 U.S. 171 (1983). "[T]he government may enforce reasonable time, place, and manner regulations as long as the restrictions 'are content-neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication.' " *Id.* at 177 (quoting Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983)).
319. 491 U.S. 781 (1989).
320. *Id.* at 802.
321. *Id.* at 803 (Marshall, J., dissenting).

Clark v. Community for Creative Non-Violence,[322] *United States v. Albertini*[323] and *Ward v. Rock Against Racism*[324] portends harsh results and minimal protection of speech. It will essentially validate any governmental regulation that accomplishes what it purports to achieve even if there are less intrusive methods to accomplish the same ends. The standard does not examine the expansiveness of the regulation or how much regulation is actually needed under the circumstances. It does not look to how the government has chosen to regulate the time, place or manner of the protected speech. Instead, it only examines whether the government's substantial interest is being furthered.

This application of a standard that purportedly requires a regulation to be narrowly tailored is outside the realm of what the actual words themselves could mean. By definition, the word "narrow" means "limited in size or scope: restricted."[325] "Tailoring" is defined as "making or adapting . . . to suit a particular purpose."[326] Individually, these words both have meanings that communicate a closely-fitted relationship. Together, they communicate a similar theme. Thus, for the Court to apply the narrowly tailored standard as only requiring that the regulation promote the government's interest and that the government's objective "would be achieved less effectively absent the regulation"[327] corrupts the normal meaning of the standard. It seems a less-than-plausible notion that this standard was intended to be applied in this manner.

If the Court continues to weaken the narrowly tailored standard, potentially any legislation that accomplishes its purposes will be upheld as constitutional. As Justice Marshall pointed out in his dissent to *Ward*, "[i]t will be enough . . . that the challenged regulation advances the government's interest only in the slightest, for any differential burden on speech that results does not enter the calculus."[328] This standard "fails to recognize that if one has a choice between using either a sledge hammer or a fly swatter in dispatching a group of insects, there is a sense in which the sledge hammer, because of its relatively severe effects on the

322. 468 U.S. 208 (1986); *see supra* notes 295-305, 316 and accompanying text.

323. 472 U.S. 675 (1985); *see supra* notes 306-17 and accompanying text.

324. 491 U.S. 781 (1989); *see supra* notes 71-75, 77-99, 250-51 and accompanying text.

325. WEBSTER'S THIRD NEW INT'L DICTIONARY 1503 (1986).

326. *Id.* at 2329.

327. *Ward*, 491 U.S. at 782-83 (quoting United States v. Albertini, 472 U.S. 675, 689 (1985)).

328. *Id.* at 806 (Marshall, J., dissenting). Justice Marshall illustrated the potential results under this standard: "[A] city could claim that bans on handbill distribution or on door-to-door solicitation are the most effective means of avoiding littering . . . or that a ban on loudspeakers and radios in a public park is the most effective means of avoiding loud noise." *Id.* (Marshall, J., dissenting).

flooring, is not narrowly tailored for the job."[329] The analysis that "an ordinance is sufficiently well tailored if it effectively promotes the government's stated interest"[330] allows the use of unnecessarily large sledge hammers as long as they are effective. Likewise, under the *Ward* standard, the manner in which the city eliminated the evil of excessive noise would be irrelevant to First Amendment review.

For example, the city could have banned all musical events at the bandshell because (1) the city had the substantial interest in eliminating the noise, and (2) absent this regulation there would be more noise. Similarly, under the standard Justice Kennedy applied in *Ward*, a number of regulations would have survived, including a total ban on the use of amplifiers or the playing of rock concerts that use noisy instruments.

Under the *Ward* standard, the Court does not hold government accountable in the least. As a result, the government does not have to concern itself with enacting legislation that will efficiently carry out its goals. Instead, the Court will tolerate regulations as long as they do *some* good. At the same time, the government will not have to consider the First Amendment, even when governmental action suppresses speech.

VI. RECOMMENDATION

This section discusses the historical application of the narrowly tailored requirement and addresses how *Ward v. Rock Against Racism*[331] misconstrues the historical precedent.[332]

A. Historical Application of the Narrowly Tailored Requirement

The Supreme Court has applied the narrowly tailored standard in varying manners over the years.[333] Historically, the Court has applied the test in a similar, if not identical manner to the test enunciated in the least restrictive means standard.[334] Under this historical approach, the narrowly tailored standard appears to reflect the phrase's denotation.

The historical cases addressing First Amendment challenges to government regulations define narrowly tailored as requiring courts to weigh

329. Wright, *supra* note 257, at 72.

330. SDJ, Inc. v. City of Houston, 837 F.2d 1268, 1276 (5th Cir. 1988), *cert. denied*, 489 U.S. 1052 (1989).

331. 491 U.S. 781 (1989).

332. *See infra* notes 333-79 and accompanying text.

333. *See supra* notes 244-92 and accompanying text; *infra* notes 334-71 and accompanying text.

334. Martin v. City of Struthers, 319 U.S. 141, 147-49 (1943); *see* Schneider v. State, 308 U.S. 147, 161 (1939). *But see* Candidates' Outdoor Graphic Serv. v. City and County of San Francisco, 574 F. Supp. 1240 (1983).

the government's substantial interest in passing the ordinance and the regulation's intrusion on First Amendment rights.[335] Under this approach, the Court does not reach a predetermined result without determining the potentially overinclusive nature of the regulation.

In *Martin v. City of Struthers*[336] Justice Hugo Black wrote the majority opinion in an early First Amendment case[337] that scrutinized the overinclusiveness of a statute by balancing the interests of the parties involved. The Court's ruling in *Martin* invalidated a city ordinance that prohibited the distribution of handbills and any other literature by ringing doorbells or otherwise summoning residents to the door.[338]

The Court in *Martin* recognized that the city had an interest in protecting its citizens, noting that "[o]rdinances of the sort now before us may be aimed at the protection of the householders from annoyance, including intrusion upon the hours of rest, and at the prevention of crime."[339] Nevertheless, the Court proceeded to attack the overinclusive nature of the ordinance that banned all uninvited door-to-door communications.

The Court began by stating that "[t]he dangers of distribution can so easily be controlled by traditional legal methods."[340] First, the Court stated that there were trespass laws that punished persons who entered onto another's property "after having been warned by the owner to keep off."[341] Second, the city had numerous other criminal ordinances that dealt with the situation of swindlers posing as canvassers.[342] Although the Court did not explicitly apply the narrowly tailored requirement at that time, it did apply an analysis that effectively balanced the govern-

335. *See Martin*, 319 U.S. at 143; *see also* Kovacs v. Cooper, 336 U.S. 77, 87 (1949) (residents unable to escape interference by sound trucks without municipality's protection); Cantwell v. Connecticut, 310 U.S. 296, 308 (1940) (discussing power of state to prohibit conduct when "clear and present danger of . . . immediate threat to public safety" appears); *Schneider*, 308 U.S. at 160-61 (discussing regulation prohibiting obstruction of traffic while leafleting).

336. 319 U.S. 141 (1943).

337. From the enactment of the Bill of Rights until World War I, the United States Supreme Court did not decide many cases involving the First Amendment. For an in-depth discussion of the First Amendment's early and formative years, see David M. Rabban, *The Emergence of Modern First Amendment Doctrine*, 50 U. CHI. L. REV. 1207 (1983) and David M. Rabban, *The First Amendment in Its Forgotten Years*, 90 YALE L.J. 516 (1981).

338. *Martin*, 319 U.S. at 142, 149. The appellant in *Martin* was convicted of violating this statute after she had gone to the homes of strangers and distributed leaflets advertising a religious meeting. *Id.* at 142. She appealed her conviction on the basis that the statute violated the First and Fourteenth Amendment rights of freedom of press and religion. *Id.*

339. *Id.* at 144.

340. *Id.* at 147.

341. *Id.*

342. *Id.* at 144, 148.

mental and individual interests in a middle-of-the-road application. This application appeared to respect not only the definitions of the words from this phrase, but also the societal importance of the First Amendment.

The narrowly tailored requirement was again applied in the First Amendment arena in *Schneider v. State*,[343] where the Court ruled on the constitutionality of four different governmental ordinances forbidding the distribution of leaflets in the streets.[344] The sole purpose behind these ordinances was to prevent littering that resulted as a by-product of this First Amendment protected activity.[345]

In striking down these ordinances, the Court examined whether these governmental actions were narrowly tailored. The Court noted that "[t]here are obvious methods of preventing littering. Amongst these is the punishment of those who actually throw papers on the streets."[346] The Court stressed that "the public convenience in respect of cleanliness of the streets does not justify an exertion of the police power which invades the free communication of information and opinion secured by the Constitution."[347]

Perhaps most significantly, the Court approached the issue in *Schneider* with the proper judicial perspective. It noted its role in weighing such infringements on the First Amendment, declining to adopt a test that would reach a predetermined result without the need for balancing interests.[348] The Court stated:

> In every case, therefore, where legislative abridgment of the rights is asserted, the courts should be astute to examine the effect of the challenged legislation. Mere legislative preferences or beliefs respecting matters of public convenience may well support regulation directed at other personal activities, but be insufficient to justify such as diminishes the exercise of rights so vital to the maintenance of democratic institutions. And so, as cases arise, the delicate and difficult task falls upon the courts to weigh the circumstances and to appraise the substantiality of the reasons advanced in support of the regulation of the free enjoyment of the rights.[349]

In *City Council v. Taxpayers for Vincent*[350] the Court applied a sim-

343. 308 U.S. 147 (1939).
344. *Id.* at 154.
345. *Id.* at 162.
346. *Id.*
347. *Id.* at 163.
348. *Id.* at 161.
349. *Id.*
350. 466 U.S. 789 (1984).

ilar analysis when it ruled on the constitutionality of an ordinance that prohibited posting signs on public property.[351] A group campaigning for a political candidate had made a number of signs and posted them on utility poles within the city.[352] When these signs were removed by the city, the group filed for an injunction against enforcement of the ordinance which would allow them to post their signs.[353] The group claimed that its First Amendment rights were being unconstitutionally infringed upon by the city's ordinance.[354] The Supreme Court disagreed with this assertion.[355]

The Court in *Taxpayers for Vincent* first determined that the city had a substantial interest in protecting its visual aesthetics through this content-neutral regulation.[356] Next, the Court struggled with the question of whether the regulation was narrowly tailored to achieve this interest.[357] Distinguishing *Schneider v. State*,[358] the Court stated that the posted signs were the actual evil the city's regulation hoped to stop.[359] In *Schneider* the Court held that ordinances which absolutely prohibit the posting of handbills on the streets are invalid.[360]

The Court in *Taxpayers for Vincent* reasoned that in a case such as *Schneider*, the city could penalize those who later actually littered with the paper given to them.[361] In *Taxpayers for Vincent*, however, the communication intended by the group posting the signs was the litter to be prevented.[362] The Court noted that "[i]n *Schneider*, an antilittering statute could have addressed the substantive evil without prohibiting expressive activity.... Here, the substantive evil—visual blight—is not merely a possible byproduct of the activity, but is created by the medium of expression itself."[363] Thus, the statute was held to be narrowly tailored.[364] The Court, however, did not reach its conclusion before it examined exactly what activity the statute was prohibiting, particularly

351. *Id.* at 791.
352. *Id.* at 792-93.
353. *Id.* at 793.
354. *Id.*
355. *Id.* at 804.
356. *Id.* at 807.
357. *Id.* at 808. The Court framed this issue as whether the regulation was "substantially broader than necessary." *Id.*
358. 308 U.S. 147 (1939).
359. *Taxpayers for Vincent*, 466 U.S. at 810.
360. *Schneider*, 308 U.S. at 162-63; *see supra* note 108 and accompanying text.
361. *Taxpayers for Vincent*, 466 U.S. at 808-09.
362. *Id.* at 810.
363. *Id.*
364. *Id.*

whether the statute was prohibiting too much First Amendment protected activity.[365]

Dicta in another recent Supreme Court case also lends support for a middle-of-the-road approach when examining the narrowly tailored requirement. In *Hynes v. Mayor of Oradell*[366] the Court struck down a city ordinance requiring, for identification purposes, advance written notice to the local police by "[a]ny person desiring to canvass, solicit or call from house to house . . . for a recognized charitable cause . . . or . . . political campaign or cause."[367] Although the ordinance was unconstitutional because it was vague, Chief Justice Burger's dicta noted how it also was not narrowly tailored for its intended purpose.[368]

The Court stated that the statute was unclear as to what it meant by a recognized charitable cause.[369] In addition, the statute required that the person would have to give adequate "identification" to the police, but neglected to define what was meant by "adequate."[370] Hence, the Court appeared to have recognized that the ordinance was not narrowly tailored to its purpose of community safety. The Court stated that its past cases had:

> [C]onsistently recognized a municipality's power to protect its citizens from crime and undue annoyance by regulating, soliciting and canvassing. A narrowly drawn ordinance, that does not vest in municipal officials the undefined power to determine what messages residents will hear, may serve these important interests without running afoul of the First Amendment.[371]

Presumedly, the Court indicated that this ordinance would not have passed muster under the narrowly tailored component of the time, place and manner test.

B. Ward v. Rock Against Racism *Misconstrues Historical Precedent*

Justice Kennedy's majority opinion and Justice Marshall's dissenting opinion in *Ward v. Rock Against Racism*[372] use the narrowly tailored requirement in order to reach extreme results—results that are incompatible with the First Amendment's marvelous protections. In the First Amendment arena, especially when dealing with highly valued speech,

365. *Id.* at 808-10.
366. 425 U.S. 610 (1976).
367. *Id.* at 611.
368. *Id.* at 620.
369. *Id.* at 621.
370. *Id.*
371. *Id.* at 616-17.
372. 491 U.S. 781 (1989); *id.* at 803 (Marshall, J., dissenting).

the Supreme Court should provide the high degree of scrutiny that it has historically applied. This demands that an inquiry be made into whether the government's actions were well-fitted for its intended purposes.

Likewise, the Court should not apply a standard that would strike down all governmental actions that regulate the time, place or manner of protected First Amendment speech. Lastly, for the sake of judicial clarity, the Court should not state the test as requiring the least restrictive of means when applying only a middle-of-the-road analysis.

The narrowly tailored requirement should be a limiting factor when applied by courts. As the Supreme Court applied the standard in *Martin v. City of Struthers*,[373] *Schneider v. State*[374] and *City Council v. Taxpayers for Vincent*,[375] narrowly tailored requires actual judicial inquiry into whether a governmental action is accomplishing its intended purpose in at least a somewhat efficient manner. This standard correctly requires judges to look at a statute, look at the substantial interest that the government promulgates with it, and then judge whether the government is doing so in an efficient manner. This standard does not necessarily require the government to enact the most closely tailored regulation, but only a narrowly tailored regulation. Accordingly, the important liberty guaranteed by the First Amendment will attain the degree of respect that it deserves.

Courts should be required to examine what other options the government had in achieving its interest, as the words narrow and tailoring denote.[376] Judges would then have to determine under the peculiar facts before them whether a regulation has been sufficiently narrowly tailored. Contrary to Justice Kennedy's proclamation that the Second Circuit had erred by sifting "through all the available . . . means of regulating sound volume,"[377] this is what courts are supposed to do and what the court of appeals appropriately did in this case.

The Supreme Court should not require that the government find the absolute best means to accomplish its goals. Nor should the Court allow the government to use any means it desires to achieve its ends. Such an analysis not only voids the meaning of narrowly tailored but simultaneously leaves First Amendment speech without any substantial protection.[378] Although the middle-of-the-road approach is more difficult to

373. 319 U.S. 141 (1943).
374. 308 U.S. 147 (1939).
375. 466 U.S. 789 (1984).
376. *See supra* notes 17-22.
377. *Ward*, 491 U.S. at 797.
378. It does not appear appropriate for the Court to void the narrowly tailored requirement of meaning while still discussing it as a viable element in time, place and manner analysis. If

apply than the seemingly absolute positions enunciated in both the majority and dissenting opinions in *Ward*, the effort renders a considered decision consistent with the significant protections of the First Amendment.[379]

VII. CONCLUSION

In *Ward v. Rock Against Racism*[380] other means of suppressing the sound levels appear to have been readily available to the city.[381] In weighing the heavy interest of protecting the freedom of expression in a traditional public forum, the city should have attempted a number of alternatives before taking over the entire sound system at the Naumberg Acoustic Bandshell. Although it is possible that the Court may have upheld the guideline under the more scrutinizing approach, the United States Supreme Court should not have eviscerated the narrowly tailored standard. The Court in *Ward* spared analysis at the expense of a workable and established standard, a standard that protects speech by creating a barrier to government overreaching.

This Article does not condemn the result reached by the majority opinion in *Ward*. Instead, it criticizes the road taken to arrive at its result. Arguably, New York City's regulation could have been viewed as narrowly tailored. By insisting that the narrowly tailored requirement only accomplish the government's interest, the Supreme Court appears to have given very little, if any, meaning to the narrowly tailored requirement.

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the Court continues to apply the *Ward* standard, it should not discuss the narrowly tailored requirement for no reason other than judicial integrity.

379. The opinions written by Justices Kennedy and Marshall each promulgate a test for the narrowly tailored standard that is both (1) easy to apply by a court and (2) likely to render consistent results. *Ward*, 491 U.S. at 798-99; *id.* at 804 (Marshall, J., dissenting). Application of Justice Kennedy's test will almost always rubber stamp legislation that contributes to the attainment of government's goals. *See id.* at 788-99. Similarly, Justice Marshall's application will reject any legislation that is not the least intrusive means of accomplishing the government's objective. *Id.* at 804. Both of these standards require little "judging" to be done by a judge confronted with applying the narrowly tailored requirement.

380. 491 U.S. 781 (1989).

381. *See supra* notes 65-70 and accompanying text.