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Carew-Reid v. Metropolitan Transportation Authority: Free Expression Sound and Fury

I. Introduction

This Note examines the constitutionality of a municipal regulation that restricts free expression and results in unequal access to a public forum. In *Carew-Reid v. Metropolitan Transportation Authority*,[1] the Court of Appeals for the Second Circuit upheld a New York City regulation that restricted the noise level of musical performances conducted in subway stations and banned entirely the use of any amplification device on subway platforms.[2] Musicians who were effectively excluded from playing on subway platforms because of the amplifier ban challenged the restriction as an unconstitutional infringement on their fundamental right of free expression.[3]

In overturning the district court decision that held the amplifier ban violated the musicians' first amendment rights, the court of appeals concluded that the regulation was a reasonable time, place or manner restriction. The court applied the standard of review articulated by the Supreme Court in *Ward v. Rock Against Racism*[4] and found that the regulation was valid because it was content-neutral, narrowly tailored to serve a significant governmental interest, and one which left open ample alternative channels for the communication.[5]

In determining the appropriate standard for review, the court of appeals failed to adequately consider two factors. First, precedent dictates that a court examine the type of public forum affected by the restriction and the impact the restriction has on

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1. 903 F.2d 914 (2d Cir. 1990).
2. N.Y. Comp. Codes R. & Regs. tit. 21, § 1050.6(c)(4) (1989).
3. *Carew-Reid*, 903 F.2d at 916. Subway Troubadours Against Repression, an organization whose purpose is to promote the rights of subway musicians, joined in the action. *Id.* at 915.
4. 109 S. Ct. 2746 (1989).
5. *Carew-Reid*, 903 F.2d at 916.

free expression in that forum. Second, a court must consider the burden the exclusion of some speakers from a public forum imposes on free expression and equal protection guarantees. The *Carew-Reid* court did neither. Instead, the court of appeals applied a lenient standard for review and upheld the regulation.

Part II of the Note examines the development of judicial standards for reviewing restrictions on free expression including: the distinction between "high" and "low" value speech; the content-neutral/content-based distinction; the evolution of free-expression rights in public forums; and the extent to which governmental regulations in the public forum may legitimately burden free expression. These doctrines combine to establish the appropriate review of regulations on speech in the public forum. Part III traces the facts and procedural history of *Carew-Reid* and discusses the court of appeals' opinion. An analysis of the court's opinion follows in Part IV. The court of appeals limited its review of the case by adopting the *Ward* standard and applied neither the traditional public forum analysis nor considered fourteenth amendment equal protection guarantees. This Note concludes in Part V that the court of appeals' reliance on *Ward* was misplaced and that the standard of review adopted by the court of appeals was inappropriate in light of judicial precedent.

II. Background

A. *Free Expression: The Extent of First Amendment Protection*

The right of free expression guaranteed by the first amendment of the United States Constitution[6] is not an absolute right.[7] Ever since Justices Holmes and Brandeis dissented in

6. U.S. CONST. amend. I; *see* Mills v. Alabama, 384 U.S. 214 (1961) (first amendment protection applies to the states through the fourteenth amendment).

7. Justice Harlan expressed this view when he wrote:

> At the outset we reject the view that freedom of speech and association, as protected by the First and Fourteenth Amendments, are "absolutes," not only in the undoubted sense that where the constitutional protection exists it must prevail, but also in the sense that the scope of that protection must be gathered solely from a literal reading of the First Amendment.

Konigsberg v. State Bar of California, 366 U.S. 36, 49 (1961) (citation omitted). Justice Black's dissent was joined by Chief Justice Warren and Justice Douglas. The dissent argued for an absolute right to free expression: "I believe that the First Amendment's

Abrams v. United States,[8] the Supreme Court has grappled with the constitutionality of limitations on free expression.[9] In subsequent opinions, the Court has examined the extent to which government may regulate free expression based on the content[10] or on the location of the speech.[11] The Court's analyses of governmental restrictions on free expression have focused on two elements: the extent to which a restriction furthers the government's interest and the burden that the restriction imposes on free expression.[12] In essence, the development and application of judicial review of restrictions on free expression has been perceived by many to be a balancing of the government's interest in

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unequivocal command that there shall be no abridgement of the rights of free speech and assembly shows that the men who drafted our Bill of Rights did all the 'balancing' that was to be done in this field." *Id.* at 61.

8. 250 U.S. 616, 624 (1919) (Holmes, J., dissenting) (the Court upheld appellant's convictions under the Espionage Acts which prohibited speech encouraging resistance to the war effort). In dissent, Justice Holmes wrote:

> I think that we should be eternally vigilant against attempts to check the expression of opinions that we loathe and believe to be fraught with death, unless they so imminently threaten immediate interference with the lawful and pressing purposes of the law that an immediate check is required to save the country.

Id. at 630.

9. The difficulties the Court has faced are reflected in its diverse approaches and opinions. According to one commentator:

> There are numerous major decisions in which the Court has subordinated free speech values to other social interests; they involve nearly every form of suppression and have issued from both liberal and conservative Courts. Even in the cases that ultimately protect free speech, the Court often achieves the protection by indirection — by statutory construction or by the use of doctrines like overbreadth, vagueness, and procedural due process — and these techniques manifest distrust of the other branches and levels of government more clearly than outright approval of the free speech values involved. In the relatively few decisions resting directly on free speech considerations, the Court often hedges its rulings with enough cautions and limitations to put into question the scope of the Court's commitment to free speech.

Nagel, *How Useful Is Judicial Review In Free Speech Cases?*, 69 CORNELL L. REV. 302 (1984).

10. Miller v. California, 413 U.S. 15 (1973) (holding that obscene material is not protected by the first amendment).

11. Greer v. Spock, 424 U.S. 828 (1976) (upholding a ban on political activity when conducted on a military base).

12. Justice Frankfurter posed the following four questions as essential to determining the validity of governmental restrictions on free expression: "1) What is the interest deemed to require the regulation of speech? . . . 2) What is the method used to achieve such ends as a consequence of which public speech is constrained or barred? . . . 3) What mode of speech is regulated? . . . 4) Where does the speaking which is regulated take place?" Niemotko v. Maryland, 340 U.S. 268, 282 (1951) (Frankfurter, J., concurring).

the regulation against an individual's fundamental right to free expression.[13]

B. *"High" and "Low" Value Speech*

In its analysis of regulations on free expression, the Supreme Court has historically made a distinction between "high" value and "low" value speech.[14] High value speech conveys ideas, beliefs, emotions, or opinions.[15] Restrictions on high value

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13. This balancing test has long been a staple of free expression cases:

> This court has characterized the freedom of speech and that of the press as fundamental personal rights and liberties. . . .
>
> . . . .
>
> Mere legislative preferences or beliefs respecting matters of public convenience may well support regulation directed at other personal activities, but be insufficient to justify such as diminishes the exercise of rights so vital to the maintenance of democratic institutions. And so, as cases arise, the delicate and difficult task falls upon the courts to weigh the circumstances and to appraise the substantiality of the reasons advanced in support of the regulation of the free enjoyment of the rights.

Schneider v. State, 308 U.S. 147, 161 (1939) (Roberts, J.); *see also* Ely, *Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis*, 88 HARV. L. REV. 1482 (1975); Redish, *The Content Distinction in First Amendment Analysis*, 34 STAN. L. REV. 113 (1981); Stone, *Content Regulation and the First Amendment*, 25 WM. & MARY L. REV. 189 (1983); T. EMERSON, THE FREEDOM OF EXPRESSION (1970).

14. Some political theorists would extend the protection of free speech only to speech that is "explicitly political." *See* Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 26 (1971). Others would extend the protection to all speech. *See* Meiklejohn, *The First Amendment is an Absolute*, 1961 SUP. CT. REV. 245 (1961). The Supreme Court has adopted an approach between these two extremes, but accords greatest protection to political speech.

15. The theory of high and low speech stems from dictum in Chaplinsky v. New Hampshire, 315 U.S. 568 (1942). In *Chaplinsky*, the Court found:

> Allowing the broadest scope to the language and purpose of the fourteenth amendment, it is well understood that the right of free speech is not absolute at all times and under all circumstances. There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or "fighting" words — those which by their very utterance inflict injury or tend to incite an immediate breach of the peace. It has been well observed 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.

Id. at 571-72.

This principle of distinguishing high speech has been followed in later cases. *See, e.g.*, Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748,

speech receive the strictest scrutiny by the judiciary.[16] Conversely, low value speech is viewed as being of limited social value and thus has been accorded less protection by the courts.[17]

In reviewing restrictions on low value speech, the Court has enunciated unique tests for each type of low value speech.[18] Thus, the analysis of a restriction on commercial speech[19] will not necessarily examine the same elements, nor give equal weight to elements, as the analysis of restrictions on obscene speech.[20] Similarly, the analysis of obscene speech will differ from that of speech which advocates unlawful action.[21] High value speech, when employed by the speaker as a mask for low value speech, may be constitutionaly restricted under low value speech analysis.[22]

One example of low value speech is commercial expression.[23] Commercial expression receives special scrutiny because of its capacity to be misleading or false.[24] As a result, the judiciary has

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771 (1976); Gertz v. Robert Welch, Inc., 418 U.S. 323, 340 (1974).

16. Stone, *supra* note 13 at 196. High value speech has been distinguished for greater protection. Professor Stone has noted that "in dealing with high value speech, the Court employs . . . a far more speech-protective analysis. Indeed, in assessing the constitutionality of content-based restrictions on high value expression, the Court employs a standard that approaches absolute protection." *Id.*

17. *See supra* note 15 and accompanying text.

18. *See, e.g.,* Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of New York, 447 U.S. 557, 566 (1980) (requiring that the regulatory technique employed to restrict commercial speech be in proportion to the substantiality of the government's interest in the regulation and that the limitation on speech be carefully designed to achieve the government's legitimate goal); *Miller*, 413 U.S. at 24 (requiring that the speech appeal to prurient interests, be patently offensive, and lack serious literary, artistic, political, or scientific value when taken as a whole).

19. *Central Hudson Gas*, 447 U.S. at 566.

20. *Miller*, 413 U.S. at 24.

21. Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) (requiring that speech that is directed at inciting or producing imminent unlawful action be likely to produce such action in order for it to be punished).

22. Political speech that includes direct advocacy of criminal action creates a clear and present danger and, therefore, may be restricted. Schenck v. United States, 249 U.S. 47, 52 (1919); *Brandenburg*, 395 U.S. at 449 (Black, J., concurring).

23. *See, e.g.,* Valentine v. Chrestensen, 316 U.S. 52 (1942) (upholding a prohibition on the distribution of commercial advertising matter on any street), *overruled by* Schaumberg v. Citizens for Better Env't, 444 U.S. 620 (1980). *Schaumberg* rejected the holding in *Valentine* that commercial expression receives no constitutional protection. *Id.* at 632-33. The *Schaumberg* Court recognized limited protection for commercial expression. *Id.* at 636-37.

24. Riley v. National Fed'n of the Blind of N.C., 487 U.S. 781 (1988) (state's interest

lessened the standard for review of restrictions on commercial expression and has consequently been more deferential to governmental regulation in this area.[25] Nonetheless, the government must still demonstrate a sufficient interest for the regulation to be valid.[26] Other low value speech includes: obscene speech,[27] speech that advocates and incites unlawful action,[28] fighting words,[29] and libel.[30]

Determining the standard of review and level of scrutiny applicable in a specific case becomes further complicated when the speech is nonverbal symbolic expression.[31] Before establishing the appropriate standard for review of restrictions on symbolic expression, courts must determine that the conduct is sufficiently communicative to constitute expression.[32] The Court has

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in protecting the public from possible fraud is a sufficiently substantial interest to justify a narrowly tailored regulation of commercial expression).

25. Lehman v. City of Shaker Heights, 418 U.S. 298 (1974) (plurality opinion upholding city policy permitting the display of commercial advertisements but prohibiting controversial, political, or public issue advertising in the interior of city buses).

26. Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of New York, 447 U.S. 557 (1980) (invalidating a ban on all public utility advertising that promoted the use of electricity because the government's interest in the ban was insufficient to justify the restriction on free expression).

27. Miller v. California, 413 U.S. 15 (1973).

28. Brandenburg v. Ohio, 395 U.S. 444 (1969) (upholding protection for speech which advocates violence as long as the speech does not incite people to imminent action).

29. Chaplinsky v. New Hampshire, 315 U.S. 568 (1942).

30. New York Times Co. v. Sullivan, 376 U.S. 254 (1964) (holding that libelous speech is knowingly and recklessly false is not protected by the Constitution).

31. *See* Henkin, *Foreword: On Drawing Lines*, 82 HARV. L. REV. 63 (1968). Henkin illustrates this complexity as follows:

> A constitutional distinction between speech and conduct is specious. Speech *is* conduct, and actions speak. There is nothing intrinsically sacred about wagging the tongue or wielding a pen; there is nothing intrinsically more sacred about words than other symbols. . . . The meaningful constitutional distinction is not between speech and conduct, but between conduct that speaks, communicates, and other kinds of conduct.

Id. at 79-80 (emphasis in original).

32. *See, e.g.*, Barnes v. Glen Theatre, 111 S. Ct. 2456 (1991) (holding that enforcement of public indecency ordinance requiring that otherwise nude dancers at adult entertainment establishments wear G-strings and pasties did not violate the first amendment); Spence v. Washington, 418 U.S. 405 (1974) (overturning appellant's conviction under a state flag misuse statute for affixing an adhesive peace symbol to the United States flag and displaying it from a window). *See* Nimmer, *The Meaning of Symbolic Speech Under the First Amendment*, 21 U.C.L.A. L. REV. 29 (1973). Nimmer observed:

> Whatever else may or may not be true of speech, as an irreducible minimum it

recognized that symbolic expression including actions,[33] entertainment,[34] and music,[35] may be classified as high or low value based on the content and communicative impact of the expression.[36] Unlike words, there is no denotation for symbolic expression; thus, the Court, in extending protection to this type of expression, must determine the expression's message before it applies the appropriate level of review.[37]

C. *The Content-Based/Content-Neutral Distinction*

To further assist courts in determining the appropriate standard for reviewing restrictions on free expression, the Supreme Court has adopted an approach distinguishing laws that regulate the content of speech from laws that are not content-based.[38] The latter are referred to as restrictions on the time,

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> must constitute a communication. . . . [U]nless there is a human communicator intending to convey a meaning by his conduct, it would be odd to think of it as conduct constituting a communication protected by the first amendment.

Id. at 36.

33. Tinker v. Des Moines Indep. Community School Dist., 393 U.S. 503 (1969) (holding unconstitutional a prohibition on armbands in the public school because the armbands represented students' opposition to the United States government's policy in Vietnam).

34. Schad v. Borough of Mount Ephraim, 452 U.S. 61 (1981) (holding unconstitutional a prohibition on all live entertainment in the borough).

35. Ward v. Rock Against Racism, 109 S. Ct. 2746, 2753 (1989) (recognizing that music is a constitutionally protected form of expression, but upholding a city ordinance requiring that all performers use city owned and operated amplification equipment when performing at a public park's bandshell because although the restriction applied in a traditional public forum, it did not limit access to that forum). *See generally*, Note, *Ward v. Rock Against Racism: Reasonable Regulations and State Sponsored Sound*, 10 PACE L. REV. 633 (1990).

36. *See* Nimmer, *supra* note 32.

37. Chief Justice Warren recognized the limits of extending constitutional protection to conduct:

> We cannot accept the view that an apparently limitless variety of conduct can be labeled "speech" whenever the person engaging in conduct intends thereby to express an idea. . . . This Court has held that when "speech" and "nonspeech" elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms.

United States v. O'Brien, 291 U.S. 367, 376 (1968).

38. This approach is central to the Court's analysis. "[R]estrictions that turn on the content of expression are subjected to a strict form of judicial review, while those concerned with matters other than content receive more limited examination. With only minor aberrations, the Supreme Court has adhered to this distinction in a series of re-

place or manner of expression.[39] Determining whether a restriction is content-based or content-neutral, just as determining whether speech is of high or low value, is a pivotal factor in judicial analysis.[40] Similar to restrictions placed on high value speech,[41] restrictions that are content-based have received stringent review.[42] The more stringent review of content-based restrictions occurs because such restrictions often result in prior restraints on speech,[43] or may create unequal access to a forum based on the message the speaker is attempting to convey.[44] The higher level of review on content-based restrictions reflects the belief that the first amendment's purpose is to ensure unfettered high value expression.[45] Conversely, the Court gives deference to those regulations that restrict low value speech.[46] Thus, within the Court's balancing of governmental interests and individual rights, the general presumption is that in order to be valid, a regulation that restricts protected, high value speech must be content-neutral and incidental to the unfettered exercise of free expression.[47]

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cent decisions." Redish, *supra* note 13, at 113 (footnotes omitted).

39. Cox v. New Hampshire, 312 U.S. 569, 575 (1941).

40. *See generally* Stephan, *The First Amendment and Content Discrimination*, 68 VA. L. REV. 203 (1982).

41. *Id.* at 207.

42. Stephan described this principle:

> [T]he constitutional principle limiting the power of government to distinguish speech according to its content has played a significant role in the Supreme Court's decisions. Although the Court soon backed away from the broad statement that the Constitution absolutely forbids such discrimination, it has continued to speak of the Constitution's "hostility" to all regulation of the content of speech, including government "prohibition of public discussion of an entire topic."

Stephan, *supra* note 41, at 204 (footnotes omitted).

43. Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 559 (1976) ("[P]rior restraints on speech and publication are the most serious and the least tolerable infringement on First Amendment rights.").

44. Police Dep't of Chicago v. Mosley, 408 U.S. 92, 96 (1972) ("There is an 'equality of status in the field of ideas' and government must afford all points of view an equal opportunity to be heard.").

45. *See supra* notes 6-13 and accompanying text.

46. *See supra* notes 17-29 and accompanying text.

47. In Konigsberg v. State Bar of California, 366 U.S. 36 (1961), the Court stated:

> [G]eneral regulatory statutes, not intended to control the content of speech but incidentally limiting its unfettered exercise, have not been regarded as the type of law the first or fourteenth amendment forbade Congress or the States to pass, when they have been found justified by subordinating valid governmental interests, a prerequisite to constitutionality which has necessarily involved a weighing

The principle of subjecting content-based regulations to more stringent review is more difficult to apply when symbolic expression is restricted.[48] In reviewing such regulations, the Court has employed the balancing test that allows incidental limitations on first amendment freedom of expression provided the government can demonstrate a sufficiently important interest in the regulation.[49]

D. *Content-Neutral Regulations: Restrictions on the Time, Place or Manner of Expression*

Content-neutral regulations[50] — those restricting the time, place or manner of expression — have generally received less scrutiny by the Supreme Court.[51] The Court has recognized that the exercise of even high value speech may result in a nuisance that the government has the authority to restrict.[52] For example, the government could probably prohibit a political protest in the middle of Times Square at rush hour.[53] All regulations on protected free expression, including those that are content-neutral, must withstand judicial review for facial validity,[54] impact,[55] and application.[56] The standard the Court has established for re-

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of the governmental interest involved.

Id. at 50-51.

48. *See supra* notes 31-37 and accompanying text.

49. United States v. O'Brien, 391 U.S. 367 (1968) (upholding convictions of defendants who burned their draft cards as part of an antiwar demonstration because the government has a substantial interest in preventing the destruction of issued Selective Service certificates).

50. *See supra* notes 38-47 and accompanying text.

51. *See infra* notes 67-75 and accompanying text. However, the level of scrutiny applied by the judiciary will depend on the nature of the forum and the impact which the restriction has on protected free expression.

52. Kovacs v. Cooper, 336 U.S. 77 (1949) (upholding a statute prohibiting vehicles containing a sound amplifier and similar devices from emitting loud and raucous noises).

53. Cox v. Louisiana, 379 U.S. 536, 554 (1965) (overturning the conviction of appellant under a statute prohibiting the obstruction of the administration of justice after appellant led a demonstration outside a local courthouse).

54. Lovell v. City of Griffin, 303 U.S. 444 (1938) (holding as facially invalid a ban on the distribution of pamphlets without first obtaining a permit because the ban allows for prior restraint and has a chilling effect on speech).

55. Schneider v. State, 308 U.S. 147 (1939) (ordinance prohibiting leafletting on any street held invalid because the governmental interest in preventing littering is insufficient to justify the burden on free expression).

56. Kunz v. New York, 340 U.S. 290 (1951) (ordinance vesting the control of restric-

viewing content-neutral regulations requires a determination that the regulation be reasonable, narrowly tailored to further a significant governmental interest, and that it allows ample alternative channels for the expression.[57]

E. *The Public Forum Doctrine*

Accomplishing a governmental interest via a time, place or manner regulation on free expression is further limited by the place where the expression occurs.[58] The level of scrutiny applied to content-neutral regulations varies in relation to the nature of the forum.[59] The Court distinguishes public from privately owned property because the first amendment generally limits government action, not actions by private parties.[60] In attempting to define the characteristics of public property, the Court has distinguished three types of public forums:[61] the traditional public forum,[62] public property the state has opened for expressive activity,[63] and public property that is not by tra-

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tions on religious meetings in an administrative official without proper standards for permit review is invalid).

57. United States v. Grace, 461 U.S. 171, 177 (1983) (citing Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983)).

58. Grayned v. City of Rockford, 408 U.S. 104 (1972) (upholding a prohibition on noise that disrupts classwork at schools although the noise emanates from a public sidewalk).

59. *Id.* at 116 ("The crucial question is whether the manner of expression is basically incompatible with the normal activity of a particular place at a particular time."). *See infra* notes 60-69.

60. The question whether to extend constitutional protection to privately owned forums has received some attention by the Court. Most notably, the Court has extended protection to privately owned property when it functions as an open public forum. *See, e.g.*, Hudgens v. NLRB, 424 U.S. 507 (1976) (extending protection to a privately owned shopping center); Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969) (requiring access to broadcasting media).

61. *Perry*, 460 U.S. at 45-46.

62. The traditional public forum includes streets and parks. These places were distinguished as unique in the opinion of the Court in Hague v. Committee for Indus. Org., 307 U.S. 496 (1939). Justice Roberts wrote:

> Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions. Such use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens.

Id. at 515.

63. Widmar v. Vincent, 454 U.S. 263, 277 (1981) (a state university that makes its

dition or designation open for free expression.[64] The traditional public forum and the public forum opened for expressive activity are subjected to the same strict standard of review,[65] while regulations that restrict speech in the nontraditional, non-opened public forum will be given greater deference.[66]

An integral part of the review of time, place or manner regulations in the public forum is the examination of the restriction of access to the forum.[67] Though the government may open or close nontraditional forums at its discretion,[68] it may not provide speakers with unequal access to an opened public forum.[69]

The application of the standard for reviewing content-neutral regulations on free speech in the public forum is most uncertain when symbolic expression is regulated.[70] Symbolic

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facilities generally available for activities by student groups may not bar use by such a group for religious worship or discussion).

64. United States v. Albertini, 472 U.S. 675 (1985) (upholding the exclusion of an individual from a military base where the individual had previously been permanently barred from the base for unlawful conduct, even though the individual's present purpose in entering the base was to engage in peaceful expressive activity during the base's annual open house).

65. *Perry*, 460 U.S. at 46.

66. *Id.*

67. In reviewing time, place, or manner restrictions, the Court may find that the regulation at issue provides unequal access to speakers raising the possibility that the regulation violates both the first amendment and the equal protection clause of the fourteenth amendment. Like a finding of prior restraint, overbreadth, or vagueness, a finding of unequal access to a public forum is sufficient to hold a regulation invalid. *See* Police Dep't of Chicago v. Mosley, 408 U.S. 92 (1972) (emphasizing the relationship between the first amendment and equal protection in the analysis of discriminatory regulations on free expression).

68. *Perry*, 460 U.S. at 46 (government not required to retain indefinitely the open character of the forum); *see also* City Council of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789 (1984) (ordinance prohibiting the posting of any signs on public property held valid); *Mosley*, 408 U.S. 92 (1972).

69. In Metromedia, Inc. v. City of San Diego, 453 U.S. 490 (1981), the Court invalidated a city ordinance prohibiting outdoor advertisements except for twelve specified categories, including political campaign signs and for-sale signs. The Court held that the city could not distinguish between various communicative interests; it must allow billboards conveying other messages. *Id.* at 512.

70. *See* Note, *The Public Forum: Minimum Access, Equal Access, and the First Amendment*, 28 STAN. L. REV. 117 (1975). As the commentator noted:

> If first amendment values are to be preserved in the public arena, the Court must devise a more reliable method of extending to expression-related conduct in the public forum the protection that flows from strict first amendment review. A logical first step toward formulating such a method is the Court's framing of first amendment coverage questions in the symbolic speech context.

speech analysis incorporates the test for all time, place or manner regulations enunciated by the Court in *United States v. Grace*.[71] In *Grace*, the Court affirmed the proposition that "the government may enforce reasonable time, place, and manner regulations as long as the restrictions 'are content-neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication.' "[72]

The Court in *Clark v. Community for Creative Non-Violence*[73] further clarified the application of constitutional protection of symbolic expression by recognizing that:

> It is also true that a message may be delivered by conduct that is intended to be communicative and that, in context, would reasonably be understood by the viewer to be communicative. Symbolic expression of this kind may be forbidden or regulated if the conduct itself may constitutionally be regulated, if the regulation is narrowly drawn to further a substantial governmental interest, and if the interest is unrelated to the suppression of free speech.[74]

In reviewing regulations that limit symbolic expression in a public forum, a court must consider both the message conveyed by the action and the validity of the government's interest in suppressing the conduct.[75]

III. *Carew-Reid v. Metropolitan Transportation Authority*

A. *The Facts*

The Metropolitan Transportation Authority (MTA) is a public benefit corporation established by New York State to develop and improve mass transportation in New York City and the surrounding areas.[76] The MTA oversees the Transportation Authority (TA) whose purpose is to develop rules of conduct in transit facilities for the safety of the public and smooth opera-

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Id. at 132-33 (footnotes omitted).

71. 461 U.S. 171 (1983).

72. *Id.* at 177 (citing *Perry*, 460 U.S. at 45).

73. 468 U.S. 288 (1984).

74. *Id.* at 294 (citations omitted). *See also supra* notes 1-37 and accompanying text.

75. *Id.*

76. Carew-Reid v. Metropolitan Transp. Auth., 903 F.2d 914, 915 (2d Cir. 1990) (citing N.Y. PUB. AUTH. LAW §§ 1262, 1263(1), 1264 (McKinney 1982 & Supp. 1990)).

tion of the system.[77]

In 1985, the MTA sponsored "Music Under New York" (MUNY), a program that allowed musicians to perform in select subway stations.[78] In 1987, the TA issued Experimental Rule section 1050.6 permitting musicians to perform on subway platforms.[79] This rule prohibited the playing of any instrument that created "excessive noise."[80] Amplifiers were allowed only if a permit was first obtained from the TA's police department.[81] These permits provided that musicians using amplifiers could not play above ninety decibels.[82]

In 1989, the TA amended and codified the experimental rule.[83] The revised rule prohibited the use of amplifiers on subway platforms and restricted all musical performances to a noise level not to exceed eighty-five decibels when measured from five

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77. *Carew-Reid*, 903 F.2d at 915.

78. Carew-Reid v. Metropolitan Transp. Auth., No. 89 Civ. 7738 at 2 (S.D.N.Y. Jan. 5, 1990).

79. *Id.*

80. *Id.*

81. *Id.*

82. *Id.* A decibel is a logarithmic unit normally used for expressing differences in signal strength. J. MARTIN, TELECOMMUNICATIONS AND THE COMPUTER 135-40 (2d ed. 1976). A decibel does not measure the absolute strength of a signal, but rather it is used to compare the power of two signals. *Id.* at 135. Consequently, it is understandable that the decibel was first used as a unit referring to sound, because the response of the human ear is proportional to the logarithm of the sound energy itself. *Id.* In other words, if one noise sounds twice as great as another, it is not in fact twice the power, but it is approximately two decibels greater. *Id.*

Decibels are used to express various quantities such as gain in amplifiers, noise levels, losses in transmission lines, and also differences in sound intensity. *Id.* at 137. For example, the intensity of common sounds measured in decibels relative to the threshold of hearing are expressed as follows:

pain threshold, 120; jet engine, 110; rock music, 100; noisy traffic, 85; normal street traffic, 75; shouted conversation, 70; normal conversation, 50; quiet conversation, 30; whispered conversation, 10; threshold of hearing, 0. *Id.* at 139.

83. N.Y. COMP. CODES R. & REGS. tit. 21, § 1050.6(c)(4) (1989), provides:

> No activity may be permitted which creates excessive noise or which emits noise that interferes with transit operations. The emission of any sound in excess of 85 dBA on the A weighted scale measured at five feet or 70 dBA measured at two feet from a token booth is excessive noise and is prohibited. In no event will the use of amplification devices of any kind, electronic or otherwise, be permitted on subway platforms.

Id. at 3.

feet away.[84] This rule went into effect October 25, 1989.[85]

The plaintiffs were musicians who performed in the New York City subway system.[86] The plaintiffs objected not to the volume level restriction but to the ban on the use of amplification devices.[87] One plaintiff stated that an amplifier was an integral part of his musical expression and without it, his classical guitar was only audible from a few feet away.[88] Another plaintiff, an electric guitar player, contended that his instrument was not audible without an amplifier.[89] Neither of these performers played in the subway after the regulations went into effect.[90] The plaintiffs provided information showing that they could stay within the decibel limitation when using amplifiers.[91] The plaintiffs argued that because there was no necessary connection between amplified music and loud music, the amplifier ban suppressed more speech than necessary to achieve noise reduction.[92] The plaintiffs sought to enjoin enforcement of the rule on the ground that the amplifier ban violated their constitutional right to free speech.[93] The defendants claimed that the ban on amplification devices was necessary to serve the TA's interest in public safety.[94]

B. *The Lower Court Decision*

The district court, in an opinion issued by Judge Stanton, held for the plaintiffs.[95] The court's opinion recognized that musical expression is protected speech under the first amendment.[96] The court noted that the standard of review is determined by

84. *Id.*
85. *Carew-Reid*, 903 F.2d at 916.
86. *Id.* at 915.
87. *Id.* at 916.
88. *Carew-Reid*, No. 89 Civ. 7738 at 4-5.
89. *Id.* at 5.
90. *Id.* at 5-6.
91. *Id.*
92. *Id.*
93. *Id.* at 10.
94. *Id.*
95. Carew-Reid v. Metropolitan Transp. Auth., No. 89 Civ. 7738 (S.D.N.Y. Jan. 5, 1990).
96. *Id.* at 11 (citing Ward v. Rock Against Racism, 109 S. Ct. 2746, 2753 (1989)).

the type of forum in which the speech occurs.[97] The court began its review by defining the principles of the public forum doctrine and identifying the type of forum affected by the regulation.[98]

The court cited *Perry Education Association v. Perry Local Educators' Association*[99] as the guideline for reviewing laws that regulate speech on public property.[100] Three types of public property were identified in *Perry*: the traditional public forum, the opened public forum, and the non-public forum.[101] The district court in *Carew-Reid* held the subway to be a designated public forum because the TA intentionally opened the subway platform to musical performances.[102] Thus, the court held that the regulation was valid only if it were "narrowly tailored to serve a significant government interest, and [would] leave[] open ample alternative channels for musical expression."[103]

The court examined the regulation by first defining the narrowly tailored requirement,[104] recognizing that a complete ban can be narrowly tailored, "but only if each activity within the proscription's scope is an appropriately targeted evil."[105] It also recognized that a rule "is narrowly tailored if it targets and eliminates no more than the exact source of the 'evil' it seeks to remedy."[106] Here the amplifier ban applied to musicians who might otherwise meet the noise level standard.[107] Because these musicians were excluded from performing, the rule was not narrowly tailored.[108]

Additionally, the court noted that the Supreme Court in *Ward v. Rock Against Racism*[109] held that if a government's

97. *Carew-Reid*, No. 89 Civ. 7738 at 11-12.

98. *Id.* at 12-13.

99. 460 U.S. 37 (1983).

100. *Carew-Reid*, No. 89 Civ. 7738 at 12.

101. *See supra* notes 60-65 and accompanying text.

102. *Carew-Reid*, No. 89 Civ. 7738 at 13-14.

103. *Id.* at 14.

104. *Id.* at 14-15.

105. *Id.* at 14.

106. *Id.* (quoting Frisby v. Schultz, 487 U.S. 474, 485 (1988)).

107. *Carew-Reid*, No. 89 Civ. 7738 at 14.

108. *Id.* at 16.

109. 109 S. Ct. 2746 (1989) (upholding governmental control over amplification equipment used for public presentations in a city owned bandshell). In *Ward*, the Court reviewed a regulation that limited all performers at New York City's Bandshell in Central Park to the use of city-supplied amplification equipment. This equipment was to be

"regulatory scheme had a substantial deleterious effect on the ability of . . . performers to achieve the quality of sound they desired, respondent's concerns would have considerable force."[110] The district court found this analysis applicable to *Carew-Reid.*[111] The ban on the use of amplifiers in *Carew-Reid* not only excluded some musicians from the forum but also "severely hampered" the artistic expression of those who continued to play without amplifiers.[112] The court then examined other means of effectuating the MTA's concern in preventing excessive noise.[113] It suggested that enforcement of the decibel level rule, though arguably less convenient, would be equally effective in accomplishing the goal.[114] The court cited *Riley v. National Federation of the Blind of North Carolina*[115] as support for the principle that "convenience of regulation cannot justify infringement on protected speech."[116]

Because it found that the regulation was not narrowly tailored, the court did not reach the question of whether alternative channels were available.[117] The court enjoined defendants from enforcing the regulation to the extent that it banned the use of amplifiers on subway platforms.[118]

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controlled by an independent sound technician hired by the city. The Court found this regulation to be a reasonable time, place or manner regulation because, although applied in a traditional public forum, it did not limit access to that forum. The *Ward* Court defined the application of the narrow tailoring requirement in light of the equal application of the regulation:

> The guideline does not ban all concerts, or even all rock concerts, but instead focuses on the source of the evils the city seeks to eliminate — excessive and inadequate sound amplification — and eliminates them without at the same time banning or significantly restricting a substantial quantity of speech that does not create the same evils. This is the essence of narrow tailoring.

Id. at 2758 n. 7.

110. *Carew-Reid*, No. 89 Civ. 7738 at 16 (quoting Ward v. Rock Against Racism, 109 S. Ct. 2746, 2759 (1989)).

111. *Carew-Reid*, No. 89 Civ. 7738 at 16.

112. *Id.*

113. *Id.*

114. *Id.* at 16-17.

115. 487 U.S. 781 (1988) (holding that the first amendment does not permit the government to sacrifice speech for efficiency).

116. *Carew-Reid*, No. 89 Civ. 7738 at 17 n.9 (citing *Riley*, 487 U.S. 781 (1988)).

117. *Carew-Reid*, No. 89 Civ. 7738.

118. *Id.* at 17, 21.

C. *The Decision of the Court of Appeals*

The defendants appealed to the United States Court of Appeals for the Second Circuit,[119] which reversed the district court in a unanimous decision, authored by Circuit Judge Meskill, delivered on May 18, 1990.[120]

The court of appeals dispensed with any review of whether the subway constitutes a public forum.[121] Instead, the court held that the government may impose reasonable restrictions on the time, place or manner of protected speech, provided the restrictions "are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information."[122]

In applying this standard of review the court examined and defined the elements beginning with content neutrality.[123] The court held that in a content-neutral regulation "the 'evil' that the regulation seeks to eliminate cannot be the regulated expression's content or message."[124] Even though the regulation may produce an "incidental effect on some speakers or messages,"[125] the court found the regulation may still be content-neutral. The court recognized that "the regulation is based on a particular medium of expression and in fact is a complete ban on the use of that medium."[126] The court found the regulation to be content-neutral because "[t]he object of the amplifier ban, nevertheless, is the elimination of excessive noise on subway platforms, not the suppression of the kind of 'electrified' music that appellees play."[127]

Having found the regulation content-neutral, the court proceeded with a review of the narrowly tailored requirement, noting that the elimination of noise is an important goal and that

119. Carew-Reid v. Metropolitan Transp. Auth., 903 F.2d 914 (2d Cir. 1990).
120. *Id.*
121. *Id.* at 919.
122. *Id.* (quoting Ward v. Rock Against Racism, 109 S. Ct. 2746, 2753 (1989)).
123. *Carew-Reid*, 903 F.2d at 916.
124. *Id.*
125. *Id.* (quoting *Ward*, 109 S. Ct. at 2754).
126. *Carew-Reid*, 903 F.2d at 917.
127. *Id.*

here, the interest is bolstered by public safety concerns.[128] As a result, narrow tailoring is accomplished "so long as the . . . regulation promotes a substantial government interest that would be achieved less effectively absent the regulation."[129]

Though the district court accepted the plaintiffs' argument that the ban suppresses more speech than is necessary to achieve the interest of noise reduction, the court of appeals disagreed, finding error on two counts.[130] "First, the district court improperly relied on the perceived availability of the less-restrictive alternative to the amplifier ban — the use of decibel meters. . . . Second, the district court imposed an excessively exacting standard in concluding that the amplifier ban is broader than necessary to achieve the goal of noise reduction."[131]

Additionally, the court of appeals faulted the lower court for misapplication of a statement made in *Ward v. Rock Against Racism*.[132] The *Ward* Court suggested that "[i]f the city's regulatory scheme had a substantial deleterious effect on the ability of . . . performers to achieve the quality of sound they desired," the regulation might sweep too broadly.[133] The court of appeals distinguished *Ward* because "in the instant case the source of the 'evil' is the medium of expression itself;" as a result, "the regulation would be less effective absent this restriction."[134] The court concluded that the amplifier ban met the narrow tailoring requirement.[135]

The court proceeded with a brief review of available alternative channels, finding other channels available because the musicians "can perform in some of the subway mezzanines and above ground and still reach similar, if not the same, audiences."[136]

The court held that the amplifier ban was a reasonable

128. *Id.*
129. *Id.* (quoting *Ward*, 109 S. Ct. at 2758).
130. *Carew-Reid*, 903 F.2d at 917.
131. *Id.* at 917-18.
132. *Id.* at 918.
133. *Id.* (quoting *Ward*, 109 S. Ct. at 2758).
134. *Carew-Reid*, 903 F.2d at 919.
135. *Id.*
136. *Id.*

time, place or manner regulation.[137] In light of this determination, the court stated that it "need not address the question whether the subway platforms constitute traditional, designated or limited public forums."[138]

IV. Analysis

The court of appeals in *Carew-Reid v. Metropolitan Transportation Authority*[139] based its decision on the recent Supreme Court case *Ward v. Rock Against Racism*.[140] That decision, though pertinent in establishing the limits and protection of free expression, should not have been controlling in *Carew-Reid*. The collective precedents set by the Court require that restrictions on free expression be reviewed in light of the full circumstances and setting of the affected place and parties.[141] A court should examine the type of forum involved, the effect of the restriction on free expression and the governmental interest furthered by the regulation.[142] Had the court of appeals properly weighed these considerations, it would have found, as the district court did, that the regulation did not meet the requirements established by the Supreme Court to validate restrictions on free expression.

The regulation on free expression challenged in *Carew-Reid* is a time, place or manner restriction[143] because it regulates expression based on place (subway platforms) and manner (amplification).[144] The Supreme Court has recognized the governmental interest in enforcing reasonable time, place or manner regulations on protected speech when they are content-neutral and are applied in a fair and nondiscriminatory way.[145] Time, place or manner regulations must be "justified without reference to the content of the regulated speech, . . . narrowly tailored to serve a significant governmental interest, and . . . leave open am-

137. *Id.*
138. *Id.*
139. 903 F.2d 914 (2d Cir. 1990).
140. 109 S. Ct. 2746 (1989).
141. *See supra* notes 58-75 and accompanying text.
142. *See supra* notes 7-38 and accompanying text.
143. *See supra* notes 65-72 and accompanying text.
144. *Carew-Reid*, 903 F.2d at 916.
145. *See supra* notes 49-57 and accompanying text.

ple alternative channels for communication of the information."[146]

The three elements articulated in *Ward* for review of time, place or manner regulations form a central, but by no means exclusive, part of the review of restrictions on free expression.[147] The standard of review is incomplete unless the court considers the location where the speech occurs, the severity of the resulting restriction on free expression, and the sufficiency of the government's interest in the regulation.[148] Absent an adequate balancing of these factors, a likely outcome will be judicial deference to governmental actions at the expense of free expression.

A. *Governmental Interest: The Public Forum Doctrine Ignored*

In its decisions reviewing regulations on free speech, the Supreme Court has sought to maintain a balance between governmental interests and free expression.[149] Various cases have reviewed asserted governmental interests including police powers,[150] public safety,[151] and aesthetics,[152] and have established the scope of valid governmental regulations in pursuit of those interests that restrict free expression.

The extent of the governmental interest necessary to restrict speech varies depending on the type of forum involved.[153] Since *Schneider v. State*,[154] the Court has recognized the importance of location in establishing the appropriate standard of review for time, place or manner regulations on free expression.[155]

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146. *Carew-Reid*, 903 F.2d at 916 (quoting *Ward*, 109 S. Ct. at 2753).

147. *See supra* notes 58-75 and accompanying text.

148. *See supra* notes 50-75 and accompanying text.

149. *See, e.g.*, Konigsberg v. State Bar of California, 366 U.S. 36 (1961); Schneider v. State, 308 U.S. 147 (1930).

150. Schenck v. United States, 249 U.S. 47 (1919) (in times of war, government has an interest in controlling hindrances to the war effort).

151. Cox v. Louisiana, 379 U.S. 536 (1965) (government has an interest in the control of travel on the streets).

152. Schneider v. State, 308 U.S. 147 (1939) (recognizing a governmental interest in preventing street littering).

153. *See supra* notes 58-66 and accompanying text.

154. 308 U.S. 147 (1939).

155. *See supra* notes 58-75 and accompanying text.

In *Perry Education Association v. Perry Local Educators' Association*,[156] the Court established that public property which the government has opened for expressive activity is "bound by the same standards [that] apply in a traditional public forum."[157] Equal access by speakers to public forums has received Court protection.[158] Only in those cases involving the restriction of low value speech[159] has the Court been deferential to regulations allowing unequal access to a public forum.[160] Unless the judiciary reviews time, place or manner regulations by examining the location of the speech and the effect of the regulation on equal access to the forum, the review is incomplete.

B. *The Misapplication of the* Ward *Decision*

In its review, the court of appeals misapplied *Ward v. Rock Against Racism*.[161] In *Ward* all speakers were affected equally by the regulation, while in *Carew-Reid v. Metropolitan Transportation Authority*[162] the burden of the restriction fell unequally on those speakers who used amplification devices. The court of appeals applied the *Ward* standard to *Carew-Reid* without recognizing that the plaintiffs who required an amplification device to be heard were effectively excluded from the forum. Exclusion from a public forum is a severe burden on the fundamental right of free expression.[163] When faced with the practical effect of unequal access to a public forum, the court must carefully scrutinize the regulation and find that it is supported by a substantial governmental interest.[164] The court of appeals

156. 460 U.S. 37 (1983).

157. *Id.* at 46.

158. *See, e.g.*, Metromedia, Inc. v. City of San Diego, 453 U.S. 490 (1981); Police Dep't of Chicago v. Mosley, 408 U.S. 92 (1972); Hague v. Committee for Indus. Org., 307 U.S. 496 (1939).

159. *See supra* notes 14-47 and accompanying text.

160. *See, e.g.*, Lehman v. City of Shaker Heights, 418 U.S. 298 (1974) (accepting an arbitrary and capricious standard of review for city restrictions on city-owned advertising space).

161. 109 S. Ct. 2746 (1989).

162. 903 F.2d 914 (2d Cir. 1990).

163. *See, e.g.*, Police Dep't of Chicago v. Mosley, 408 U.S. 92, 99 (1972) (quoting Reed v. Reed, 404 U.S. 71, 76 (1971)) ("The crucial question . . . is whether [the regulation] advances that objective in a manner consistent with the command of the Equal Protection Clause.").

164. *See, e.g.*, Carey v. Brown, 447 U.S. 455, 461-62 (1980) (citing *Mosley*, 408 U.S.

failed to weigh the regulation in light of the equal protection concerns that arise when the resulting restriction provides unequal access to a public forum, as it does here.

In *Carew-Reid*, the court of appeals recognized that the governmental interest in eradicating excessive noise is significant.[165] In addition, the court held that the exclusion of some speakers from the forum did not amount to unconstitutional content-based regulation.[166] Citing *City Council of Los Angeles v. Taxpayers for Vincent*,[167] the court of appeals further held that "even though the regulation is based on a particular medium of expression and in fact is a complete ban on the use of that medium, it remains neutral with regard to the expression's content."[168]

Taxpayers for Vincent, however, is not on point. The fundamental issue in *Taxpayers for Vincent* was not whether the regulation was valid because it was not content-based, but rather whether the absolute prohibition of a medium — the posting of signs on public property — was a constitutional restriction of speech in a public forum.[169] *Perry Education Association v. Perry Local Educators' Association* held that a state is not required to retain the open characteristic of a non-traditional public forum.[170] However, once a forum is opened, the government may only choose to allow equal access or to close the forum.[171] In *Taxpayers for Vincent*, the government chose to close the forum.[172] In *Carew-Reid*, the government is attempting to leave the forum open — to continue to allow music in the subway — but to limit access to the forum by effectively excluding some speakers who are otherwise willing and able to re-

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at 98-99) ("When government regulation discriminates among speech-related activities in a public forum, the Equal Protection Clause mandates that the legislation be finely tailored to serve substantial state interests, and the justifications offered for any distinctions it draws must be carefully scrutinized.").

165. *Carew-Reid*, 903 F.2d at 917.

166. *Id.* at 919.

167. 466 U.S. 789 (1984); *see supra* note 68 and accompanying text.

168. *Carew-Reid*, 903 F.2d at 917.

169. *Taxpayers for Vincent*, 466 U.S. 789 (1984).

170. 460 U.S. 37, 46 (1983).

171. Police Dep't of Chicago v. Mosley, 408 U.S. 92, 100-01 (1972).

172. *Taxpayers for Vincent*, 466 U.S. at 791.

main within volume limits set for all speakers in the forum.[173] This is contrary to both the public forum doctrine[174] and the equal protection clause of the fourteenth amendment.[175]

Had the court of appeals applied the standard of review for regulations on free expression in light of the public forum and equal protection doctrines, it would have reached the same conclusion as the district court.[176] Instead, the court incorrectly relied on *Taxpayers for Vincent*[177] to dispense with the issue of unequal access and ignored any application of the public forum doctrine.[178]

Even absent a consideration of the public forum or equal protection arguments, the court of appeals should have found, as the district court did, that the government's interest was not sufficient to justify the regulation.[179] The court of appeals in *Carew-Reid* acknowledged that music is a form of protected speech.[180] As such, music enjoys the full protection of the first amendment.[181] Whenever protected speech is limited by a regulation, the government must provide sufficient justification for the regulation.[182] The court of appeals failed to question why both a volume limit and an amplification ban were necessary to accomplish the government's public safety objective.[183] Such deference to governmental regulations on free expression for the convenience of enforcement is not sufficient grounds to justify restrictions on free expression.[184]

By approaching the regulation as separate and distinct from

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173. *See supra* note 91 and accompanying text.

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

175. *Mosley*, 408 U.S. at 94-95.

176. *Carew-Reid v. Metropolitan Transp. Auth.*, No. 89 Civ. 7738 (S.D.N.Y. Jan. 5, 1990).

177. *Carew-Reid v. Metropolitan Transp. Auth.*, 903 F.2d 914, 919 (2d Cir. 1990) (citing City Council of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789, 812 (1984)).

178. *Carew-Reid*, 903 F.2d at 919 ("Because we conclude that the amplifier ban is a reasonable time, place or manner regulation, we need not address the question whether the subway platforms constitute traditional, designated or limited public forums.").

179. *Carew-Reid*, No. 89 Civ. 7738 at 20.

180. *Carew-Reid*, 903 F.2d at 916 (quoting Ward v. Rock Against Racism, 109 S. Ct. 2746, 2753 (1989)).

181. *Ward*, 109 S. Ct. at 2753.

182. *See supra* notes 12-13 and accompanying text.

183. *Carew-Reid*, 903 F.2d at 918.

184. *See supra* notes 67-75 and accompanying text.

the type of forum involved or the inequity that resulted from allowing unequal access to a public forum or the sufficiency of the government's interest in the regulation, the court of appeals adopted a far less exacting standard for a regulation on free expression than is required by Supreme Court precedent.

The Court has defined the elements for courts to consider when reviewing regulations that restrict free expression. The court of appeals focused its inquiry in *Carew-Reid* on one element — the time, place or manner test — excluding other essential components: the public forum doctrine, the equal access principle, and the limited significance of the governmental interest in the regulation. By limiting the application of well-established judicial principles, the court of appeals cursorily reviewed the district court decision and in overturning that decision, eroded judicial protection of the fundamental right to free expression.

V. Conclusion

Had the court of appeals applied the rules adopted by the Supreme Court, it would have concluded that the amplification ban cannot be supported. The district court examined *Ward v. Rock Against Racism*,[185] but unlike the court of appeals, it recognized the limited application of that case to the facts here. The elements for reviewing regulations that restrict free expression are embodied in the public forum and equal protection doctrines. The proper application of these doctrines as part of the traditional balancing of the governmental interest and the right to free expression provide the appropriate test for regulations that restrict free speech. The court of appeals failed to apply these doctrines in *Carew-Reid v. Metropolitan Transportation Authority*.[186] The decision thus creates a misleading precedent[187] and provides governmental bodies with support in their efforts to apply the most convenient, even if obstructive, means of securing their interests.

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185. 109 S. Ct. 2746 (1989).
186. 903 F.2d 914 (2d Cir. 1990).
187. Acorn v. St. Louis County, No. 89-3811 (8th Cir. April 8, 1991).