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Search for Valid Governmental Regulations: A Review of the Judicial Response to Municipal Policies Regarding First Amendment Activities

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The Search for Valid Governmental Regulations: A Review of the Judicial Response to Municipal Policies Regarding First Amendment Activities

Despite numerous judicial decisions scrutinizing governmental regulation of first amendment activities, local governments have had difficulty fashioning policies which both protect valid governmental interests and regulate first amendment activities within constitutional bounds.[1] Although the Supreme Court remains the ultimate judge as to whether a regulation is constitutionally acceptable, the Court has denied that it has any duty to elaborate on what policies might be valid in a given situation. As Justice Black stated in *Gregory v. City of Chicago*:[2] "[I]t is not our duty and indeed not within our power to set out and define with precision just what statutes can be lawfully enacted to deal with situations like the one confronted here . . . ."[3] The government entity itself must draft narrowly prescribed regulations to protect its legitimate interests and in doing so must avoid trammeling the rights of others.

To discover the constitutional standard applicable to the specific activity involved, government officials must rummage through past judicial

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1 One commentator notes that local and state governments have traditionally approached regulation, "the expression of government, in the nature of a rule of conduct," by emphasizing the "limitations and restraints" of regulation rather than concentrating on the flexibility of their power. SAND, LOCAL GOVERNMENT LAW § 14.01 at 14-2 (1982) (quoting FREUND, LEGISLATIVE REGULATION 3 (1982) and citing TIEDEMAN, A TREATISE ON THE LIMITATIONS OF THE POLICE POWER IN THE UNITED STATES (1882)). Government officials, along with writers of the nineteenth century, stressed a narrow view of governmental powers thereby encouraging courts to use their discretion in opposing assertions of governmental authority. *Id.* at 14-2 and 14-3 (citing COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION (1st ed., 1868; 8th ed., 1927); JACOBS, LAW WRITERS AND THE COURTS (1954); and JACKSON, THE STRUGGLE FOR JUDICIAL SUPREMACY (1941)).

2 394 U.S. 111 (1969).

3 *Id.* at 118. In *Gregory*, the Supreme Court held that demonstrators arrested while conducting a peaceful march in protest of desegregation of Chicago's public schools were convicted for holding the demonstration and not for their refusal to obey police orders. In a separate opinion joined by Justice Douglas, Justice Black argued that Chicago needed a more narrowly drawn ordinance:

> These facts disclosed by the record point unerringly to one conclusion, namely, that when groups with diametrically opposed, deep-seated views are permitted to air their emotional grievances, side by side, on city streets, tranquility and order cannot be maintained even by the joint efforts of the finest and best officers and of those who desire to be the most law-abiding protestors of their grievances.
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> It is because of this truth, and a desire both to promote order and to safeguard First Amendment freedoms, that this Court has repeatedly warned States and governmental units that they cannot regulate conduct connected with these freedoms through use of sweeping, dragnet statutes that may, because of vagueness, jeopardize these freedoms. In those cases, however, we have been careful to point out that the Constitution does not bar enactment of laws regulating conduct, even though connected with speech, press, assembly, and petition, if such laws specifically bar only the conduct deemed obnoxious and are carefully and narrowly aimed at that forbidden conduct. The dilemma revealed by this record is a crying example of a need for some such narrowly drawn law.

Id. at 117-18. Justice Black further stated that the ordinance "might better be described as a meat-ax ordinance, gathering in one comprehensive definition of an offense a number of words which have a multiplicity of meanings, some of which would cover activity specifically protected by the First Amendment." *Id.* at 118-19.

decisions, pinpoint relevant analyses, and decipher the factors which judges weigh in making their decisions. General lack of practical direction in judicial decisions as well as varying interpretations of the first amendment and obscure treatment of first amendment issues make this task quite onerous. Over and above these problems, the local practitioner continually faces new issues which seem to defy simple first amendment analysis.[4]

This note reviews the broad judicial response to governmental regulation of first amendment activities, attempts to clarify the applicable constitutional standard, and offers assistance to practitioners who are seeking to draft and implement well-grounded first amendment policies in government. Part I identifies judicial schemes which courts have used in analyzing municipal policies and determining the amount of protection given particular events. Part II reviews the current constitutional standard for regulation of first amendment activities, offering practical guidelines as to what is and is not acceptable under the law today. The section also summarizes time, place, and manner restrictions which the Supreme Court has upheld, addresses the judicial response to permit fees and licensing regulations, and notes the special problem with insurance requirements. Finally, Part III presents a unique, practical tool which officials may use to determine whether a given governmental regulation of an activity will be permissible under the Constitution.

I. The Judicial Analysis

The Supreme Court has not prescribed a specific formula for determining whether an activity will be protected from regulation in a given situation. Professor Emerson concludes that while the Supreme Court has relied on various doctrines to resolve first amendment issues, "it has totally failed to settle on any coherent approach or to bring together its various doctrines into a consistent whole."[5] In *Gregory*, Justice Black openly admitted that the "[C]ourt, to be sure, has had its difficulties and

4 *See, e.g.*, *Public Access to Cable TV: Can Nazis Be Barred?*, GOVERNING, Feb. 1988, at 14 (addressing problems municipal officials in Cincinnati, Ohio have had regulating a neo-Nazi talk show on cable television) and Poole, *Architectural Appearance Review Regulations and The First Amendment: The Good, The Bad, and The Consensus Ugly*, 20 URB. LAW. 287 (1988) (discussing the first amendment rights inherent in architectural design and land use).

5 T. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 16 (1970). Professor Emerson summarizes the major approaches the Supreme Court has used in first amendment analysis:

> The outstanding fact about the First Amendment today is that the Supreme Court has never developed any comprehensive theory of what that constitutional guarantee means and how it should be applied in concrete cases. At various times the Court has employed the bad tendency test, the clear and present danger test, an incitement test, and different forms of the ad hoc balancing test. Sometimes it has not clearly enunciated the theory upon which it proceeds. Frequently it has avoided decision on basic First Amendment issues by invoking doctrines of vagueness, overbreadth, or the use of less drastic alternatives. Justice Black, at times supported by Justice Douglas, arrived at an "absolute" test, but subsequently reverted to the balancing test in certain types of cases. The Supreme Court has also utilized other doctrines, such as the preferred position of the First Amendment and prior restraint
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> . . . .

Id. at 15-16. Professor Emerson asserts that "[t]he major doctrines applied by the Supreme Court have proved inadequate, particularly in periods of tension, to support a vigorous system of freedom of expression." *Id.* at 16.

sharp differences of opinion in deciding the precise boundaries dividing what is constitutionally permissible and impermissible in [the first amendment] field."[6]

Although members of the Supreme Court have disagreed as to the proper test to be applied in first amendment decisions, the Court has often weighed the same factors in deciding whether to grant protection. First amendment decisions appear to have turned on the interest requiring regulation of speech, the method used to regulate speech, the mode of speech regulated, and the place where speech occurs.[7] Since the Justices have difficulty agreeing upon the significance of these factors and the proper method to be used in applying them to a given situation, the Court's first amendment position appears to shift as each Justice writes an opinion. It is therefore important for policymakers to understand the nuances of each Justice's position. Once the Court's system of analysis is clear, officials should be able to evaluate their regulations with competence.

A. *Nature of the Speech*

In the initial step of its analysis a court must determine whether a particular activity deserves first amendment protection at all. Using terms such as "pure speech," "akin to speech," "symbolic speech," and "speech plus," the Supreme Court has delineated a sliding scale of protection which is similar, but not identical, to the system proposed by Professor Emerson in *The System of Freedom of Expression*.[8] The Court has identified four categories of speech deserving different levels of protection: pure speech, speech plus, symbolic speech, and unprotected speech. Note that the Court's method is not a single-tiered approach considering only the nature of the speech in question. Its characterization of the speech is but one tier of the comprehensive first amendment analysis. Once the Court determines the mode of the expression, it looks to other significant factors such as the government's interest, its method of regulation, and the forum.[9]

1. Pure Speech

The Supreme Court has repeatedly awarded pure speech comprehensive protection under the first amendment.[10] Pure speech may be defined as expression in its pristine state, completely isolated from activity. As one court has explained by exclusion, "picketing is not pure speech, because it involves conduct and need not include spoken

6 *Gregory*, 394 U.S. at 114.

7 G. GUNTHER, CONSTITUTIONAL LAW ch. 12, § 4, at 1200 (11th ed. 1985).

8 T. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION (1970). In Professor Emerson's view expression itself is of utmost importance. While action can be monitored and even restrained at times, "[e]xpression must be freely allowed and encouraged." *Id.* at 17. Professor Emerson believes that freedom of expression will survive only if it receives complete first amendment protection. *Id.* Another commentator posits that the Supreme Court's sliding scale of speech protection is a necessary evil which reflects "the perceived value of the speech in question." Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943, 967 (1987).

9 *See supra* note 7 and accompanying text.

10 Tinker v. Des Moines Community School District, 393 U.S. 503, 506 (1969).

words."[11] When pure speech unreasonably interferes with the rights or interests of others, the Court may withdraw its absolute protection and allow local governments to impose reasonable time, place, and manner regulations to protect the interests of others. Activity which the Court determines is "akin to pure speech" receives much the same protection given to pure speech.[12]

2. Speech Plus

In *Teamsters Union v. Hanke*[13] Justice Frankfurter, joined by three members of the Court, recognized a "hybrid" form of expression which involved both speech and conduct.[14] The plurality of Justices determined that the "speech plus" mixture of speech and activity involved in picketing did not merit the absolute protection given to pure speech. Instead, the government may prescribe reasonable time, place, and manner restrictions on these activities so long as the regulations are not based solely upon the content of the speech involved. Those who communicate ideas by their conduct deserve freedom, but not the same degree of freedom afforded those who express themselves through pure speech.[15] Even the Justices who do not explicitly recognize "speech plus" as a separate category of expression, in certain circumstances would award more limited protection to speech that is intermingled with conduct by focusing their analysis upon the conduct involved rather than upon the speech itself.[16]

3. Symbolic Speech

The Supreme Court first acknowledged that the first amendment encompasses communicative activities as well as actual verbal expression in *Stromberg v. California*.[17] The Court reversed Stromberg's conviction for displaying a communist flag in opposition to organized government, stating that her actions were a means of free political expression guarded by the Constitution.[18] Likewise, in *West Virginia State Board of Education v. Barnette*[19] the Court acknowledged that a mandatory flag salute unconstitutionally forced individuals to affirm a belief and adopt a particular atti-

11 Pursley v. City of Fayetteville, 820 F.2d 951 (8th Cir. 1987).

12 Cox v. Louisiana, 379 U.S. 536 (1965).

13 339 U.S. 470 (1950), *reh'g denied*, 339 U.S. 991 (1950).

14 Local 391, Int'l Bhd. of Teamsters v. City of Rocky Mount, 672 F.2d 376, 379, nn. 6 and 7 (4th Cir. 1982) (citing *Hanke*, 339 U.S. 470, 474 and Note, *Political Boycott Activity and the First Amendment*, 91 HARV. L. REV. 659, 669 (1978)). In *Hanke*, Chief Justice Vinson and Justices Jackson and Burton joined Justice Frankfurter's opinion. Justice Clark concurred in the result whereas Justices Black, Minton and Reed dissented. Justices Minton and Reed, joining in dissent, would have held that the labor union's peaceful picketing was "protected by the constitutional guaranty of the right of free speech" even though they admitted the picketing was "more than speech." 339 U.S. at 484.

15 *Id.* at 380 (quoting Cox v. Louisiana, 379 U.S. 536, 555 (1965)).

16 *Cox*, 379 U.S. at 578 (citations omitted). As Justice Black stated, "[p]icketing though it may be utilized to communicate ideas, is not speech, and therefore is not of itself protected by the First Amendment." Justices Minton and Reed, on the other hand, distinguished peaceful picketing, which in their opinion deserved protection, from "abusive picketing," which "may lead to a forfeiture of the protection of free speech." *Hanke*, 339 U.S. at 484.

17 283 U.S. 359 (1931).

18 *Id.* at 369.

19 319 U.S. 624 (1943).

tude of mind.[20] These communicative activities, which actually involved no speech at all, deserved first amendment protection. In effect the activities became symbolic speech which, if compelled, would force an individual to "utter what is not in his mind."[21]

The Court applied similar reasoning to justify a "sit-in" by blacks at a public library in *Brown v. Louisiana*.[22] Noting that the defendants had not spoken a word while conducting their protest, the Court reiterated that first amendment "rights are not confined to verbal expression. They embrace appropriate types of action which certainly include the right in a peaceable and orderly manner to protest by silent and reproachful presence, in a place where the protestant has every right to be, the unconstitutional segregation of public facilities."[23]

In *Brown* the protesters used their conduct as the sole method of asserting their expression. The activity itself, the silent presence in the library, symbolized their desire to be treated equally and to be accepted within the library's educational environment. Bifurcation of the speech and the activity involved would have been impossible. Thus, the Court correctly recognized the protesters' actions as symbolic speech rather than speech plus.

In *United States v. O'Brien*[24] the Court added workable boundaries for the protection of symbolic speech by refusing to accept the notion that any variety of conduct can be labeled speech whenever the person involved intends to express an idea.[25] The Court held that the regulation could be justified so long as it was constitutionally permissible, it advanced an important or substantial governmental interest, it was not related to suppressing free expression, and it was no greater than necessary to serve the government's interest.[26]

4. Unprotected Speech

In *Chaplinsky v. New Hampshire*[27] the Supreme Court set forth its longstanding position that the expression of lewd, obscene, profane,

20 *Id.* at 633.
21 *Id.* at 634.
22 383 U.S. 131 (1966).
23 *Id.* at 142.
24 391 U.S. 367 (1968), *reh'g denied*, 393 U.S. 900 (1968).
25 *Id.* at 376.
26 *Id.* at 377. In a later case, the Court avoided ruling on the symbolic speech issue although the District Court had expressly done so. Wooley v. Maynard, 430 U.S. 705 (1977). In *Wooley* a Jehovah Witness couple claimed that a law imposing criminal sanctions against persons who obscure the state motto, "Live Free or Die," on automobile license plates violated their first amendment rights. The District Court held that Mr. Maynard, one of the plaintiffs, was engaged in symbolic speech when he unlawfully covered the words on his license plate. The Supreme Court, however, affirmed on other grounds noting that the appellees had undermined their symbolic speech argument when they requested that the state issue them special plates without the logo. A majority of the Court felt that this action "[w]as hardly consistent with the stated intent to communicate affirmative opposition to the motto." 430 U.S. at 713 n.10. Justices Rehnquist and Blackmun dissented, arguing that the case involved no free speech issue since the State did not force the appellees to " 'say' anything" symbolically or otherwise. *Id.* at 720.
27 315 U.S. 568 (1942). The holding of *Chaplinsky* has been qualified significantly by subsequent cases. *See, e.g.*, Cohen v. California, 403 U.S. 15 (1971) (granting substantial protection to offensive speech); Gooding v. Wilson, 405 U.S. 518 (1972) (protecting vulgar, offensive language spoken to a

libelous, and fighting words may be prohibited and even punished by the government. The Court stated 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."[28] Although *Chaplinsky* has been significantly qualified by later cases, it still stands for the position that some speech deserves little or no constitutional protection.[29]

Admittedly, the Court's characterization of the nature of the behavior in question may determine singularly whether governmental regulation will be allowed, especially if the speech falls at either end of the sliding scale, deserving absolute protection or, like fighting words, no protection at all. More often, however, the Court's classification of the nature of the activity is not in itself determinative. When the speech occurs on public property, the Court must go on to consider the nature of the forum and the nature of the governmental interest involved before it imposes regulation.

B. *Nature of the Forum*

The nature of the forum in which speech takes place is the second factor to consider in reviewing first amendment decisions. Governmental property is divided into three classes: full-fledged public forums, limited public forums, and nonpublic forums. At times courts may extend protection primarily because of the nature of the forum in which speech takes place; at other times they may lend more weight to other factors and in turn deny protection.

1. Full-Fledged Public Forums

Full-fledged public forums are those governmental properties which are open for public discussion either by tradition or by designation. *Hague v. Committee for Industrial Organization*[30] set forth the well-established view that parks and streets are public forums because they are held in trust for the use of the public and traditionally have been used for assembly, communication, and public discussion.[31] In *Hague* Justice Roberts found that

> [t]he 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,

policeman); and City of Houston v. Hill, 107 S. Ct. 2502 (1987) (invalidating an ordinance making it illegal to intentionally verbally interrupt a police officer in the performance of his duties).

28 315 U.S. at 572.

29 Other categories of speech which have been held to be outside first amendment protection are obscenity, Roth v. United States, 354 U.S. 476 (1957); incitement to riot, Brandenburg v. Ohio, 395 U.S. 444 (1969); and child pornography, New York v. Ferber, 458 U.S. 747 (1982). On the other hand, the Supreme Court in Schad v. Borough of Mount Ephraim, 452 U.S. 61, 83 (1981), found that nude dancing is protected by the first amendment.

30 307 U.S. 496, 515-16 (1939).

31 *Id.* at 515.

> and in consonance with peace and good order; but it must not, in the guise of regulation, be abridged or denied.[32]

Accordingly, under *Hague* the municipality could not require persons seeking to hold public meetings in the city to obtain a permit authorized by the director of public safety for the sole purpose of prohibiting riots and disorder.[33] The Court held that the respondents could hold meetings without a permit and determined that the city's ordinance was void as an overbroad prior restraint.[34]

Several lower courts have expanded the public forum concept by recognizing "public forums by designation." These forums are by their nature so much like traditional public forums that the courts extend to them similar protection. In 1978, the United States District Court for the Southern District of Indiana determined that state fairgrounds were a public forum.[35] Similarly, in *Fernandes v. Limmer*[36] the United States Court of Appeals for the Fifth Circuit found that the terminal buildings of the Dallas-Fort Worth airport complex were public forums. Even though the court recognized that corridors within the Dallas-Fort Worth terminals were crowded, it determined that the city could not prohibit first amendment activities in them. Rather, in these designated public forums the activities were to be regulated by reasonable time, place, and manner restrictions.[37]

Designated public forums may be classified as created public forums. Created public forums are public property which the State has opened to the public for expressive activity.[38] As long as these areas are open to the public, they are subject to the same standards as traditional public forums, even though the government may not have been required to allow access in the first place. As Justice White stated in his majority opinion in *Perry Education Association v. Perry Local Educators' Association*,[39] "[a]lthough a State is not required to indefinitely retain the open character of the facility, as long as it does so it is bound by the same standards

32 *Id.* at 515-16.

33 *Id.* at 502 n.1.

34 *Id.* at 518.

35 International Soc'y for Krishna Consciousness v. Bowen, 456 F. Supp. 437 (S.D. Ind. 1978), *aff'd*, 600 F.2d 667 (7th Cir. 1979), *cert. denied*, 444 U.S. 963 (1979). The district court noted that the fact that officials required an admission fee had no effect on the issue of whether the fairgrounds constituted a public forum since "[n]umerous public places, far more enclosed and less open than fairgrounds, have been held to be first amendment forums where persons may circulate and engage in first amendment expression . . . ." *Id.* at 442.

36 663 F.2d 619 (5th Cir. 1981), *reh'g denied*, 669 F.2d 729 (5th Cir. 1982), *cert. dismissed*, 458 U.S. 1124 (1982).

37 In making its decision the Fifth Circuit rejected airport authorities' arguments that the unique shape of the terminals and the lease of the terminals to private air carriers made the areas inappropriate public forums. The court considered whether "the character of the place, the pattern of usual activity, the nature of its essential purpose and the population who take advantage of the general invitation extended" made it a proper place to communicate views on political and social issues. *Id.* at 626 (quoting Southeastern Promotions Ltd. v. City of West Palm Beach, 457 F.2d 1016, 1019 (5th Cir. 1972), quoting Wolin v. Port Authority of New York, 392 F.2d 83, 89 (2d Cir. 1968), *cert. denied*, 393 U.S. 940 (1968)).

38 Perry Education Association v. Perry Local Educators' Association, 460 U.S. 37, 45 (1983).

39 *Id.*

as apply in a traditional public forum."[40] In these areas "all parties have a constitutional right of access and the State must demonstrate compelling reasons for restricting access to a single class of speakers, a single viewpoint, or a single subject. When speakers and subjects are similarly situated, the State may not pick and choose."[41] The government may prescribe reasonable time, place, and manner restrictions, and only those content-based restrictions which are selected to effectuate a significant state interest.

In summary, in traditional public forums, the rights of the government to limit first amendment activity are sharply circumscribed.[42] The State may not prohibit all communicative activity in full-fledged public forums whether those forums are traditional public forums or public forums by designation or creation.[43] In addition, the government may not apply content-based restrictions unless the regulations are essential to serve a compelling state interest and are narrowly drawn to achieve that end.[44] Reasonable time, place, and manner regulations are permissible.

2. Limited Public Forums

In contrast to a traditional public forum, the government may create a "limited" forum, in which the State may draw distinctions based upon the specific purpose for which the property is used.[45] In these areas only groups with similar characteristics are guaranteed access by the first amendment.[46] The majority in *Perry* found that internal school mailboxes were government property "not dedicated to open communication."[47] Since the mailboxes were not open to the general public, the government could restrict their use to persons involved in the forum's official business.[48] Once the government grants a speaker access to a

40 *Id.* at 46. Interestingly, the Supreme Court recently recognized the *Perry* analysis in Board of Airport Comm. of Los Angeles v. Jews for Jesus, Inc., 107 S. Ct. 2568 (1987), but declined to apply it. Instead, in a unanimous decision the Justices focused on overbreadth, holding that the ordinance which banned all individuals from engaging in first amendment activities "reach[ed] the universe of expressive activity" thereby "prohibit[ing] even talking and reading, or the wearing of campaign buttons or symbolic clothing." 107 S. Ct. at 2572. Speaking for all of the Justices, Justice O'Connor stated: "Under such a sweeping ban, virtually every individual who enters [the airport] may be found to violate the resolution by engaging in some 'First Amendment activit[y].' " *Id.* The Justices refrained from deciding whether the airport was a public or nonpublic forum, concluding, "We think it obvious that such a ban cannot be justified even if [the airport] were a nonpublic forum because no conceivable government interest would justify such an absolute prohibition of speech." *Id.*

41 460 U.S. at 55.

42 *Id.* at 45.

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

44 *Id.*

45 *Id.* at 55. At least one court has found the term "limited public forum" to be misleading, preferring instead to use the term "created public forums." *See* M.N.C. of Hinesville, Inc. v. United States Dep't of Defense, 791 F.2d 1466, 1472 n.2 (11th Cir. 1986), where the Court of Appeals for the Eleventh Circuit stated: "We eschew this terminology because it is misleading. Although the government, when it turns property from a nonpublic forum into a public one, may do so only for a limited purpose, . . . it also may open the forum to the same extent as a traditional forum."

46 *Id.* at 48.

47 *Id.* at 53.

48 *Id.* Justice Brennan, arguing for the dissent, disagreed with the majority's finding that the mailboxes were not a public forum. Since the challenging teachers' union did not claim an absolute right of access, he felt the majority should have focused on an equal access analysis rather than its public forum analysis. *Id.* at 55-72.

limited public forum, however, it may not regulate the speaker on the basis of what he has to say without showing a compelling state interest.

3. Nonpublic Forums

Unlike full-fledged or limited public forums, nonpublic forums are those reserved for a particular governmental use. The public has no right to use these premises to communicate their views even though the areas are technically public property. Although the government may not absolutely prohibit speech in nonpublic forums, it may exercise its widest latitude in restricting speech in these areas.[49] The government may regulate subject matter and speaker identity in a nonpublic forum if the decisions made are reasonable in light of the purpose of the forum and are not based upon the viewpoint of the speaker.[50] Moreover, the government may choose one speaker over another without turning a nonpublic forum into a public one.[51] In *M.N.C. of Hinesville v. United States Department of Defense*[52] the court recognized that military bases are traditionally considered to be nonpublic forums and determined that granting one publisher the right to distribute a civilian enterprise newspaper on the base did not change the nature of the forum. Thus, the government merely needed a rational basis for restricting access to the base to one newspaper company.

In *Adderley v. Florida*[53] the Supreme Court reiterated the traditional view that jails are nonpublic forums. In dissent, Justice Douglas argued for the opposite view. He stressed that "[t]he jailhouse, like an executive mansion, a legislative chamber, a courthouse, or the statehouse itself . . . is one of the seats of government, whether it be the Tower of London, the Bastille, or a small county jail. And when it houses political prisoners or those who many think are unjustly held, it is an obvious center for protest."[54] For Justice Douglas the majority's absolute prohibition of first amendment activities in places designated nonpublic forums was unacceptable.

Once again, it is important to recognize that the Court will not always base its first amendment decisions entirely on the nature of the forum involved, whether traditional, created, or nonpublic. At times the forum may be determinative of whether protection is extended; at other times countervailing factors may outweigh considerations of where the speech took place. Importantly though, the Court's characterization of the nature of the forum will have a significant impact upon the amount of government regulation allowed with regard to first amendment activities.

49 M.N.C. of Hinesville, Inc. v. United States Dep't of Defense, 791 F.2d 1466, 1473 (11th Cir. 1986) (citing *Perry*, 460 U.S. at 46).

50 Cornelius v. NAACP Legal Defense & Educational Fund, 473 U.S. 788 (1985) (citing *Perry*, 460 U.S. at 49). The unanimous decision of the Court in *Jews for Jesus, supra* note 40, in which the Justices declined to address the public forum/nonpublic forum issue, indicates that the Justices are still debating exactly what transforms a nonpublic forum into a public forum.

51 791 F.2d at 1493.

52 791 F.2d 1466 (11th Cir. 1986).

53 385 U.S. 39 (1966), *reh'g denied*, 385 U.S. 1020 (1967). The Court stated that "[t]raditionally, state capital grounds are open to the public. Jails, built for security reasons, are not." *Id.* at 41.

54 *Id.* at 49.

C. *Nature of the Governmental Interest*

The nature of the government's interest also affects a court's decision regarding a particular piece of legislation. When "speech" and "nonspeech" elements are combined in the same activity, the governmental interest is a particularly important factor in the judicial analysis. If the governmental interest is substantial, much deference will be given the government in regulating the activity. If, on the other hand, the governmental interest in regulating the activity is minimal or even nonexistent, very little regulation will be tolerated.

1. Quality of the Governmental Interest

As noted above,[55] in *United States v. O'Brien*[56] Justice Warren, joined by seven members of the Court, stated that

> a governmental regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial government 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 [further the interest].[57]

The Supreme Court along with other courts has determined that local governments have many interests which merit weight in the first amendment analysis. These decisions, some of which are discussed below, help to clarify the various governmental interests which will meet the *O'Brien* standard.

2. Types of Governmental Interests

Courts have long recognized that the government has a strong interest in protecting its citizens. This protection may be as routine as formulating rules for regulating traffic or as unique as forming emergency procedures to be followed in the event of a nuclear attack.[58] Governmental officials may strictly regulate activities involving national or even local public security while they may place only minimal restrictions on peaceful activities which have no real effect beyond the immediate sphere of the speech. In any situation, however, public officials or the police may not simply quash the right of free speech and assembly in an effort

55 *See supra* note 26 and accompanying text.

56 391 U.S. 367 (1968), *reh'g denied*, 393 U.S. 900 (1968).

57 *Id.* at 377. The Court found in *O'Brien* that the government had a substantial interest in protecting the use of draft cards in order to insure that the Selective Service system would continue to function effectively. Since the protection of draft cards from destruction was the least restrictive alternative available, the regulation was constitutional.

58 *See, e.g.*, Cox v. Louisiana, 379 U.S. 536 (1965). According to Justice Goldberg, "[t]he constitutional guarantee of liberty implies the existence of an organized society maintaining public order, without which liberty itself would be lost in the excesses of anarchy." *Id.* at 554. Traffic control is an example of a permissible control "designed to promote the public convenience in the interest of all, and not susceptible to abuses of discriminatory application . . . ." *Id.* Obviously, "[o]ne would not be justified in ignoring the familiar red light because this was thought to be a means of social protest. Nor could one, contrary to traffic regulations, insist upon a street meeting in the middle of Times Square at the rush hour as a form of freedom of speech or assembly." *Id.*

to avoid performing their duty to maintain order.[59] Fear of riot alone, either by those who plan to exercise their rights or by those who might retaliate, is not enough to justify a prior restraint on the speech.[60]

Besides protecting public health and safety, the government has an interest in protecting citizens from fraudulent solicitation and undue annoyance.[61] Thus, the government may regulate soliciting and canvassing even though these activities are protected under the first amendment. These restrictions will be allowed so long as they are precise, narrowly drawn standards which are closely related to the government interests at stake.[62] When considering an ordinance governing solicitation, courts will often balance the government's interest in protecting the public from crime or annoyance with the public's right to receive information.[63] Similarly, depending upon the subject of the solicitation, the government may have additional interests in regulation of the material.[64] Ideally, the courts will scrutinize each regulation carefully to ensure that it allows as much free expression as possible under the particular circumstances.

By weighing the nature of the speech, the nature of the forum, and the nature of the governmental interest, the Court determines the amount of constitutional protection to be afforded an activity. Of course, the factors are not to be weighed in a vacuum. They are considered together with lesser interests giving way to those more substantial. Municipal officials have the responsibility to keep abreast of the Supreme Court's first amendment analysis and to tailor their policies accordingly.

II. The Constitutional Standard and Guidelines for Determining Acceptable Restrictions

A. *Summary of the Constitutional Standard*

The survey of past judicial decisions in Part I[65] reveals that first amendment expression will be allowed unless the government is able to step in and give good reasons for its regulations affecting speech. As those cases reflect, in recent years first amendment protection has expanded significantly. Moreover, many forms of speech are protected today which were not previously protected.[66] Places which were traditionally reserved as nonpublic forums but which have been opened to the public are considered either limited or created public forums to-

59 McQUILLIN, THE LAW OF MUNICIPAL CORPORATIONS § 24.591 at 631 (3d ed. 1981).

60 *Id.* at 631 (3d ed. 1981); at 139 (Supp. 1987) (citing Beckerman v. City of Tupelo, 664 F.2d 502 (5th Cir. 1981)). The *Beckerman* court stressed that the municipal ordinance which allowed a police chief to deny a parade permit if he determined disorderly conduct would occur was unconstitutional since the ordinance did not contain standards for the police chief to use in determining whether riotous activity would occur. 664 F.2d at 510-11.

61 McQUILLIN, § 24.369 at 42 (Supp. 1987).

62 RHYNE, THE LAW OF LOCAL GOVERNMENT OPERATIONS 505-6 (1980) (citing People v. Fogleson, 577 P.2d 677 (Cal. 1978)).

63 McQUILLIN, § 24.446 at 72 (Supp. 1987).

64 *See, e.g.*, Bigelow v. Virginia, 421 U.S. 809, 827 (1975), where Justice Blackmun noted that a state's interest in quality medical services would have come into play if the advertisement in question had "affected the quality of medical services within Virginia."

65 *See supra* notes 5-64 and accompanying text.

66 *See, e.g.*, Virginia Pharmacy Board v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1976) (granting first amendment protection to commercial speech) and *supra* notes 27 and 29.

day.[67] Additionally, governmental officials must design regulations for traditional, designated, and limited public forums to provide the maximum speech protection possible under the circumstances.[68] As set forth in Part I, the Supreme Court will uphold a regulation which is appropriate considering the nature of the speech, the nature of the forum, and the nature of the governmental interest. If the regulation is content-based, vague, or overbroad, the Court may strike it down even if the government asserts other valid interests.[69]

In light of the numerous decisions in the first amendment area and the complexity of the Supreme Court's analysis, a government official's ad hoc determination of the reasonableness of a specific regulation is grossly inadequate. Government officials drafting first amendment policies and regulations have a professional obligation to keep abreast of judicial decisions and to implement the standards established. Therefore, officials should select policies affecting first amendment rights conservatively, keeping in mind the complexity and the unpredictability of the judicial process.

Section B below provides a review of time, place, and manner restrictions which courts have found to be acceptable. Section C in turn discusses the judicial response to permit fees, licensing regulations, and insurance requirements. Officials would be wise to evaluate their policies and regulations in light of the decisions discussed in these sections to insure that their policies reflect valid governmental interests such as protecting the public health, safety, and welfare rather than reinforcing prejudices of the community.

B. *Valid Time, Place, and Manner Restrictions*

In *Heffron v. International Society for Krishna Consciousness, Inc.*[70] the Supreme Court reasserted its view that "[t]he 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[;] . . . the activities of . . . those . . . protected by the First Amendment are subject to *reasonable time, place and manner restrictions*."[71]

The Court added that restrictions are constitutional if "they are justified without reference to the content of the regulated speech, . . . they serve a significant governmental interest, and . . . in doing so, they leave open ample alternative channels for communication of the information."[72]

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67 *See supra* notes 35-41 and accompanying text.

68 *See supra* notes 56-57 and accompanying text.

69 *See, e.g.*, Perry Education Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (citing Carey v. Brown, 447 U.S. 455, 461 (1980); United States Postal Serv. v. Council of Greenburgh Civic Ass'n, 453 U.S. 114, 132 (1981); Consolidated Edison Co. v. Public Serv. Comm'n, 447 U.S. 530, 535-536 (1980); Grayned v. City of Rockford, 408 U.S. 104, 115 (1972); Cantwell v. Connecticut, 310 U.S. 296 (1940); and Schneider v. State, 308 U.S. 147 (1939)).

70 452 U.S. 640 (1981).

71 *Id.* at 647 (citations omitted and emphasis added).

72 *Id.* at 648 (citations omitted).

In *Olivieri v. Ward*[73] the United States Court of Appeals for the Second Circuit approved specific time, place, and manner restrictions to be applied to demonstrators in front of St. Patrick's Cathedral in Manhattan on June 29, 1986 while the annual Gay Pride Parade took place. Governmental officials had first attempted to "freeze" the sidewalk in front of the church allowing no demonstrators, counterdemonstrators, or even members of the general public. The trial court found that this restriction was not reasonable since police had acted with "excessive sensitivity to the Catholic Church" in completely banning expression in front of the church.[74]

On expedited appeal three days before the scheduled parade the appeals court considered the critical questions before it: "(1) how many individuals need be on the sidewalk to convey [the parties'] messages with some impact to the line of marchers and to the public, and (2) how can the size, positioning, and timing of these competing groups be accommodated to legitimate public safety concerns."[75] The court resolved the problem by imposing identical restrictions on demonstrators and counterdemonstrators. Compromising between the government's proposed limit of twenty demonstrators and the plaintiffs' proposed limit of seventy-five demonstrators, the court allowed twenty-five demonstrators from each group to use the sidewalk.[76] The court also permitted each group to demonstrate within a guarded, closed area for thirty minutes, divided by a thirty minute interval with no demonstrative activity.[77]

The *Olivieri* case is an excellent example of the analysis a court must undertake in determining whether a governmental regulation limiting the time, place, or manner of an activity is constitutional. First, the court set forth the basic legal principles and tests for the validity of a government regulation.[78] Next, the court identified the proper scope of its review.[79] Finally, the court recognized the need to address the critical questions posed by the ordinance and to fashion an equitable remedy.[80] The court noted that while courts ordinarily determine only whether a particular regulation is constitutionally valid, the regulation of first amendment activity in this case required more immediate action.[81] Therefore, the court accepted the compromise of the district court which it described as "a middle course between two extremes."[82] The court's decision took into account the government's interests as well as its important obligation to ensure that free expression is protected. This practical examination of the Manhattan march will be helpful to cities that are

73 801 F.2d 602 (2d Cir. 1986), *cert. denied*, 107 S. Ct. 1371 (1987).
74 *Id.* at 604.
75 *Id.* at 607.
76 *Id.* at 607-08.
77 *Id.* at 607.
78 801 F.2d at 605.
79 The court described the scope of review as a "middle ground between the two extremes" of "kowtow[ing] without question to agency expertise" and "dispens[ing] justice according to notions of individual expediency 'like a kadi under a tree.'" 801 F.2d at 606 (citing Terminiello v. Chicago, 337 U.S. 1 (1949) (Frankfurter, J., dissenting)).
80 801 F.2d at 606.
81 *Id.*
82 *Id.* at 607

attempting to determine in advance what a court's reaction to their regulations might be.

1. Time Restrictions

As in *Olivieri*, the need for time restrictions often arises when two or more groups are competing to exercise their rights in the same location. Assuredly, prohibiting both groups from demonstrating due to the conflict is not an adequate solution to the problem. The municipality has the responsibility to work as an arbitrator between the competing groups to find an agreeable compromise. Of course, the city will not be a completely disinterested party since it will be attempting to protect the interests of the general public.

Time restrictions also may be necessary in other circumstances. *Peters v. Breier*[83] concerned a time restriction which is familiar to almost every city or town dweller. The plaintiffs in *Peters* claimed that a park curfew effective between the hours of 10:00 p.m. and 7:00 a.m. was unconstitutional. The district court disagreed and upheld the ordinance imposing the curfew. The court said that the ordinance was facially valid since it defined the restricted area and the hours of the curfew, it provided adequate notice, and it was nondiscriminatory.[84] Similarly, picketing and demonstrating may be regulated to reasonable hours under an ordinance specifically defining nondiscriminatory restrictions and providing for adequate notice.[85]

In *Community For Creative Non-Violence v. Carvino*[86] the district court upheld a time regulation which authorities in charge of the United States Capitol Grounds had enacted for an entirely different purpose than that protected in the case.[87] The challenged regulation provided that "no permit shall authorize demonstration[s] of more than 24 consecutive hours."[88] Plaintiffs claimed that a statue, depicting a modern creche, which was used in their demonstration against the plight of the homeless, should be exempted from the twenty-four hour requirement "because of the size, weight, fragility and expense of the statue . . . ."[89]

In holding for the government the court found that "the 24-hour removal requirement serve[d] a significant government interest in assuring that the props used by demonstrators are mobile so that they not

83 322 F. Supp. 1171 (E.D. Wis. 1971).

84 *Id.* at 1172.

85 Cox v. New Hampshire, 312 U.S. 569, 576 (1941).

86 660 F. Supp. 744 (D.D.C. 1987).

87 The Capitol Grounds Board offered several governmental interests in support of the twenty-four hour regulations: "(1) to guard against the appearance of Congressional sponsorship, (2) to avoid the addition of permanent structures on Capitol Grounds . . . (3) to promote the free flow of traffic . . . (4) to keep the forum open to others, and (5) to aid the Capital Police in keeping day-to-day control over Capitol Grounds." *Id.* at 748. The district court, however, sustained the regulation on the grounds that the twenty-four hour rule properly protected Capitol Grounds from permanent structures.

88 *Id.* at 745. In *Carvino* demonstrators requested permission to serve food each night and to maintain a vigil on behalf of the homeless for a period of seven nights. The demonstrators agreed to leave the capital grounds for a few minutes each night but could not easily remove a five hundred pound statue brought in as part of their demonstration.

89 *Id.* at 746.

become or appear to become permanent structures on the Capitol Grounds."[90] In addition, "[t]he 24-hour requirement relieve[d] the authorities of the need to make fine distinctions between what is temporary and what is permanent" since "[b]y any definition, a structure which is movable, and is, in fact, moved every 24 hours, is not permanent."[91] Hence, the twenty-four hour rule was a valid content-neutral regulation.[92]

2. Place Restrictions

Place restrictions are those which restrict an activity or expression to a particular location. In *Heffron v. International Society for Krishna Consciousness, Inc.*[93] the Supreme Court upheld a regulation requiring members of the International Society for Krishna Consciousness who desired to sell or distribute literature to confine their activities at a state fair to a fixed location. The majority found that the regulation was a permissible restriction on the place and manner of communicating the group's religious views since alternative forums for expression were available in that the regulation did not prohibit members from practicing their religion outside the fairgrounds and since the regulation did not prohibit the group from expressing their views orally anywhere within the fairgrounds or from arranging for an exhibitor's booth from which they could distribute and sell their religious materials.[94]

In *Konen v. Spice*[95] the governmental regulation did not fare so well. Officials had enacted ordinances which barred all gatherings in any place except a designated ballpark unless the assemblers applied for a permit in advance.[96] The district court found that the ordinances chilled the first amendment right of assembly and left too much room for arbitrary enforcement.[97] The court noted that "[u]nder the terms of these ordinances, one who wanted to meet with five other persons in a public park to hold an orderly demonstration could be denied permission to do so; this transcends a privilege protected by the first amendment."[98] The government had overstepped its legitimate powers to make reasonable place regulations.

The United States District Court for the Southern District of New York in *International Society for Krishna Consciousness, Inc. v. City of New York*[99] considered a more narrowly tailored place restriction. The New York City Police Department, responsible for guarding the United Na-

90 *Id.* at 749 (quoting from Defendants' Memorandum of Law in Support of their Motion for Summary Judgment and in Opposition to Plaintiffs' Motion for Preliminary Injunction at 11, filed December 5, 1986).

91 *Id.*

92 *Id.*

93 *See supra* note 70.

94 452 U.S. at 654-55. The Court found the Minnesota State Fair to be a limited public forum since the fair existed to allow a large number of people to exhibit their products or views efficiently within a relatively short period of time. *Id.*

95 318 F. Supp. 630 (E.D. Wis. 1970).

96 *Id.* at 631-32.

97 *Id.* at 632.

98 *Id.*

99 484 F. Supp. 966 (S.D. N.Y. 1979).

tions Headquarters, had created a buffer zone around portions of the United Nations building as a security measure. The department also had designated six areas for demonstrations near the building. The department, however, did not allow demonstrators near the Visitors' Gate which serves as the only public entrance to the facility.[100] The plaintiffs claimed that the department violated their first amendment rights by imposing the buffer zone near the gate.[101]

The district court's opinion discussed in detail the importance of the United Nations Headquarters, the many crowds who visit the headquarters daily, potential security problems associated with the facility, as well as the popularity of demonstrations on the site. While recognizing that the government could not "bar access to one site for expression of ideas and beliefs simply because it prefers another,"[102] the court found that "the exclusion of plaintiffs from the immediate vicinity of the Visitors' Gate [was] a reasonable accommodation of the conflicting interests at stake, well-tailored to the exigencies presented at [the] heavily trafficked entry point to the U.N. Headquarters."[103]

3. Manner Restrictions

Manner regulations are those which restrict the method by which a speaker seeks to express himself. As with time and place restrictions, manner regulations are to be judged within the framework of the judicial analysis summarized in Part I.[104] A manner restriction may be perfectly appropriate in one instance and not in another. Manner restrictions are rarely reviewed in judicial decisions.

In *Brown v. Louisiana*[105] a plurality of Justices intimated that if the blacks participating in a library sit-in had been disruptive or disorderly, the government could have validly restricted them from the library.[106] In concurring opinions the Justices emphasized the orderly conduct of the protesters.[107] The protesters' conduct simply did not provide a basis for forcing them to leave the library. The Justices implied that if the petitioners' expression had been disorderly, the government easily could have applied a manner regulation considering the traditional characterization of a library as "a place dedicated to quiet, to knowledge, and to beauty."[108] Accordingly, a narrowly tailored policy prohibiting boisterous, distractive activities within the library would have been constitutionally acceptable.

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100 *Id.* at 968-69.

101 *Id.* at 970.

102 *Id.* at 971 (citations omitted).

103 *Id.* at 972.

104 *See supra* notes 5-64 and accompanying text.

105 383 U.S. 131 (1966).

106 *Id.* at 132-35.

107 For example, Justice Fortas stated: "Petitioners' deportment while in the library was unexceptionable. They were neither loud, boisterous, obstreperous, indecorous nor impolite." *Id.* at 139.

108 *Id.* at 142.

More recently, in *Clark v. Community for Creative Non-Violence*[109] the Court upheld a manner restriction when demonstrators wished to sleep in Lafayette Park and the Mall in the heart of Washington, D.C. to emphasize the plight of the nation's homeless. A National Parks policy prohibited sleeping, setting up tents, storing belongings, or cooking upon the premises involved. The Park Service allowed the demonstrators to set up symbolic tent cities in the area, but refused to let the participants sleep on site.[110] The Court upheld the Park Service regulation as a valid manner restriction.[111]

Although the Court recognized that sleeping might be considered worthy of first amendment protection as symbolic speech, it determined nevertheless that the restriction was valid because reasonable time, place, or manner regulations may be applied to such speech.[112] Because the regulation was content-neutral and reasonably related to the governmental interest of preventing damage to the parks, leaving ample alternatives available to the demonstrators, it survived the majority's scrutiny.

In summary, to be considered valid, time, place, and manner restrictions must concern only the permissible hours of expression, the locus of the expression, and the manner in which the expression takes place. The courts will strike down the regulations if they are overly broad, if they digress into content, or if they are completely unrelated to a valid governmental interest.

C. *Permissible Permit Fees, Licensing Regulations, and Insurance Requirements*

In the past, cities commonly have required citizens to pay minimal permit or licensing fees in order to use public property for first amendment activities.[113] Likewise, local governments have required that citizens wishing to organize parades or marches purchase an insurance policy naming the city as a co-insured in the event of any accident or injury to the public.[114] Recently, the constitutionality of such requirements has come into question, especially in light of the liability and insurance crisis of the 1980s. This section sheds light on the depth of the problem with permit and licensing fees and insurance requirements, the effect of rising costs upon first amendment activities, and realistic alternatives which cities may need to consider in the future.

1. Fees and Licensing Requirements

In *Cox v. New Hampshire*[115] persons seeking a special license for a parade challenged the constitutionality of a state statute requiring a li-

109 468 U.S. 288 (1984).
110 *Id.* at 292.
111 *Id.* at 294 and 298-99.
112 *Id.* at 294-95 (citations omitted).
113 User fees are becoming even more important due to federal budget cuts and state-imposed tax limits. *Intergovernmental Relations: Municipal User Fees*, NAT'L J., Jan. 1988, at 155. A National League of Cities report indicated that sixty-eight percent of the 596 officials surveyed planned to increase user rates this year for the use of public buildings and properties such as parks. *Id.* The officials claim that increasing user fees is easier to promote politically than raising taxes. *Id.*
114 *See, e.g., infra* notes 148-171 and accompanying text.
115 312 U.S. 569 (1941).

cense. In ruling that the license fee was not an unconstitutional abridgment of the right of free speech, the Court stated that a municipality's power to impose regulations to provide for "safety and convenience" in the use of highways does not contradict individual freedoms.[116] Instead, the authority is a "means of safeguarding the good order upon which [those freedoms] ultimately depend."[117] The Court noted that public authorities could use a license to prevent confusion and disorder in the streets so long as the authorities were "not vested with arbitrary power or an unfettered discretion."[118] Under *Cox* a licensing fee was permissible so long as it represented the minimal administrative expense of the municipality.[119]

The Court explained in *Murdock v. Pennsylvania*[120] that licensing fees for activities protected by the first amendment are inherently evil since "[f]reedom of speech, freedom of press, freedom of religion are available to all, not merely to those who can pay their own way . . . ."[121] The Court concluded that the "power to impose a license tax on the exercise of these freedoms is indeed as potent as the power of censorship which this Court has repeatedly struck down."[122] Elaborating on the inherent evils of flat license taxes, the Court found that these devices would be "a ready instrument for the suppression of the faith which any minority cherishes but which does not happen to be in favor."[123]

Under *Cox* and *Murdock* a governmental body or a community may not restrict or tax the expression of certain beliefs because they are unpopular, offensive, or distasteful.[124] The governing body may, though, charge a licensing or permit fee to those who wish to sponsor parades or similar first amendment activities so long as those fees are calculated to cover the actual costs involved. Although the fee is a type of prior restraint on speech in certain circumstances, it will be allowed if it is the least restrictive means of serving substantial municipal interests.

Under *Eastern Connecticut Citizens Action Group v. Powers*[125] municipalities have an interest in receiving advance notice of marches, parades, and other activities to enable them to provide adequate police protection and to minimize public inconvenience.[126] In light of *Central Florida Nuclear Campaign v. Walsh*,[127] however, it is unclear whether cities may require parade participants to pay the cost of additional police protection. In *Walsh*, the United States Court of Appeals for the Eleventh Circuit declared invalid a city ordinance that required people demonstrating in city

116 *Id.* at 574.
117 *Id.*
118 *Id.* at 576. The Court stated that "[t]he obvious advantage of requiring application for a permit was noted as giving the public authorities notice in advance so as to afford opportunity for proper policing." *Id.*
119 *Id.* at 577.
120 319 U.S. 105 (1943).
121 *Id.* at 111-12.
122 *Id.* at 113 (citations omitted).
123 *Id.* at 116.
124 *Id.*
125 723 F.2d 1050 (2d Cir. 1983).
126 *Id.* at 1056.
127 774 F.2d 1515 (11th Cir. 1985), *cert. denied*, 475 U.S. 1120 (1986).

streets and parks to prepay the cost of police protection because the ordinance gave the chief of police unrestricted discretion in deciding how much police protection was needed and because the ordinance did not provide the least restrictive means of achieving the governmental interests of protecting the public.[128] According to the court of appeals, the ordinance placed an undue burden on controversial speech by charging more for first amendment activities which required additional police protection.[129] The court concluded that the ordinance was unconstitutional on its face and as applied.[130] The fear was that an unpopular group might be prohibited from speaking by an exorbitant fee for additional police protection required merely because people opposing the group might attend the activity. "[T]he eventual result might be the total suppression of all those voices whose pockets are not so deep" and whose enemies are numerous.[131]

Therefore, to be constitutional a licensing or permit fee required by a city must be (1) a minimal payment designed to cover actual administrative costs; (2) a fee which is not so financially prohibitive as to preclude a person from exercising his first amendment rights even if such a fee represents the city's actual costs; and (3) the least restrictive means of protecting the governmental interest.

2. The Special Problem with Insurance Requirements

a. *The Nature of the Problem*

In the past municipalities have commonly required groups wishing to exercise first amendment rights to furnish the city a short-term liability insurance policy naming the city as a co-insured for the duration of the activity. Such a policy would serve to protect the city in the event of any accident or injury occurring during the activity.[132] Until recently the costs of obtaining such policies were relatively minimal. With the onset of the current tort liability and insurance crisis, however, such policies have skyrocketed in price and have become difficult to acquire unless one already has insurance coverage and the carrier is willing to take on the additional risk.[133] Thus, many groups which once easily might have obtained the required policies at a minimal cost now may be completely unable to acquire the insurance.

Such difficulties have not discouraged all municipalities from imposing insurance requirements. Unfortunately, municipalities are often compelled to require insurance from groups wishing to exercise first amendment rights because the cities themselves cannot afford the cost of insurance. In addition, local governments are no longer protected by the

128 *Id.* at 1525-6.
129 *Id.* at 1525.
130 *Id.* at 1526.
131 *Fernandes*, 663 F.2d at 632.
132 *See, e.g., infra* notes 148-171 and accompanying text.
133 Telephone interviews with Robert Sweitzer, Vice President of Bath Associates in South Bend, Indiana (August, 1986) and John Ramsbottom, Vice President of 1st Source Insurance in South Bend, Indiana (August, 1986).

blanket tort immunity of the past.[134] The insurance crisis has had a devastating effect on municipalities.[135] For example, insurance premiums in Hartford, Connecticut rose twenty percent while the city's liability coverage fell from $31 million to $4 million.[136] Other cities have completely lost their liability insurance coverage and have been forced to discontinue all governmental activity.[137] Moreover, the Task Force on Tort Liability and the Insurance Crisis found that according to a survey released July 21, 1986 by the United States Conference of Mayors, twelve percent of the cities responding were operating with no insurance in one or more areas of liability.[138]

Insurance companies argue that insurance rates for municipalities are high because municipalities are naturally high risks. "[G]overnment bodies get into cases that are difficult to settle, expensive to litigate, and involve important social issues that have nothing to do with money. Thus, it is often difficult, if not impossible to underwrite or predict the risks involved in insuring municipalities."[139] As a result, cities which have never filed claims under their insurance policies have been dropped by their insurance companies and are unable to acquire new insurance. Even minimal coverage policies may be too expensive for a municipality to bear forcing the city to go without the benefit of insurance.[140]

Importantly, the difficulty of acquiring insurance arises at the same time cutbacks in governmental immunity are becoming commonplace. Municipalities are no longer afforded the broad immunity in tort which was once widespread.[141] At a time when municipalities are beginning to recognize a real need for the protection of liability insurance policies neither they nor groups exercising first amendment rights are able to obtain or afford the insurance.

b. *The Impact upon Groups Wishing to Exercise First Amendment Rights*

Acquiring insurance for parades and similar first amendment events is expensive and is becoming more difficult in light of the current liability

134 To date twenty-two states have enacted general tort liability statutes affecting the tort liability of local governments. ANTIEAU, INDEPENDENT LOCAL GOVERNMENT ENTITIES § 30A.46 at 30A-71 (Supp. 1988). Those states include California, Illinois, Michigan, Minnesota, Washington, Nebraska, Nevada, Iowa, Oklahoma, Oregon, Texas, Wisconsin, Nebraska, New Jersey, Tennessee, Utah, Idaho, Alabama, New Mexico, Colorado, New Hampshire, Indiana, and Florida. *Id.* at 30A-71 and 30A-72. Other states have enacted specific statutes abrogating the sovereign immunity of local governments in certain circumstances. *Id.* at 30A-72.

135 TASK FORCE ON TORT LIABILITY AND THE INSURANCE CRISIS, REPORT TO THE NATIONAL INSTITUTE OF MUNICIPAL LAW OFFICERS, 51ST ANNUAL CONFERENCE, 1 (October, 1986).

136 *Id.*

137 *Id.*

138 *Id. See* Rynard, *The Local Government as Insured or Insurer: Some New Risk Management Alternatives*, 20 URB. LAW 103 (1988) (additional information on the insurance crisis and risk management alternatives local governments are choosing since insurance prices have skyrocketed and liability coverage is often no longer available).

139 Justice William R. Quinlan, Illinois Appellate Court, Intergovernmental Risk Pooling as a Response to the Tort Liability and Insurance Crisis, Remarks at the NIMLO Mid-Year Seminar, 1 (1986).

140 Forward to NIMLO Resolution at 1.

141 *See supra* note 134.

crisis.[142] Companies which have issued parade insurance in the past are shying away from these short-term, high risk policies due to the high cost of the policies and the possibility of exposure to expensive claims.[143] Although most organizations or groups could acquire the same policy at a lower rate from their own insurance carriers as a temporary add-on to their regular policies, the cost of the insurance or the complete inability to obtain insurance would be prohibitive to some groups.

Promoters of the recent "Hands Across America" event[144] reported expenditures of approximately $3.5 million on liability insurance.[145] Such extravagant figures illuminate the difficulties which a smaller, more controversial group would have in attempting to exercise its right to speak on a nationwide basis. Admittedly, a smaller group might be subject to less burdensome insurance requirements since fewer people would be involved. Yet, the imposition of even minimal insurance requirements by a number of cities could be prohibitive.

Assuredly, groups seeking to exercise first amendment rights, especially controversial political groups expressing unpopular opinions, will have at least as tough a time acquiring insurance as municipalities do. Like municipalities, the groups are a high risk to the insurance companies. Political out-groups,[146] however, will not have the prestige or political power to convince insurance companies to make exceptions to their standards that municipalities might. Since acquiring policies for short-term, one-time events of this nature is becoming more difficult, if not impossible, regulations requiring such policies are becoming more constitutionally questionable.

c. *The Judicial Response to Insurance, Indemnity Agreements, and Other Requirements*

The Supreme Court has not yet made a definitive statement as to whether insurance and indemnity requirements for first amendment activities are constitutional. Due to the varying views among appeals courts and district courts, the modern problems associated with such requirements and the important effect the regulations may have on those who wish to exercise their first amendment rights, the Supreme Court will likely voice its opinion regarding insurance and indemnity requirements in the near future.[147]

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142 *See supra* note 133 and accompanying text.

143 *See infra* notes 155-158 and accompanying text.

144 South Bend Tribune, Aug. 24, 1986, at A8, cols. 4-5; Telephone interview with Dave Fulton, Public Information Officer of Hands Across America, (October, 1986).

145 *Id.*

146 Legal commentators apparently borrowed the term "out-group" from the field of sociology. The word "out-group" originated in 1907 and means those who "not necessarily forming a group themselves, . . . are excluded from or do not belong to a specific in-group." OXFORD ENGLISH DICTIONARY Vol. III 143 (Supp. 1982). Hence, political out-groups are those who are excluded from a specific group having political power.

147 *See* City of Lakewood v. Plain Dealer Publishing Co., 794 F.2d 1139 (6th Cir. 1986), *noting probable jurisdiction*, 107 S. Ct. 1345 (March 2, 1987), in which a publishing company challenged a municipal ordinance providing that publishers wishing to display newsracks on public streets must indemnify the city for all liability and obtain property damage insurance in the amount of $100,000, naming the city as an additional insured. 794 F.2d at 1146 n.6. The lower court found the provision

In *Houston Peace Coalition v. Houston City Council*[148] the United States District Court for the Southern District of Texas struck down a city ordinance requiring either "a comprehensive general liability insurance policy, which may exclude the parade participants, or . . . any other evidence of indemnity for the city's protection incident to the holding of any such parade . . . ."[149] The ordinance itself did not specify the type of policy, the dollar amount of the policy, the form, or the extent of coverage required.[150] The court found the ordinance unconstitutional because it required parade applicants to obtain liability insurance without setting forth clear, judicious standards for the insurance.[151] Additionally, the court indicated that officials must administer regulations of this type in a non-discriminatory and non-discretionary manner.[152] The Houston ordinance was unconstitutional since it vested unbridled discretion in the city attorney.[153]

In *Collin v. Smith*[154] the plaintiffs were originally denied permission to demonstrate in a Skokie, Illinois public park because they refused to comply with an ordinance which required them to obtain $350,000 in liability and property damage insurance. The ordinance established the rule that all public assemblies above a certain size had to obtain an insurance policy, which the court referred to as "rare and expensive," or receive an exemption from the requirement.[155] The District Court for the Northern District of Illinois struck down the ordinance because it drastically restricted first amendment freedoms.[156] The court offered two rea-

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to be unconstitutional since the city did not require insurance of all permittees who desired to use public property. *Id.* at 1147.

148 310 F. Supp. 457 (S.D. Tex. 1970).

149 *Id.* at 461.

150 *Id.* at 462.

151 *Id.* at 463.

152 *Id.*

153 *Id.* at 462. In Rock Against Racism v. Ward, 658 F. Supp. 1346 (S.D. N.Y. 1987), the United States District Court for the Southern District of New York held an insurance requirement unconstitutional using an almost identical analysis. In *Ward* guidelines promulgated by the Commissioner of Parks for the use of a Central Park bandshell provided that "many events are required to have in effect at all times insurance in the amount stated on the Special Event Permit." *Id.* at 1356. The district court invalidated the insurance requirement because it vested "unfettered discretion" in the officials authorized to issue special event permits and because the city did not show "that the insurance requirement represent[ed] the least restrictive means of serving" its interest in protecting itself from liability. *Id.* at 1356-57. The court relied upon Eastern Connecticut Citizens Action Group v. Powers, *supra* note 125, stating that "[t]he record before [the court] [wa]s equally bare of any evidence of past injuries or past claims against the City arising from any special event at the Bandshell." *Id.* The plaintiff's "seven year track record of sponsoring events which . . . did not produce injuries or otherwise threaten the City with liability claims" also played an important part in the district court's decision. *Id.*

154 447 F. Supp. 676 (N.D. Ill.), *aff'd*, 578 F.2d 1197 (7th Cir.), *cert. denied*, 439 U.S. 916 (1978).

155 447 F. Supp. at 685. The court found the testimony of a licensed insurance broker that plaintiffs could not obtain the insurance because of the nature of their organization to be persuasive. *Id.* at 684. The broker, Janet Jarosz, stated that she had tried unsuccessfully to find insurance for the plaintiffs for four to five months even though she contacted thirteen different companies including some which specialized in obtaining difficult lines of insurance. *Id.* Ms. Jarosz concluded that insurance companies were not interested in providing the kind of insurance which Skokie required due to the high risks involved. *Id.* If the companies did agree to issue the policies, they would only do so for well-established, respected organizations, and the cost would be as much as $1,000 for a single event. *Id.*

156 *Id.*

sons for its conclusion. First, no evidence proved that the village needed such a burdensome insurance requirement. Second, the ordinance allowed for the exemption of some organizations from the insurance requirement at the pure discretion of community officials or by village cosponsorship.[157]

Upon review, the Village of Skokie conceded that the insurance requirements could not be applied to the plaintiffs who proved they could not obtain insurance. The plaintiffs, however, attempted to convince the court of appeals to affirm the district court decision regarding the unconstitutionality of ordinances requiring insurance. The court refused to make such a broad ruling stating "we do not need to determine now that no insurance requirement could be imposed in any circumstances, which would be a close question, in our view."[158] To pass the constitutional test, the requirement of insurance must be rationally balanced with the actual need for the insurance. Consequently, if the activity is one which inherently increases the risk of physical injury, such as a running race, as opposed to an activity which increases the risk of injury merely due to the probable negative reaction of onlookers, a municipality may require insurance. On the other hand, if the activity is relatively placid, such as a walk, a municipality should require little or no insurance.

The Illinois district court once again addressed the problem of insurance requirements in *Collin v. O'Malley*.[159] The court noted that it had previously declared unconstitutional a Chicago Park District ordinance which required the posting of a $100,000 to $300,000 public liability insurance policy and a $50,000 property damage insurance policy before issuance of a parade permit.[160] City officials requested a stay of the order allowing the plaintiff to march since they had modified their policy to require $10,000 to $50,000 in public liability insurance and $10,000 in property damage insurance.[161]

In refusing to grant the requested stay, the court expressed its disapproval of the city's actions: "It appears that defendants persist on a dubious practice by the simple device of changing the amount of insurance they demand of the plaintiff before allowing him, those with him, as well as others like him, to go to a public park and there enjoy rights guaranteed him by the federal constitution."[162] Although the court did not state that insurance requirements were unconstitutional, it did intimate that as applied to unpopular groups who are unable to acquire insurance because of their political and social views, the requirements are unacceptable.

In *Eastern Connecticut Citizens Action Group v. Powers*[163] state officials sought to require a citizens' group desiring to protest along an abandoned railway bed to obtain insurance and to execute a "save-harmless"

157 *Id.*
158 *Collin*, 578 F.2d at 1208.
159 452 F. Supp. 577 (N.D. Ill. 1978).
160 *Id.* at 578.
161 *Id.* at 579.
162 *Id.* at 579-80.
163 723 F.2d 1050 (2d Cir. 1983).

agreement before allowing access to the site. The appellants claimed that the requirements were unconstitutional prior restraints.[164] The Second Circuit noted that insurance requirements may be a special threat to certain groups because underwriters often consider irrelevant factors such as political beliefs and the likelihood of adverse publicity in deciding whether to accept or reject applications for insurance coverage.[165] The court found that although insurance requirements were not unconstitutional *per se*, they were unconstitutional as applied to the group in question.

According to the court the requirements did not represent the least restrictive means available.[166] The facts of *Powers* illustrate that the citizens' group made numerous efforts to avoid liability problems.[167] Each marcher also signed a waiver of all claims against the state.[168] In addition, the court found that the state could have relied on civil and criminal sanctions, rather than insurance, to protect its interests.[169] The court concluded that "[a]bsent a showing that those carefully-crafted remedies are unavailing in this instance, the state may not insist upon broader restrictions which substantially infringe constitutional rights, particularly in light of the uneventful history of the previous Railathon."[170] It recommended a standard of "careful scrutiny" for fee and insurance provisions touching areas of first amendment expression and added that officials attempting to impose insurance requirements should be prepared to justify the amount of coverage required.[171]

The United States District Court for the Northern District of Texas cast its vote against a fidelity bond requirement in *Holy Spirit Association for Unification of World Christianity v. Hodge*.[172] In *Hodge* an ordinance required solicitors to be adequately covered by a fidelity bond.[173] The court struck down the bond requirement noting that the Supreme Court has condemned charging a fee for the exercise of first amendment freedoms.[174] Since the requirement would make solicitation available solely to those who could afford insurance, the court found it unconstitutional on its face.[175]

Similarly, in *Invisible Empire Knights of the Ku Klux Klan v. City of West Haven*,[176] a local ordinance required a bond to be posted for all activities within city parks which were expected to draw more than twenty-five peo-

164 *Id.* at 1053.
165 *Id.* at 1056 n.2.
166 *Id.* at 1057.
167 *Id.* at 1053. Organizers of the Railathon studied the route in advance to avoid dangerous locations and contacted police in advance, informing them of the walk. They also distributed a brochure telling participants about the event that included a map of the Railathon route and a list of rules. *Id.*
168 *Id.*
169 *Id.* at 1057.
170 *Id.*
171 *Id.*
172 582 F. Supp. 592 (N.D. Tex. 1984).
173 *Id.* at 599.
174 *Id.* (citations omitted).
175 *Id.*
176 600 F. Supp. 1427 (D. Conn. 1985).

ple. The city used the proceeds from the bond to pay its police officers for supervising the event. Although the ordinance provided that an applicant who was unable to acquire a bond could substitute the financial guarantee of another person to cover the costs, the United States District Court for the District of Connecticut found the provision unconstitutional.[177] Besides needlessly chilling first amendment rights, the ordinance lacked adequate standards for determining the amount of the bond required and failed to give notice of when a bond was required.[178] The policy also unconstitutionally required an applicant to pay the cost of police protection thereby forcing him to pay for the opportunity to "engage in public discussion."[179] The court explained the inherent evils of the wealth-conscious policy:

> The Ordinance in question, which imposes a cost on expression, treats the First Amendment as a privilege to be bought rather than a right to be enjoyed. It is society that benefits by the free exchange of ideas, not only the person whose ideas are being shared. In order to fully preserve and protect the people's right to be informed, it is society that should bear the expense, however great, of guaranteeing that every idea, no matter how offensive, has an opportunity to present itself in the marketplace of ideas.[180]

In summary, most courts disfavor any regulations which force demonstrators to pay a price in order to exercise their first amendment rights. Accordingly, courts will review insurance and bond requirements with careful scrutiny to be sure they are precisely defined, nonarbitrary, and nondiscriminatory. Cities which impose insurance regulations should be prepared to prove that the amounts required are actually needed, either based on the past history of a particular event or by other means.[181]

Considering the controversial nature of insurance and bond requirements as well as the inherent difficulty in drafting acceptable provisions requiring such regulations, cities would be wise to look to less restrictive means of protecting their interests. Requiring waivers of liability and hold-harmless agreements is less burdensome than making a group pay for an insurance policy prior to an event. In turn, if a group already has insurance the city will probably be justified in requesting an add-on provision naming the city as a co-insured for the duration of the event, since the costs of such provisions are usually minimal. Furthermore, the city

177 *Id.* at 1433-4.

178 *Id.* at 1432-3.

179 *Id.* at 1433.

180 *Id.* at 1434.

181 Presumably cities could look to the history of similar events in their locality to show that a certain amount of insurance is needed. It is unclear whether cities could look to the history of events in other cities or back up their insurance requirement with insurance company recommendations. In any case, documentation of injuries or incidents at prior events is very important if a city wishes to continue requiring liability insurance. The *Ward* decision, *supra* note 153, indicates that the city may look to the track record of a particular sponsor. 658 F. Supp. at 1357. The city must be careful, however, to avoid requiring insurance for groups merely because onlookers who opposed their views were violent at a prior activity. Such a response would unfairly place the burden of insurance on an innocent party.

may always look to civil and criminal sanctions to protect its interests.[182] Whatever means muncipalities choose, they should take a conservative approach in the insurance area until the Supreme Court decides the constitutionality of insurance requirements in the first amendment area.[183]

III. Predicting the Judicial Response to a Particular Regulation

A municipal official must be prepared to predict the judicial response to every ordinance and regulation affecting first amendment activities. In order to carry out this task effectively, officials need a quick, efficient method whereby they may examine even the most complex judicial decisions regarding such activities. Visual aids and graphing techniques provide ideal assistance to public officials who are attempting to form concrete standards upon which to build acceptable and workable public policies.

A. *Graphing the Supreme Court's System of Analysis*

The three-dimensional graph on page 587 illustrates the Supreme Court's complex system of analysis discussed in Part I *supra*. This visual representation of the Court's analytical framework is useful in helping the practitioner predict acceptable governmental regulations. The axes of the cube depict each of the factors used in the Court's first amendment analysis. Axis A represents the nature of the forum ranging from the traditional public forum in which speech is given maximum protection to the nonpublic forum where speech may be limited or even prohibited in some instances; Axis B stands for the nature of the governmental interest ranging from no interest at all near point X to a substantial governmental interest on the far side of the cube; and Axis C signifies the nature of the speech including pure speech which is protected almost absolutely, speech plus which is given intermediate protection and violent speech or activity which may be prohibited entirely.

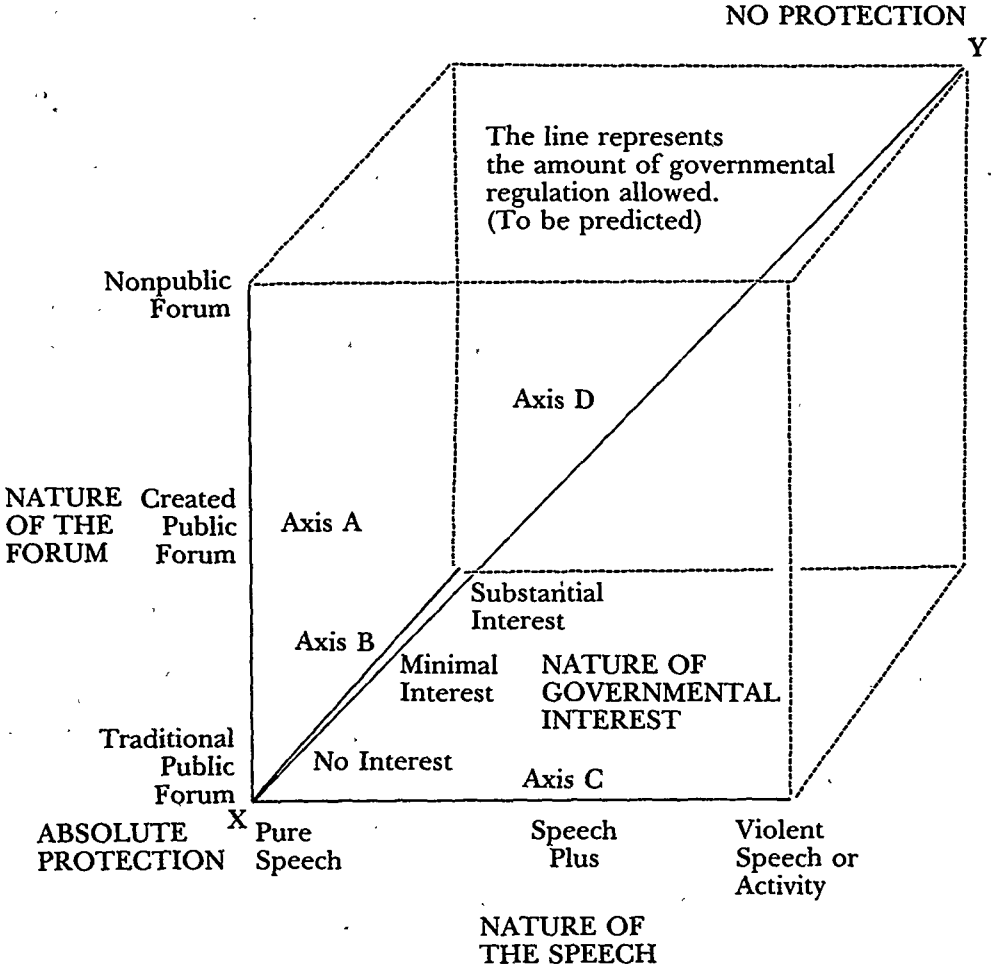
By plotting these factors as determined by past judicial decisions, the municipality should be able to predict the amount of protection from governmental regulation on Axis D, the line which cuts across the cube from X to Y. Axis D represents the amount of governmental regulation which courts will allow based upon an evaluation of relevant factors in the judicial analysis. A prediction which is plotted on Axis D closer to point X should receive almost absolute protection while predictions plotted closer to point Y will receive less protection from regulation.

B. *Classifying the Results of Previous Decisions*

The graph may be put to practical use by deciphering the significant factors of previous judicial decisions. In each decision the practitioner

182 For example, if a city is sued for injuries or damages by a private individual as a result of a group's action, the city may demand indemnification from the group in court. In addition, many states still authorize limited immunity for local governments which may provide some protection in these circumstances. The city may also be able to resort to statutes or ordinances recognizing a cause of action for vandalism or destruction of public property.

183 *See supra* note 147.


NO PROTECTION
Y
The line represents
the amount of governmental
regulation allowed.
(To be predicted)
Nonpublic
Forum
Axis D
NATURE
OF THE
FORUM
Created
Public
Forum
Axis A
Substantial
Interest
Axis B
Minimal
Interest
NATURE OF
GOVERNMENTAL
INTEREST
Traditional
Public
Forum
No Interest
Axis C
X
ABSOLUTE
PROTECTION
Pure
Speech
Speech
Plus
Violent
Speech or
Activity
NATURE OF
THE SPEECH

must identify the nature of the forum, the nature of the governmental interest, and the nature of the speech as determined by the reviewing court.[184] Next, the practitioner should assign numbers to each factor according to the classes listed below:

Class 1: Traditional public forum; no governmental interest; pure speech.

Class 2: Created or limited public forum; minimal or moderate governmental interest; speech plus or violent speech tending not to breach the peace.

Class 3: Nonpublic forum; substantial governmental interest; obscene speech, violent speech tending to breach the peace, or pure activity.

For example, a court considering a challenge to an ordinance banning all speech in a nuclear testing zone would base its decisions on the following factors: (1) the speech took place in a nonpublic forum; (2) the ordinance banned all speech, including pure speech; and (3) the government has a substantial interest in keeping unauthorized persons out of the nuclear testing zone. The practitioner would assign the following numbers to the case: Class 3 (nonpublic forum), Class 1 (pure speech), and Class 3 (substantial governmental interest).[185]

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184 *See supra* notes 5-64 and accompanying text.

185 As a further elaboration, the decisions cited in this article would be classified as follows: (Note: "F" means forum; "GI" means governmental interest; and "S" means speech.)

1. Gregory v. City of Chicago, 394 U.S. 111 (1969)
   F - Class 1 (Sidewalk)
   GI - Class 2 (Maintaining order)
   S - Class 2 (Peaceful march)
   Result: 2 (Expression allowed)
2. Tinker v. Des Moines Community School District, 393 U.S. 503 (1969)
   F - Class 2 (School)
   GI - Class 3 (Preventing disruption of education process)
   S - Class 2 (Wearing armband)
   Result: 2 (Expression allowed)
3. Pursley v. City of Fayetteville, 820 F.2d 951 (8th Cir. 1987)
   F - Class 1 (Residential sidewalk)
   GI - Class 2 (Preserving domestic tranquility)
   S - Class 2 (Picketing of residence)
   Result: 2 (Expression allowed)
4. Cox v. Louisiana, 379 U.S. 536 (1965)
   F - Class 1 (Street across from courthouse)
   GI - Class 3 (Preventing riot and obstruction of traffic)
   S - Class 2 (Peaceful march)
   Result: 2 (Expression allowed)

*5. Teamsters Union v. Hanke, 339 U.S. 470 (1950)
   F - Class 1 (Commercial district sidewalk)
   GI - Class 2 (Protecting self-employers)
   S - Class 2 (Peaceful picketing)
   Result: 2 (Expression not allowed)

6. Local 391, Int'l Bhd. of Teamsters v. City of Rock Mount, 672 F.2d 376 (4th Cir. 1982)
   F - Class 1 (Public sidewalk)
   GI - Class 2 (Convenience in use of public streets and sidewalks; preservation of public access to public buildings)
   S - Class 2 (Labor picketing)
   Result: 2 (Expression allowed)
7. Stromberg v. California, 238 U.S. 359 (1931)
   F - Class 1 (Private summer camp)
   GI - Class 2 (Preventing display of sign/symbol in opposition to government)

C. *Charting the Results of Previous Decisions*

Next, the practitioner should chart all pertinent decisions by class and factor. Once all important decisions have been charted, a govern-

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S - Class 2 (Displaying red Communist flag)
Result: 2 (Expression allowed)

8. West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943)
F - Class 2 (Public school)
GI - Class 2 (Fostering national unity)
S - Class 2 (Refraining from saluting American flag for religious purposes)
Result: 2 (Expression allowed)

9. Brown v. Louisiana, 383 U.S. 131 (1966)
F - Class 2 (Public library)
GI - Class 3 (Preventing breach of peace)
S - Class 2 (Peaceful sit-in)
Result: 2 (Expression allowed)

*10. United States v. O'Brien, 391 U.S. 367 (1968)
F - Class 1 (Steps of courthouse)
GI - Class 3 (Protecting national security and maximizing efficiency in raising United States armies)
S - Class 2 (Burning draft card)
Result: 2 (Expression not allowed)

11. Wooley v. Maynard, 430 U.S. 705 (1977)
F - Class 2 (License plate of car)
GI - Class 3 (Preventing defacement of property)
S - Class 2 (Covering portion of license plate stating "Live Free or Die")
Result: 2 (Expression allowed)

*12. Chaplinsky v. New Hampshire, 315 U.S. 568 (1942)
F - Class 1 (Public sidewalk near entrance of city hall)
GI - Class 3 (Preventing breach of peace)
S - Class 1-2 (Distributing literature; verbally denouncing religion and government using profane language - "damned Fascist")
Result: 2 (Expression not allowed)

13. Cohen v. California, 403 U.S. 14 (1971)
F - Class 2 (Courthouse)
GI - Class 3 (Preventing disturbance of peace)
S - Class 2 (Wearing jacket bearing words "Fuck the Draft" in protest of Vietnam war and draft)
Result: 2 (Expression allowed)

14. Gooding v. Wilson, 405 U.S. 518 (1972)
F - Class 1 (Outside a public building)
GI - Class 3 (Preventing breach of peace)
S - Class 2 (Opprobrious and abusive words to a police officer - "White son of a bitch I'll kill you")
Result: 2 (Expression allowed)

15. City of Houston v. Hill, 107 S. Ct. 2502 (1987)
F - Class 1 (Public street)
GI - Class 2 (Preventing interruption of police officers in performance of their duties and prohibiting verbal criticism and challenge of police officers)
S - Class 1 (Shouting at police officer)
Result: 1 (Expression allowed)

16. Roth v. United States, 354 U.S. 476 (1957)
F - Class 2 (United States mails)
GI - Class 3 (Regulating United States mails)
S - Class 3 (Mailing, advertising, and distributing obscene materials)
Result: 3 (Expression not allowed)

17. Brandenberg v. Ohio, 395 U.S. 444 (1969)
F - Class 1 (Private farm)
GI - Class 3 (National security)
S - Class 2 (Verbally advocating violence to reform government at a Ku Klux Klan rally)
Result: 2 (Expression allowed)

18. New York v. Ferber, 458 U.S. 747 (1982)
F - Class 1 (Private adult bookstore)

ment official has a blueprint which is uniquely suited to predict future

GI - Class 3 (Protecting children from pornographic acts)
S - Class 3 (Distributing and selling child pornography)
Result: 3 (Expression not allowed)

19. Schad v. Borough of Mount Ephraim, 452 U.S. 61 (1981)
F - Class 1 (Private adult bookstore)
GI - Class 2 (Enforcement of zoning laws prohibiting all live entertainment in borough)
S - Class 3 (Nude dancing)
Result: 2 (Expression allowed)

20. Hague v. Committee for Indus. Org., 307 U.S. 496 (1939)
F - Class 1 (Public streets, parks, and buildings)
GI - Class 3 (Preventing riots, disturbances and disorder)
S - Class 1-2 (Distributing printed material and holding public meetings without a permit)
Result: 1-2 (Expression allowed)

21. International Soc'y for Krishna Consciousness Inc. v. Bowen, 456 F. Supp. 437 (S.D. Ind. 1978)
F - Class 2 (State fairgrounds)
GI - Class 2 (Insuring maximum enjoyment by fairgoers)
S - Class 1-2 (Proselytizing, distributing religious literature and soliciting donations)
Result: 2 (Expression allowed)

22. Fernandes v. Limmer, 663 F.2d 619 (5th Cir. 1981)
F - Class 2 (Public airport complex)
GI - Class 2 (Preventing fraud and providing public security)
S - Class 2 (Disseminating religious literature and soliciting funds)
Result: 2 (Expression allowed)

23. Southeastern Promotions Ltd. v. City of West Palm Beach, 457 F.2d 1016 (5th Cir. 1972)
F - Class 2 (Municipal auditorium)
GI - Class 2 (Preserving auditorium for family-type entertainment)
S - Class 2 (Performance of musical production "Hair")
Result: 2 (Expression allowed)

24. Wolin v. Port Auth. of New York, 392 F.2d 83 (2d Cir. 1968)
F - Class 2 (Bus terminal)
GI - Class 3 (Preventing disorderly conduct)
S - Class 1-2 (Peaceful and orderly distribution of literature and assembly)
Result: 2 (Expression allowed)

25. Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37 (1983)
F - Class 2 (Public school mailboxes and mail system)
GI - Class 2 (Insuring labor peace and maintaining an exclusive bargaining representative for teachers)
S - Class 2 (Distributing information through school mail system)
Result: 2 (Expression allowed)

26. Board of Airport Comm'rs of Los Angeles v. Jews for Jesus, Inc., 107 S. Ct. 2568 (1987)
F - Class 2 (Airport)
GI - Class 2 (Preventing congestion and disruption)
S - Class 1 (Any first amendment expression)
Result: 2 (Expression allowed)

27. Carey v. Brown, 447 U.S. 455 (1980)
F - Class 1 (Residential sidewalk)
GI - Class 2 (Insuring residential privacy)
S - Class 2 (Picketing)
Result: 2 (Expression allowed)

*28. M.N.C. of Hinesville, Inc. v. United States Dep't of Defense, 791 F.2d 1466 (11th Cir. 1986)
F - Class 3 (Military base)
GI - Class 2 (Disseminating information to troops at no cost and maintaining exclusive civilian newspaper)
S - Class 2 (Civilian newspaper competing with newspaper awarded exclusive contract to service base)
Result: 2 (Expression not allowed)

29. Cornelius v. NAACP Legal Defense and Educ. Fund, 473 U.S. 788 (1985)
F - Class 2 (Federal workplace)
GI - Class 3 (Preventing disruption of workplace)

first amendment decisions in his jurisdiction. The chart on page 593 illustrates how the practitioner's graph should look when completed. Of

S - Class 2 (Charitable fund-raising drive not selected as part of uniform drive permitted by government)
Result: 2 (Expression not allowed)

30. Adderley v. Florida, 385 U.S. 39 (1966)
F - Class 3 (Jail driveway not open to public)
GI - Class 3 (Maintaining jail security)
S - Class 2 (Demonstrating)
Result: 3 (Expression not allowed)

31. Beckerman v. City of Tupelo, 664 F.2d 502 (5th Cir. 1981)
F - Class 1 (Public streets and places)
GI - Class 3 (Preventing disorderly conduct and traffic problems)
S - Class 2 (Conducting parade, using profanity, and using sound equipment)
Result: 2 (Expression allowed)

32. People v. Fogleson, 21 Cal. 3d 158, 577 P.2d 677 145 Cal. Rptr. 542 (1978)
F - Class 2 (Public airport)
GI - Class 2 (Preventing fraud, harassment and interference with business operations)
S - Class 2 (Soliciting contributions)
Result: 2 (Expression allowed)

33. Bigelow v. Virginia, 421 U.S. 809 (1975)
F - Class 1 (Newspaper)
GI - Class 2 (Promoting state policy against allowing profit from medical referrals; maintaining quality medical care)
S - Class 2 (Advertising abortion services in another state)
Result: 2 (Expression allowed)

34. Virginia Pharmacy Bd. v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1976)
F - Class 1 (Newspapers, fliers, and other promotional channels)
GI - Class 2 (Maintaining professionalism of licensed pharmacists)
S - Class 2 (Advertising prices of prescription drugs)
Result: 2 (Expression allowed)

35. United States Postal Serv. v. Council of Greenburgh Civic Ass'ns, 453 U.S. 114 (1981)
F - Class 2 (Mailboxes)
GI - Class 3 (Insuring efficient and secure delivery of United States mails; preventing overcrowding of mailboxes)
S - Class 3 (Delivering messages to residents by placing unstamped notices and pamphlets in letterboxes of private homes)
Result: 3 (Expression prohibited)

36. Consolidated Edison Co. v. Public Serv. Comm'n, 447 U.S. 530 (1980)
F - Class 2 (Billing envelopes of public utility company)
GI - Class 2 (Avoiding forcing utility company's views on captive audiences who receive billing envelopes; allocating company's limited resources in the public interest; and insuring that ratepayers do not subsidize the cost of bill inserts)
S - Class 2 (Inserts in electric bills discussing controversial issues of public policy)
Result: 2 (Expression allowed)

37. Grayned v. City of Rockford, 408 U.S. 104 (1980)
F - Class 1 (Public sidewalk next to school grounds)
GI - Class 3 (Preventing interference with normal school activities)
S - Class 3 (Disruptive demonstration)
Result: 3 (Expression prohibited)

38. Cantwell v. Connecticut, 310 U.S. 296 (1940)
F - Class 1 (Residential area)
GI - Class 2 (Protecting public from fraud in solicitation of money or valuables in the guise of religion)
S - Class 1-2 (Solicitation and attacking the Catholic religion)
Result: 1-2 (Expression allowed)

39. Schneider v. State, 308 U.S. 147 (1939)
F - Class 1 (Public streets)
GI - Class 2 (Preventing litter and stoppage of storm drains)
S - Class 2 (Distributing handbills)
Result: 2 (Expression allowed)

40. Heffron v. International Soc'y for Krishna Consciousness, Inc., 452 U.S. 640 (1981)
F - Class 2 (State fairgrounds)

course, the actual descriptions in each category, except those derived

GI - Class 2 (Providing fairgoers and concessionaires with adequate and equal access and minimizing congestion)
S - Class 2 (Soliciting and distributing religious materials)
Result: 2 (Expression allowed but limited to fixed location)

41. Olivieri v. Ward, 801 F.2d 602 (2d Cir. 1986)
F - Class 1 (Public sidewalk)
GI - Class 3 (Preventing confrontation between rival demonstrators)
S - Class 2 (Demonstrating)
Result: 2 (Expression allowed)

42. Terminiello v. Chicago, 337 U.S. 1 (1949)
F - Class 2 (Auditorium)
GI - Class 3 (Prohibiting breach of peace and disorderly conduct)
S - Class 1 (Speech criticizing political and racial groups)
Result: 2 (Expression allowed)

43. Peters v. Breier, 322 F. Supp. 1171 (E.D. Wis. 1971)
F - Class 1 (Public park)
GI - Class 3 (Protecting the public and public property)
S - Class 3 (Presence after curfew)
Result: 3 (Expression not allowed)

44. Cox v. New Hampshire, 312 U.S. 569 (1941)
F - Class 1 (Public street)
GI - Class 2 (Controlling use of public streets)
S - Class 2 (March in which particpants carried signs and handed out leaflets without a permit)
Result: 2 (Expression allowed without permit)

45. Community for Creative Non-Violence v. Carvino, 660 F. Supp. 744 (D.D.C. 1987)
F - Class 1 (United States Capitol Grounds)
GI - Class 2 (Avoiding appearance that government sponsors demonstration activity, prohibiting landscape changes not approved by Congress, and to guarantee control over demonstrations on a daily basis)
S - Class 2 (Display of a 500-pound statue of a modern-day creche)
Result: 2 (Expression restricted in that demonstrators had to remove statue once every twenty-four hours)

46. Konen v. Spice, 318 F. Supp. 630 (E.D. Wis. 1970)
F - Class 1 (All public places except a public ball park)
GI - Class 2 (Regulating use of streets and public ways)
S - Class 2 (Demonstating)
Result: 2 (Expression allowed)

*47. International Soc'y for Krishna Consciousness, Inc. v. City of New York, 484 F. Supp. 966 (S.D.N.Y. 1979)
F - Class 1 (Sidewalks immediately adjacent to United Nations headquarters)
GI - Class 3 (Guaranteeing peace and safety of United Nations headquarters)
S - Class 1-2 (Peaceful proselytizing and soliciting donations)
Result: 1-2 (Expression not allowed in that area)

*48. Clark v. Community for Creative Non-Violence, 468 U.S. 288 (1984)
F - Class 1 (National park)
GI - Class 2 (Preventing damage to national park and assuring accessibility to park)
S - Class 3 (Sleeping to demonstrate plight of homeless)
Result: 2 (Expression not allowed)

49. Murdock v. Pennsylvania, 319 U.S. 105 (1943)
F - Class 1 (Residential area)
GI - Class 2 (Safeguarding community from evils of solicitation and charging a fee for canvassing/selling within city)
S - Class 2 (Soliciting and distributing religious materials without paying fee)
Result: 2 (Expression allowed)

50. Eastern Connecticut Citizens Action Group v. Powers, 723 F.2d 1050 (2d Cir. 1983)
F - Class 3 (State railway bed - no longer used for trains)
GI - Class 2 (Preserving corridor for future transportation purposes and defraying administrative expenses)
S - Class 2 (March)
Result: 2 (Expression allowed)

51. Central Florida Nuclear Campaign v. Walsh, 774 F.2d 1515 (11th Cir. 1985)

	FORUM	GOVERNMENT INTEREST	SPEECH	REGULATION TO BE PREDICTED
Class 1	Sidewalk Street Private summer camp Steps of courthouse Outside a public building Private farm Private adult bookstore Public building Newspaper Park	(No Class 1 designation for the decisions cited. Examples of Class 1 government interests would be any superficial interests which the government uses to suppress speech or to make content-based decisions)	Proselytizing Shouting at police officer Public meetings Verbally attacking a religion Criticizing political and racial groups	No restrictions allowed
Class 2	School Public library License plate of car Courthouse United States mails State fairgrounds Public airport complex Municipal auditorium Bus terminal Public school mailboxes Federal workplace Billing envelopes of public utility	Maintaining order Preserving domestic tranquility Protecting self-employers Convenience in use of public streets Preventing display of sign/symbol opposing government Preservation of public access to public buildings Fostering national unity Preventing interruption of police officers Enforcing zoning laws Preventing fraud Providing security	Peaceful march Wearing armband Peaceful picketing Displaying communist flag Refraining from saluting American flag for religious purposes Peaceful sit-in Covering license plate Wearing jacket bearing profane language Rude/abusive words to police officer Advocating violence to reform government	Reasonable time, place, and manner regulations
Class 3	Military base Jail driveway not open to public State railway bed	Preventing disruption of education process Preventing riot Preventing obstruction of traffic Preventing breach of peace Protecting national security Maximizing efficiency of raising United States armies Preventing defacement of property; security interests Regulating United States mails Protecting children from pornographic acts	Burning draft card Mailing, advertising, and distributing obscene materials Distributing/selling child pornography Nude dancing Disruptive demonstration Presence after curfew Sleeping overnight to demonstrate plight of homeless Placing unstamped notices and pamphlets in letterboxes	Activity may be prohibited Criminal or civil penalties may be imposed if adequate notice Imprisonment
	AXIS A	AXIS B	AXIS C	AXIS D

from Supreme Court decisions, may vary from jurisdiction to jurisdiction.

D. *Predicting the Results of Future Decisions*

Once the practitioner has classified the factors of pertinent decisions in his jurisdiction, he is ready to predict how the courts will react to different governmental regulations. To accurately predict a court's decision concerning a given regulation, the practitioner must correctly identify each factor the court will consider in light of his completed chart. He can do this easily by numbering each of the three factors according to the descriptions from his chart which most closely match his situation. Actually, by comparing the case to be predicted to the descriptions

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F - Class 1 (Streets and parks)
GI - Class 2 (Preventing possible disorder, controlling traffic and protecting public safety)
S - Class 2 (Parade and rally)
Result: 2 (Expression allowed)

52. City of Lakewood v. Plain Dealer Publishing, 794 F.2d 1139 (6th Cir. 1986)
F - Class 1 (Streets and sidewalks)
GI - Class 2 (Preventing interference with right of public to use streets and sidewalks, protecting city from liability, and promoting aesthetics)
S - Class 2 (Newspaper racks)
Result: 2 (Expression allowed)

53. Houston Peace Coalition v. Houston City Council, 310 F. Supp. 457 (S.D. Tex 1970)
F - Class 1 (Downtown streets)
GI - Class 2 (Regulating downtown area, protecting city from liability incident to parade)
S - Class 2 (Parade)
Result: 2 (Expression allowed)

54. Rock Against Racism v. Ward, 658 F. Supp. 1346 (S.D. N.Y. 1987)
F - Class 1 (Park bandshell)
GI - Class 2 (Preventing overuse of public facility, preventing overcrowding and excessive noise, and regulating security)
S - Class 2 (Music)
Result: 2 (Expression allowed with certain sound and time limitations)

55. Collin v. Smith, 447 F. Supp.. 676 (N.D. Ill. 1978)
F - Class 1 (In front of village hall)
GI - Class 3 (Preventing riot, protecting village from liability)
S - Class 2 (Assembling, wearing German Nazi uniforms; and carrying placards stating "Free Speech for White Americans," etc.)
Result: 2 (Expression allowed)

56. Collin v. O'Malley, 452 F. Supp. 577 (N.D. Ill. 1978)
F - Class 1 (City park)
GI - Class 2 (Protecting City from liability)
S - Class 2 (Assembling without obtaining insurance)
Result: 2 (Expression allowed)

57. Holy Spirit Ass'n for Unification of World Christianity v. Hodge, 582 F. Supp. 592 (N.D. Tex. 1984)
F - Class 1 (Residential area)
GI - Class 2 (Preventing fraud and misrepresentation)
S - Class 1-2 (Soliciting and proselytizing without license)
Result: 1-2 (Expression allowed)

58. Invisible Empire Knights of the Ku Klux Klan v. City of West Haven, 600 F. Supp. 1427 (D. Conn. 1985)
F - Class 1 (Public park and recreational facilities)
GI - Class 2 (Receiving advance notice of use of city facilities and being reimbursed for police protection costs)
S - Class 2 (Ku Klux Klan rally held without permit or bond)
Result: 2 (Expression allowed)

* Indicates that the author would disagree with the decision reached by the court using this analysis. For further discussion see note 186 *infra*.

charted, the practitioner is comparing the factors of his case to the factors of pertinent cases in his jurisdiction. Paralleling these factors of a case is analogous to finding a case "on point."

Next, the practitioner should add the three numbers together, divide by three, and round the answer to the closest whole number. If two of the three factors have the same number, the practitioner should use that number as the result in order to conservatively predict which regulations will be acceptable.

Regulations to be predicted are divided into the following classes:

> Class 1 -No restriction of the speech. At the most, minimal time, place, and manner regulations may be applied.
>
> Class 2 -Reasonable time, place, and manner regulations may be applied.
>
> Class 3 -Activity may be prohibited. Criminal or civil penalties may be imposed if adequate notice.

Thus, continuing with the nuclear testing zone example, the practitioner would add up the numbers of the three classifications chosen (Class 3, Class 1 and Class 3) and divide by three (seven divided by three = 2.33). However, since two of the three classes have the same number, the actual result will be three. In other words, a Class 3 regulation will be permitted.

E. *Accuracy of the Prediction*

Applying the test to each of the decisions discussed in this note, the practitioner would come to the conclusion that five of the decisions were incorrectly decided.[186] Even so, had the municipality used this analysis in those cases, it would have erred conservatively and thus would have avoided liability. The safeguards of the method, rounding numbers up and classifying conservatively if two numbers match, guarantee that if the city errs it will err in favor of first amendment freedom. At the same time the method allows local governments to identify quickly restrictions which courts will reject. The system provides exactly what the practitioner needs — a quick and efficient method of predicting judicial decisions in the first amendment area.

186 The author would find that five of the fifty-eight decisions cited were incorrectly decided. Several of the disputed decisions are early ones. *See, e.g.*, Teamsters Union v. Hanke, 339 U.S. 470 (1950), in which the Court allowed the prohibition of peaceful labor picketing, and Chaplinsky v. New Hampshire, 315 U.S. 568 (1942), in which the Court allowed the prohibition of profane language directed at the government. Another decision, United States v. O'Brien, 391 U.S. 367 (1968), seemed to turn on the trial court's finding that the government regulation punished only the pure activity of burning the draft card. If the Court had not made the distinction between O'Brien's conduct and his speech, the speech would have been determined to be Class 2 and would have merited protection. Two of the remaining disputed cases deal with federal interests which appear to override other interests. In M.N.C. of Hinesville, Inc. v. United States Dep't of Defense, 791 F.2d 1466 (11th Cir. 1986), the fact that the forum was a military base appeared to be crucial to the court. Likewise, in International Soc'y for Krishna Consciousness, Inc. v. City of New York, 484 F. Supp. 966 (S.D.N.Y. 1979), the forum was critical in that the expression occurred immediately adjacent to the United Nations headquarters.

IV. Conclusion

This note provides a skeletal outline of the judicial first amendment analysis including the nature of the speech, forum, and governmental interest as well as valid time, place, and manner restrictions, and problems inherent with permit, insurance, and indemnity requirements. Admittedly, summary of the judicial analysis in the first amendment area is difficult. Although rigid systems are easy to visualize and thus helpful in predicting future decisions, they are neither practical nor desirable at all times. Just as concepts of liberty have evolved in the past two hundred years, they will surely continue to evolve in the future. The mathematical analyses provided by graphs and similar techniques are extremely beneficial to municipalities attempting to predict judicial decisions. Yet, they are not without flaws.

Municipalities need to get a clear grasp of the system of analysis the Supreme Court uses in making its decisions. Prediction devices can be helpful if they are used conservatively, recognizing their limitations. First, officials must remember that the judicial analysis, unlike a graph, is flexible. Presumably, if a city keeps a graph of current decisions, flexibility will not be a problem. Second, officials must recognize that the judicial analysis is complex. Not every factor influencing the Justices in a given situation can be determined. Moreover, each Justice has his or her own view which may change depending on the facts and circumstances of each case. Finally, although *stare decisis* is the norm, the principle obviously is not followed with complete consistency.

For many municipalities the largest problem in first amendment regulation is knowing where to begin. Graphs, charts, and other visual aids offer the basic capability of summarizing the entire analytical framework at a glance. If officials attempting to draft new policies or to evaluate existing regulations graph the results of Supreme Court and applicable circuit and state court decisions using the analysis provided herein, they should be able to predict which restrictions will pass constitutional muster.

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