FIRST AMENDMENT—FREE SPEECH—MUNICIPAL NOISE ORDINANCE IMPOSING MANDATORY ADHERENCE TO SOUND AMPLIFICATION GUIDELINES CONSTITUTES A VALID TIME, PLACE, OR MANNER RESTRICTION ON PROTECTED SPEECH—*Ward v. Rock Against Racism*, 491 U.S. 781 (1989).

Armando O. Bonilla

I. INTRODUCTION

The first amendment to the United States Constitution provides in part that "Congress shall make no law . . . abridging the freedom of speech . . . ."[1] This amendment, however, has never been interpreted to provide absolute protection of individual expression.[2] Legislators have thus attempted to pass a variety of laws that circumvent, to some degree, the seemingly broad protections of the first amendment.[3] Concurrently,

---

[1] U.S. CONST. amend. I. The first amendment states in full that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." *Id.*

The United States Supreme Court has repeatedly held that the first amendment is applicable to the states through the fourteenth amendment. *See, e.g.*, Douglas v. City of Jeannette, 319 U.S. 157, 162 (1943); Thornhill v. Alabama, 310 U.S. 88, 95 (1940); Schneider v. State, 308 U.S. 147, 160 (1939); *see also* Carey v. Brown, 447 U.S. 455 (1980); Food Employees v. Logan Plaza, 391 U.S. 308 (1968); Cox v. Louisiana, 379 U.S. 536 (1965); Niemotko v. Maryland, 340 U.S. 268 (1951).

[2] *See, e.g., Food Employees*, 391 U.S. at 320-21 ("[T]he exercise of first amendment rights may be regulated where such exercise will unduly interfere with the normal use of the public property by other members of the public with an equal right of access to it."); *Cox*, 379 U.S. at 554-55 (The right of self-expression is not limitless.); *see also, e.g.*, Heffron v. Int'l Soc'y For Krishna Consc., 452 U.S. 640, 647 (1981); Cohen v. California, 403 U.S. 15, 19 (1971); Adderley v. Florida, 385 U.S. 39, 47-48 (1966); Poulos v. New Hampshire, 345 U.S. 395, 405 (1953); Whitney v. California, 274 U.S. 357, 371 (1927); Gitlow v. New York, 268 U.S. 652, 666 (1925); United States v. Schenk, 249 U.S. 47, 51 (1919). *See generally* R. ROSSUM & G. TARR, AMERICAN CONSTITUTIONAL LAW 329-31 (2d ed. 1987) ("[T]he First Amendment was never intended to protect all speech and publications; rather this amendment, like other provisions of the Bill of Rights, merely embodied guarantees that had existed under English Law."); L. LEVY, ORIGINAL INTENT AND THE FRAMERS' CONSTITUTION 195-220 (1988); Note, *Secondary Effects and Political Speech: Intimations of Broader Governmental Regulatory Power*, 34 VILL. L. REV. 995 (1989) (The first amendment was never intended to provide absolute protection of expressive activity.).

[3] *See* City of Watseka v. Illinois Public Action Council, 796 F.2d 1547, 1548-49 (7th Cir. 1986) (ordinance regulating the hours of door-to-door solicitation in residential areas); Regan v. Time, Inc., 468 U.S. 641, 643-44 (1984) (federal statute proscribing the

the United States Supreme Court has afforded both state and federal governments increasing deference where content-neutral regulations pertain to the time, place, or manner of protected speech.[4] Recently, in *Ward v. Rock Against Racism*,[5] the Supreme Court broke new ground by relaxing the constitutional standard to which a government entity must adhere when restricting conduct that facilitates expression in a public forum.[6]

Since 1979, Rock Against Racism (RAR)[7] has sponsored annual concerts featuring speeches and music at the Naumberg Acoustic

---

reproduction of United States currency with limited exceptions relating to educational, historical, and numismatic purposes); City Council v. Taxpayers for Vincent, 466 U.S. 789, 791-92 (1984) (municipal code prohibiting the posting of signs on public property); *Carey*, 447 U.S. at 457 (statute prohibiting the picketing of residences or dwellings with the exception of peaceful labor disputes); Shuttlesworth v. Birmingham, 394 U.S. 147, 149-50 (1969) (ordinance requiring participants in a parade on a public street to first obtain a permit which city officials could deny for "public safety" reasons); Freedman v. Maryland, 380 U.S. 51, 52 n.1 (1965) (ordinance requiring prior submission of motion pictures to censor boards for approval); *Poulos*, 345 U.S. at 397 n.2 (ordinance forbidding the holding of religious meetings in a public park without first obtaining the requisite permit); Martin v. Struthers, 319 U.S. 141, 142 (1943) (municipal ordinance banning door-to-door solicitation); *Thornhill*, 310 U.S. at 91-92 (ordinance forbidding loitering or picketing "without a just cause or legal excuse"); *Schneider*, 308 U.S. at 150 (ban on the distribution of handbills on city streets).

[4] *See infra* notes 85-100 and accompanying text (discussing a municipal ordinance banning picketing on or near an individual's residence or dwelling upheld); *see also infra* notes 73-83 and accompanying text (discussing a constitutional ban on sleeping in a public park); Hoffman Estates v. Flipside, Hoffman Estates Inc., 455 U.S. 489, 504 n.22 (1982) (upholding an ordinance requiring a business to obtain a special permit if it engaged in the sale of any items "designed or marketed for use with illegal cannabis or drugs"); *infra* notes 53-70 and accompanying text (upholding an ordinance restricting the distribution and sale of religious material in a public forum); FCC v. Pacifica Foundation, 438 U.S. 726, 748 (1978) (upholding stringent restrictions upon public broadcasting); *Adderley*, 385 U.S. at 48 (upholding a statute proscribing demonstrations upon the premises of the county jail); Kovacs v. Cooper, 336 U.S. 77, 89 (1949) (upholding an ordinance forbidding the use of sound trucks which emit "loud and raucous" noises); *infra* notes 25-34 and accompanying text (discussing a constitutional statute proscribing participation in a parade or procession unless the requisite permit was first obtained).

[5] 491 U.S. 781 (1989).

[6] *Id*; *see infra* notes 102-41.

[7] Rock Against Racism (RAR) is an unincorporated association "dedicated to the espousal and promotion of anti-racist views." *Id.* at 784.

Bandshell (Bandshell) located in New York City's Central Park.[8] Because of numerous complaints regarding excessive sound amplification at RAR's concerts, coupled with an uncooperative attitude exhibited by RAR representatives toward city officials, the city denied RAR's 1985 application for an event permit.[9] In response, RAR brought suit against the City of New York and its officials,[10] seeking the issuance of the permit through injunctive relief.[11] Prior to a judicial determination on the matter, the parties reached an agreement and the city officials issued the permit.[12]

The following year, New York City adopted Sound Amplification Guidelines (Use Guidelines),[13] an elaborate system of regulations aimed

---

[8] Rock Against Racism v. Ward, 658 F. Supp. 1346, 1349 (S.D.N.Y. 1987). New York City issues licenses to various entertainers to perform in this popular outdoor facility from mid-spring through early fall. *Id.* at 1351.

[9] *Rock Against Racism*, 491 U.S. at 785. Each year, at its sponsored events, RAR provided both the sound equipment and the technician used by the Bandshell performers. *Id.* On occasion, city officials were forced to abruptly halt these concerts due to a series of complaints concerning excessive noise levels coupled with RAR's refusal to comply with repeated requests to lower the sound volume. *Id.*

[10] *Rock Against Racism*, 658 F. Supp. at 1348. The plaintiff named the City of New York, Edward I. Koch, Mayor of the City of New York, Police Commissioner Benjamin Ward, and four officials of the city's Department of Parks and Recreation (George Scarpelli, Sheldon Horowitz, Joseph Killian and Robert Russo) as defendants. *Id.*

[11] *Rock Against Racism*, 491 U.S. at 785.

[12] *Id.* In exchange for the granting of the event permit, RAR agreed to respect the informal regulations regarding maximum sound volume. *Id.*

[13] *Id.* at 785-86. The Use Guidelines provide, in pertinent part:

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

at controlling "the volume of amplified sound at Bandshell events."[14] After receiving notice that New York officials expected them to comply with the Use Guidelines, RAR returned to the federal district court, asserting that the regulations operated as an unconstitutional prior restraint on free speech.[15]

At the conclusion of the bench trial, the Federal District Court for the Southern District of New York upheld the city's Sound Amplification Guidelines.[16] On appeal, the United States Court of Appeals for the

---

recommendations.

Rock Against Racism v. Ward, 848 F.2d 367, 368 n.1 (2d Cir. 1988).

The Use Guidelines also required sponsors to apply for permits, post a clean-up bond, pay a processing, as well as, a user fee, and obtain insurance. *Rock Against Racism*, 658 F. Supp. at 1354-59. In addition, the guidelines limited the hours and dates a sponsor could use the Bandshell, regulated the solicitation of funds, and placed a cap on maximum attendance. *Id.*

[14] *Rock Against Racism*, 491 U.S. at 785-86. City officials had determined that the use of inadequate sound amplification equipment and inexperienced sound technicians by Bandshell performers created numerous problems which mandated the implementation of these regulations. *Id.* at 786. First, many audiences at Bandshell events had become disruptive and unruly due to their inability to adequately hear the performances. *Id.* Second, as a direct result of the unsophisticated machinery used and the unskilled technicians employed, excessive noise emanating from the Bandshell interfered with the enjoyment of passive activities in the nearby, "sedate" areas of the park. *Id.* Third, this excessive noise disrupted the tranquil atmosphere of neighboring residents. *Id.* From these determinations, city officials concluded "that the most effective way to achieve adequate but not excessive sound amplification would be for the city to furnish high quality sound equipment and retain an independent, experienced sound technician for all performances at the Bandshell." *Id.* at 787.

[15] Rock Against Racism v. Ward, 636 F. Supp. 178, 178-79 (S.D.N.Y. 1986). The district court preliminarily enjoined enforcement of New York City's Sound Amplification Guidelines. *Id.* at 181. Because of this injunction, RAR was the only user of the Bandshell during the 1986 season to employ its own sound technician and equipment. *Rock Against Racism*, 491 U.S. at 787-88. After the concert, RAR amended its complaint to seek both damages and a declaratory judgment claiming that the Guidelines were facially invalid. *Id.* at 788.

[16] *Rock Against Racism*, 491 U.S. at 788-89. The district court made several findings of fact. *Id.* First, the court noted that the city, in its pursuit to employ a sound technician and equipment, was concerned with the quality of the equipment and technician it was to employ and not the price. *Rock Against Racism*, 658 F. Supp. at 1352. Second, the court opined that the city's objectives in adopting the regulations not only included the desire to control excessive volume, but also "to ensure the quality of sound at Bandshell events." *Id.* Third, the court emphasized the overwhelming positive response which the city received during the 1986 season from the other sixty sponsors using the city's sound system and technician. *Id.* Fourth, the court noted that during Bandshell events, the city had a practice of continuously communicating with the sponsor

Second Circuit reversed,[17] holding that the Sound Amplification Guidelines were not the least restrictive means available to achieve the city's legitimate interest in curtailing the adverse effects of excessive noise.[18] Invalidating the Use Guidelines, the court declared that a content-neutral time, place, or manner regulation "must be the *least* intrusive upon the freedom of expression as is reasonably necessary to achieve a legitimate purpose of the regulation."[19]

---

in an effort to accommodate their desires. *Id.* Fifth, the court emphasized the significant interest a city has in curtailing the adverse effects of excessive noise which might disturb "the quality of urban life." *Id.* at 1352-53 (citing City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 48 (1986) (quoting Young v. American Mini Theatres, Inc., 427 U.S. 50, 71 (1976))). Sixth, the court stipulated that first amendment protection does not guarantee the right "to turn up the volume as loud as [one] wishes." *Id.* at 1353. Lastly, the court stated that "[t]he City's implementation of the Bandshell guidelines provides for a sound amplification system capable of meeting RAR's technical needs and leaves control of the sound 'mix' in the hands of RAR." *Id.* Based on these findings, the court concluded that the Guidelines were narrowly tailored to serve a significant governmental interest and, for the most part, were "constitutional because they [did] not impinge upon a protected right." *Id.*

The district court held that the Guidelines' provisions which required sponsors to use the city's sound equipment and technician, obtain permits, post a clean-up bond, pay processing fees, and respect the time limits placed on the facility's use did not conflict with the protections afforded by the first amendment. *Id.* at 1354-59. The district court further held, however, that the provisions regarding the payment of user fees, the maintenance of insurance, the limitation on attendance, and the regulation placed on the solicitation of funds did violate the first amendment. *Id.*

[17] Rock Against Racism v. Ward, 848 F.2d 367 (2d Cir. 1988). RAR's appeal only challenged the district court's failure to permanently enjoin the enforcement of the Use Guidelines. *Id.* at 368. For a discussion of other issues determined by the district court, see *supra* note 16. The court of appeals affirmed in part and reversed in part, holding that the city was vested with the inherent authority to reasonably limit the volume of Bandshell performances, but the requirement mandating the use of the city's sound technician and equipment violated a performer's first amendment freedom of expression. *Rock Against Racism*, 848 F.2d at 372.

[18] *Rock Against Racism*, 848 F.2d at 369-71. The Second Circuit first reaffirmed the proposition that a state could lawfully regulate noise as well as sound volume. *Id.* at 370 (citing Grayned v. City of Rockford, 408 U.S. 104, 116 (1972); Kovacs v. Cooper, 336 U.S. 77, 87-89 (1949)). Relying on the standard set forth in United States v. O'Brien, 391 U.S. 367 (1968), the court held that the existence of alternative means which would be less intrusive on protected speech, yet still achieve the city's goals, rendered this regulation invalid. *Rock Against Racism*, 848 F.2d at 371-72. For a discussion of the *O'Brien* standard, see *infra* note 52 and accompanying text. For a discussion of the Second Circuit's analysis, see *infra* note 19 and accompanying text.

[19] *Rock Against Racism*, 848 F.2d at 370 (citing *O'Brien*, 391 U.S. at 377) (emphasis added). The court articulated several less restrictive alternatives which might achieve the city's significant interest in controlling excessive volume; namely, setting a maximum

The United States Supreme Court granted certiorari to elucidate the Second Circuit's interpretation of the second prong of the traditional test for assessing regulations on the time, place, or manner of protected speech.[20] The Supreme Court reversed, rejecting the court of appeals' interpretation of the narrowly tailored requirement,[21] and declared the Guidelines facially valid.[22]

II. THE GENESIS OF TIME, PLACE, OR MANNER RESTRICTIONS

In 1919, the United States Supreme Court first expounded upon the protections afforded by the first amendment in the context of governmental regulations purportedly directed at enhancing national security.[23] After a long line of cases evincing the Court's struggle to

---

volume level, installing a volume-limiting device, or "pulling the plug," and thus, concluded that the Guidelines were not the least restrictive alternative. *Rock Against Racism*, 491 U.S. at 789 (citing *Rock Against Racism*, 848 F.2d at 370-72). Moreover, the court explained that by adhering to the Guidelines, "the volume, the sound 'mix,' and the overall sound quality [of Bandshell performances] are under the physical control of the city-supplied technician who answers to officials of the Department of Parks." *Rock Against Racism*, 848 F.2d at 369. Acknowledging the district court's finding that the city customarily deferred to the performers' wishes, the court of appeals found that the Guidelines do not require such deference. *Id.*

Although the Second Circuit conceded that the first amendment permits some regulations on the time, place, or manner of "harmful speech," it opined that the city "has not shown, nor has a record been established from which it could be found, that the requirement of the use of the city's sound system and technician was the least intrusive means of regulating the volume." *Id.* at 370-71.

[20] *Rock Against Racism*, 491 U.S. at 789. For a discussion of the traditional time, place, or manner test, see *infra* notes 59-70 and accompanying text.

[21] *Rock Against Racism*, 491 U.S. at 789-90. For a discussion of the court of appeals' assertion that the requirement of narrow tailoring mandates the utilization of the least restrictive alternative analysis, see *supra* note 19 and accompanying text.

[22] *Rock Against Racism*, 491 U.S. at 790.

[23] J. NOWAK, R. ROTUNDA & J. YOUNG, CONSTITUTIONAL LAW § 16.13(a), at 854 (3d ed. 1986) [hereinafter NOWAK & ROTUNDA]. Prior to World War I, "Congress generally followed the first amendment directive that 'Congress shall make *no* law' restricting free speech . . . ." *Id.* (emphasis added). *See also* W. LOCKHART, Y. KAMISAR & J. CHOPER, CONSTITUTIONAL LAW § 1, at 650 (5th ed. 1980).

Specifically, in Schenk v. United States, 249 U.S. 47 (1919), the Supreme Court acknowledged the protections afforded by the first amendment, but stipulated that one's right to expression must be analyzed in the context and circumstances under which the speech is proffered. *Id.* at 48. In *Schenk*, the defendant was charged with conspiracy to violate the Espionage Act of 1917 after he distributed pamphlets opposing the military

establish a standard by which to secure first amendment protections without infringing on the power of government agencies to regulate certain exercises of speech,[24] the Court decided the seminal case of *Cox*

---

draft. *Id.* at 48-49. Writing for a unanimous Court, Justice Holmes emphasized the absence of absolute protection afforded under the first amendment, stating that "[t]he most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic." *Id.* at 52. Affirming the defendant's conviction, the Court adopted a "clear and present danger" analysis which permitted the government to restrict speech in situations presenting grave and imminent threats to society. *Id.*

Later that same year, in Abrams v. United States, 250 U.S. 616 (1919), the Court substantially relaxed the "clear and present danger" standard. *Id.* at 624. In *Abrams*, the defendant was convicted under the Espionage Act of 1917 after conspiring to print and distribute pamphlets denouncing the United States government, its officials, and its participation in World War I. *Id.* at 618-23. As in *Schenk*, the defendant challenged the validity of the Espionage Act, claiming that it directly contradicted the protections explicitly afforded by the first amendment. *Id.* at 619. Upholding the defendant's conviction, the Court concluded that a state may regulate expressive activity in situations which "tend" to create harmful results. *Id.* at 623-24.

[24] In Gitlow v. New York, 268 U.S. 652 (1925), the Court, emphasizing the necessity of judicial deference to legislative decisions, held that the government may regulate speech so long as the statute is supported by a reasonable basis. *Id.* at 668-71. Justice Sanford, writing for the majority, emphasized that violence or harm need not be imminent in order for legislatures to regulate speech. *Id.* at 671-72. Analogizing the exercise of state police power to dousing a smoldering fire, Justice Sanford stated:

> [i]t cannot be said that the State is acting arbitrarily or unreasonably when in the exercise of its judgment as to the measures necessary to protect the public peace and safety, it seeks to extinguish the spark without waiting until it has enkindled the flame or blazed into the conflagration.

Id. at 669.

The Court continued to disregard the "clear and present danger" test until 1937 when it decided Herndon v. Lowry, 301 U.S. 242 (1937). In *Herndon*, the defendant was convicted of attempting to incite an insurrection against the United States government based upon his affiliation with, and active participation in, the communist party. *Id.* at 245-46. The defendant challenged his conviction, claiming that the statute which authorized punishment for "acts of insurrection" was both unconstitutionally vague and provided no system of due process. *Id.* at 244. The Court, in a 5-4 opinion, stated that "[t]he power of a state to abridge freedom of speech . . . is the exception rather than the rule . . . ." *Id.* at 258. Effectively abandoning the *Gitlow* analysis, the *Herndon* majority held that a government entity could *not* restrict expressive activity which merely "tended" to be dangerous. *Id.* at 259.

Shortly thereafter, the Court began to expand the application of this doctrine to cases involving constitutional challenges to governmental suppression not pertaining to seditious acts. *See, e.g.*, West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943) (A statute mandating public school children to salute the flag and pledge allegiance unconstitutionally violated individual freedom of choice.); Thornhill v.

v. New Hampshire.[25] The *Cox* Court recognized, for the first time, the constitutionality of government restrictions on the time, place, or manner of protected speech in a public forum.[26] *Cox* involved a state statute which prohibited parading and demonstrating upon public streets without a special permit.[27] The appellants, five Jehovah Witnesses,[28] were charged with "taking part in a parade or procession" on a public street without first obtaining the requisite license.[29] Writing for the unanimous Court,[30] Chief Justice Hughes upheld the statute and the convictions, resting the Court's decision on the state's inherent authority

---

Alabama, 310 U.S. 88, 105-06 (1940) (An Alabama statute forbidding picketing and loitering was struck down as an unconstitutional denial of freedom of speech.); Cantwell v. Connecticut, 310 U.S. 296, 304 (1940) ("[A] State may by general and non-discriminatory legislation, regulate the times, the places, and the manner of [protected speech in order to] . . . safeguard the peace, good order and comfort of the community, without unconstitutionally invading the liberties protected by the [First and] Fourteenth amendment[s]."). For a discussion of the current status of the "clear and present danger" doctrine, see NOWAK & ROTUNDA, *supra* note 23, at 862-65.

[25] 312 U.S. 569 (1941). For a discussion of the *Cox* case, see Note, *A Reconsideration of* Cox v. New Hampshire: *Can Demonstrators be Required to Pay the Cost of Using America's Public Forums?*, 62 TEX. L. REV. 403, 406-07 (1983) ("the power of government to require demonstrators to procure permits"). *See also* Note, *Paying for Free Speech: The Continuing Validity of* Cox v. New Hampshire, 64 WASH. U.L.Q. 985, 992 (1986) ("Although police protection may force speakers to restructure their methods of presentation, such ordinances do not foreclose access to public forums.").

[26] *Cox*, 312 U.S. at 574. *See* Note, *supra* note 2, at 1000 (discussing state court considerations of time, place, or manner regulations as early as the late 1800's).

[27] *Cox*, 312 U.S. at 570-72. The statute provided, in pertinent part, that:

> No theatrical or dramatic representation shall be performed or exhibited, and no parade or procession upon any public street or way, and no open-air public meeting upon any ground abutting thereon, shall be permitted, unless a special license therefor shall first be obtained from the selectmen of the town, or from a licensing committee for the cities hereinafter provided for.

Id. at 571 (quoting N.H. P.L. ch. 145, § 2 (current version at N.H. REV. STAT. ANN. § 286:2 (1987))).

The statute was enacted in an effort to promote public convenience and prevent congestion on public streets. *Id.* at 574. The Court held that the "regulation of the use of the streets for parades and processions is a traditional exercise of control by local government." *Id.*

[28] *Id.* at 573. There were a total of 88 demonstrators, 68 of whom were arrested and convicted; only the five appellants challenged the Superior Court of New Hampshire's decision. *Id.* at 571 (citing State v. Cox, 91 N.H. 137, 16 A.2d 508 (1940)).

[29] *Id.* at 573.

[30] *Id.* at 570.

to safeguard the welfare of its citizenry.[31] Asserting that individual freedom of expression is not absolute,[32] the *Cox* Court concluded that municipalities could regulate expressive activity to further the public welfare.[33] The Court stipulated, however, that such regulation must not unreasonably abridge or deny the freedoms of speech and association intimately identified with public places.[34]

Seven years later, the Court clarified the *Cox* standard in *Saia v. New York*.[35] *Saia* involved a city ordinance which proscribed the utilization of sound amplification devices in public forums unless the requisite permit was first obtained.[36] The appellant, a Jehovah's Witness

---

[31] *Id.* at 574. Chief Justice Hughes explained that "[t]he authority of a municipality to impose regulations in order to assure the safety and convenience of the people . . . has never been regarded as inconsistent with civil liberties but rather as one of the means of safeguarding the good order upon which they ultimately depend." *Id.*

[32] *Id. See supra* note 2 and accompanying text (discussing the historical reaffirmation of this declaration).

[33] *Cox*, 312 U.S. at 574. Chief Justice Hughes analogized the petitioner's position to that of a person consciously disregarding a red traffic signal and attempting to justify their action by claiming that they were exercising their first amendment right of free speech. *Id.*

[34] *Id.* Chief Justice Hughes supported this finding by citing Lovell v. Griffin, 303 U.S. 444 (1938). In *Lovell*, the Court declared that an ordinance prohibiting the distribution of literature without first obtaining permission from the city manager was an unconstitutional prohibition on first amendment expressive activity. *Id.* at 451. Chief Justice Hughes also referred to Hague v. C.I.O., 307 U.S. 496 (1939), wherein the Court previously noted that:

> The privilege of a citizen of the United States to use the streets and parks for communication of views on national questions may be regulated in the interest of all; it is not absolute, but relative, and must be exercised in subordination to the general comfort and convenience, and in consonance with peace and good order; but it must not, in the guise of regulation, be abridged or denied.

Id. at 515-16.

[35] 334 U.S. 558 (1948) (5-4 decision).

[36] *Id.* at 559-60. In pertinent part, the ordinance provided:

> Section 2. Radio devices, etc. It shall be unlawful for any person to maintain and operate in any building, or on any premises or on any automobile, motor truck or other motor vehicle, any radio device, mechanical device, or loud speaker or any device of any kind whereby the sound therefrom is cast directly upon the streets and public places and where such device is maintained for advertising purposes or for the purpose of attracting the attention of the passing public, or which is so placed and operated that the sounds coming therefrom can be heard to the annoyance or inconvenience of travelers upon

minister, was convicted of violating the statute having broadcast a series of addresses in a public park using an amplifier.[37] Challenging the statute on its face, the appellant asserted that it violated his first amendment right of free speech.[38] Justice Douglas, writing for the majority, characterized the ordinance as a prior restraint on the dissemination of information which violated the first amendment.[39] Maintaining that freedom of speech must be afforded preferred treatment,[40] the Court charged that the police chief's ability to grant or deny the permit, based solely on his assessment of the circumstances, vested unbridled discretion in a city official to suppress free speech.[41] Assessing the constitutionality of time, place, or manner restrictions, Justice Douglas declared that courts must balance the state's interest in adopting the regulation against the fundamental protections afforded by the first amendment.[42] Emphasizing the vitality of individual liberty, the Court pointed to various less intrusive means to curtail the adverse effects of excessive noise.[43]

> any street or public places or of persons in neighboring premises.
>
> Section 3. Exception. Public dissemination, through radio loudspeakers, of items of news and matters of public concern and athletic activities shall not be deemed a violation of this section provided that the same be done under permission obtained from the Chief of Police.

Id. at 559 n.1 (citations omitted).

[37] *Id.* at 559. Initially, the appellant complied with the statute by obtaining the requisite permit. *Id.* However, due to a series of complaints regarding excessive noise during his mass sermons, the appellant's application for a renewal permit was denied upon its expiration. *Id.* Subsequently, the appellant ignored the regulation, attached an amplifier to his car, and proceeded to communicate his message in direct violation of the statute. *Id.*

[38] *Id.* *See supra* note 23 (discussing the request for a literal reading of the first amendment).

[39] *Saia*, 334 U.S. at 559-60 (citing Cantwell v. Connecticut, 310 U.S. 296 (1940); Hague v. C.I.O., 307 U.S. 496 (1939); Lovell v. Griffin, 303 U.S. 444 (1938)).

[40] *Id.* at 561. The Court noted that *Cox* "did not depart from the rule of these earlier cases but re-emphasized the vice of the type of ordinance [presented] here." *Id.* at 561 n.2 (citing Cox v. New Hampshire, 312 U.S. 569, 577-78 (1941)).

[41] *Id.* at 560-62.

[42] *Id.* at 562.

[43] *Id.* Justice Douglas noted two such viable alternatives; namely, regulating decibels and controlling the time and place of public discussion. *Id.* Justice Frankfurter, with whom Justices Reed and Burton joined, dissented, emphasizing the rights of unwilling listeners. *Id.* at 563 (Frankfurter, J., dissenting). Taking into consideration future

Twenty years later, despite the entrenched parameters delineated in *Saia*, the Court adopted a practical approach for determining the constitutional validity of a governmental regulation of expressive activity in public forums.[44] In *United States v. O'Brien*,[45] the defendant was charged and convicted of violating the Universal Military Training and Service Act of 1948[46] after publicly burning his selective service registration certificate in protest of the draft.[47] The defendant admitted that he knowingly violated the Act,[48] but challenged the Act's constitutionality on first amendment principles.[49] The majority, per Chief Justice Warren, distinguished the regulation in *O'Brien* from a statute previously invalidated by the Court which completely banned all manifestations of opposing views to organized government.[50] The Court upheld the defendant's conviction,[51] asserting that when expressive activity involves a hybrid of speech and non-speech, "a

---

technological advances in sound amplification devices which might seriously impede individual privacy interests, Justice Frankfurter applied a balancing approach, placing less emphasis upon expressive freedoms, and concluded that the statute was a valid restriction on the time, place or manner of protected speech. *Id.* at 566 (Frankfurter, J., dissenting). Justice Jackson, in a separate dissent, characterized the ordinance as not only appropriate, but necessary in the fulfillment of the city's duty to protect its citizenry. *Id.* at 567 (Jackson, J., dissenting).

[44] United States v. O'Brien, 391 U.S. 367 (1968). For a discussion of the *O'Brien* case, see Note, *The Political Boycott: An Unprivileged Form of Expression*, 1983 DUKE L.J. 1076, 1083 ("Both the federal and state governments have the constitutional power ... to prohibit [expressive] conduct . . . .").

[45] 391 U.S. 367 (1968).

[46] 50 U.S.C.A. § 462(b)(3) (West 1948) (amended 1965).

[47] *O'Brien*, 391 U.S. at 370. The statute proscribed the knowing destruction, mutilation, or alteration of a United States Selective Service registration certificate. *Id.*

[48] *Id.* at 369.

[49] *Id.* at 376.

[50] *Id.* at 382 (citing Stromberg v. California, 283 U.S. 359 (1931)). *Stromberg* concerned California's adoption of an anti-sedition statute which prohibited the public display of any symbol which might be characterized as antagonistic toward organized government. *Stromberg*, 283 U.S. at 361. The Supreme Court invalidated the statute, stating that it directly conflicted with the fundamental liberties guaranteed by the first amendment. *Id.* at 368-70.

In *O'Brien*, Chief Justice Warren differentiated *Stromberg* by noting that, in *Stromberg*, the California Legislature failed to proffer any justification for the statute other than an abolition of one form of expressive conduct, whereas the regulation adopted in *O'Brien* was designed to prevent destructive conduct, not expressive activity. *O'Brien*, 391 U.S. at 382 (quoting *Stromberg*, 283 U.S. at 361).

[51] *O'Brien*, 391 U.S. at 382.

sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms."[52]

Over a decade later, in *Heffron v. International Society For Krishna Consciousness*,[53] the Court refined the *O'Brien* analysis by articulating a three prong test for assessing the constitutional validity of a restriction on the time, place, or manner of protected speech.[54] In *Heffron*, the plaintiffs, seeking declaratory and injunctive relief, challenged a Minnesota rule[55] proscribing the distribution or sale of any materials outside certain prescribed areas.[56] The plaintiffs asserted that the regulation was unconstitutional on its face and as applied,[57] claiming that it prevented the free exercise of their religious beliefs.[58] First, the Court pronounced that a valid restriction on protected speech "may not

---

[52] *Id.* at 376. Chief Justice Warren set forth the analysis as follows:

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

Id. at 377. Applying this standard to the case at hand, the majority concluded that the 1965 amendment to the Universal Military Training and Services Act, which promoted Congress' constitutional authority to "raise and support armies," satisfied the requirements stated above. *Id.*

[53] 452 U.S. 640 (1981). For a discussion of the *Heffron* case, see Note, Heffron v. International Society For Krishna Consciousness, Inc.: *A Restrictive Constitutional View of the Proselytizing Rights of Religious Organizations*, 9 PEPPERDINE L. REV. 519 (1982).

[54] *Heffron*, 452 U.S. at 647-48.

[55] MINN. R. 6.05 (1980).

[56] *Heffron*, 452 U.S. at 643. An organization known as the "Minnesota Agricultural Society" (Society) was empowered by the state to enact the necessary bylaws, ordinances, and rules for the annual Minnesota state fair. *Id.* To ease the congestion caused by the massive crowd gatherings in certain areas of the fair, the Society implemented Rule 6.05 which limited distributions and solicitation to certain areas. *Id.*

[57] *Id.* at 645.

[58] *Id.* at 644. The respondents claimed that Rule 6.05 suppressed their religious practice of Sankirtan which involved the distribution and sale of religious literature and the solicitation of donations. *Id.* at 645.

be based upon either the content or subject matter of speech."[59] Having emphasized this point, the Court concluded that the regulation was content-neutral since it was applied even-handedly.[60] The Court went on to declare that a regulation must not vest unbridled discretion in the official charged with its application because it might prompt discriminatory enforcement.[61]

Next, the *Heffron* Court explained that the regulation must further a significant government interest in order to survive first amendment scrutiny.[62] Emphasizing the deferential nature of this second prong, the majority relied on *Grayned v. City of Rockford*[63] and *Cox v. New Hampshire*[64] to assert the proposition that a state's interest in safeguarding the "safety and convenience" of its citizenry in using a public forum is a genuine government objective.[65] Recognizing the validity of the state's interest in avoiding excessive congestion which might adversely affect the public welfare, the Court held that the Minnesota rule served a significant government interest.[66]

Lastly, the Court articulated the third prong of the test, stating that "it must also be sufficiently clear that alternative forums for the expression of . . . protected speech exist despite the effects of the [regulation]."[67] The majority held that, since the Minnesota rule neither banned the activity outside the fairgrounds, nor denied access to the

---

[59] *Id.* at 648 (quoting Consolidated Edison Co. v. Public Service Comm'n, 447 U.S. 530, 536 (1980)); *see also* Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748, 771 (1976) (plurality opinion) (Restrictions on protected speech must be "justified without reference to the content of the regulated speech . . . ."); Grayned v. City of Rockford, 408 U.S. 104, 115 (1972) ("[G]overnment has no power to restrict . . . activity because of its message.").

[60] *Heffron*, 452 U.S. at 649. The majority noted that no person or organization was exempt from this regulation, and that Rule 6.05 did not provide for any exceptions. *Id.*

[61] *Id.* *See infra* notes 118-20 and accompanying text (discussing the invalidity of regulations of speech which place unbridled discretion in the hands of government officials).

[62] *Heffron*, 452 U.S. at 649 (quoting *Virginia State Bd. of Pharmacy*, 425 U.S. at 771).

[63] 408 U.S. 104 (1972).

[64] 312 U.S. 569 (1941).

[65] *Heffron*, 452 U.S. at 650.

[66] *Id.* at 651-54. Addressing the Minnesota Supreme Court's characterization of Rule 6.05 as an "unnecessary regulation," the majority concluded that the alternative suggested by the lower court, which provided for the sanctioning of individual misconduct, failed to adequately account for the potential problems of heavy congestion caused by massive sales and solicitation. *Id.* at 654.

[67] *Id.* at 654.

grounds, the regulation satisfied this final element.[68] Thus, the *Heffron* Court concluded that because the rule was content-neutral, furthered a significant government interest, and left open ample alternative avenues for dissemination of the information,[69] the regulation was a valid time, place, or manner restriction on protected speech.[70]

In 1984, the Court further refined the second prong of the time, place, or manner analysis, requiring that the means chosen be "narrowly tailored" to further a significant government interest.[71] In *Clark v. Community For Creative Non-Violence*,[72] the Court considered a National Park Service regulation which prohibited camping in certain

---

[68] *Id.* at 654-55.

[69] *Id.* at 647-48 (quoting Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748, 771 (1976)).

[70] *Id.* at 655. Justice Brennan, with whom Justices Marshall and Stevens joined, in a separate opinion, criticized the majority's disregard of the "narrowly tailored" issue. *Id.* at 658 (Brennan, J., concurring in part and dissenting in part). Characterizing the means implemented to achieve the state's legitimate interest of crowd control as overly intrusive, Justice Brennan articulated that "once a government regulation is shown to impinge upon basic First Amendment rights, the burden falls on the government to show the validity of its asserted interest and the absence of less intrusive alternatives." *Id.* at 657-58 (Brennan, J., concurring in part and dissenting in part) (citing Schneider v. State, 308 U.S. 147 (1939)). Moreover, the dissent stressed that "[t]he challenged 'regulation must be narrowly tailored to further the State's legitimate interest.'" *Id.* at 658 (Brennan, J., concurring in part and dissenting in part) (quoting Grayned v. City of Rockford, 408 U.S. 104, 116-17 (1972)).

Justice Blackmun, writing separately, reiterated Justice Brennan's agreement with the majority's finding of a significant government interest, but criticized the Court's total abdication of the least restrictive alternative inquiry. *Id.* at 663-64 (Blackmun, J., concurring in part and dissenting in part) (quoting Schaumburg v. Citizens for a Better Environment, 444 U.S. 620, 636-37 (1980)).

[71] Clark v. Community For Creative Non-Violence, 468 U.S. 288, 293 (1984). For a discussion of *Community For Creative Non-Violence*, see Comment, *Symbolic Speech*, 3 N.Y.L. SCH. HUM. RTS. ANN. 485 (1986) (constitutional ban on sleeping in a public park); *see also* Note, *National Park Service Regulation Prohibiting "Camping" as Applied to Demonstrators, Who Wish to Sleep in Public Parks, Does Not Violate First Amendment Rights*, 10 T. MARSHALL L.J. 677 (1985).

The Court initially adopted the language of "narrowly tailored" in Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37 (1983), but that phrase was not germane to the Court's analysis of a collective bargaining agreement which excluded the access of a rival teachers' union to an interschool mail system. *Perry Educ. Ass'n*, 460 U.S. at 39.

[72] 468 U.S. 288 (1984).

parks in an effort to conserve the environment and facilitate tourism.[73] Demonstrators for the homeless, who wished to "camp-out" in the park, filed for an injunction seeking to invalidate the regulation.[74] Writing for the majority, Justice White reaffirmed the notion that expressive activity, in any form, is subject to reasonable time, place, or manner restrictions.[75] Alluding to the absence of a direct correlation between the application of the regulation and the purported message to be conveyed, the majority concluded that the regulation was content-neutral and thus, satisfied the first prong of the *Heffron* test.[76]

Addressing the second prong of the analysis, Justice White explained that a regulation is narrowly tailored if its absence would hinder the advancement of a legitimate government interest.[77] Holding that the preservation of national parks was a significant government interest which would be less well-served absent the proscription against camping in certain areas,[78] the majority found that the regulation was narrowly tailored.[79]

Turning to the third prong, requiring that sufficient alternative

---

[73] *Id.* at 290-91. The regulation was adopted by the Interior Department which "is charged with [the] responsibility for the management and maintenance of the National Parks and is authorized to promulgate rules and regulations for the use of the parks in accordance with the purposes for which they were established." *Id.* at 289.

[74] *Id.* at 292.

[75] *Id.* at 293 (citing City Council v. Taxpayers for Vincent, 466 U.S. 789 (1984); United States v. Grace, 461 U.S. 171 (1983); *Perry Educ. Ass'n*, 460 U.S. at 45-46; Heffron v. Int'l Soc'y For Krishna Consc., 452 U.S. 640, 647-48 (1981); Virginia State Bd. of Pharmacy Board v. Virginia Citizens Consumer Council, 425 U.S. 748 (1976); Consolidated Edison Co. v. Public Service Comm'n, 447 U.S. 530, 535 (1980)).

[76] *Id.* at 295. The majority based this conclusion on the fact that no evidence existed to support a finding of discriminatory application. *Id.* at 295 & n.6.

[77] *Id.* at 296-97. The majority explained that:

> If the Government has a legitimate interest in ensuring that the National Parks are adequately protected . . . and if the parks would be more exposed to harm without the sleeping prohibition than with it, the ban is safe from invalidation under the First Amendment as a reasonable regulation of the manner in which a demonstration may be carried out.

Id. at 297 (citing *Taxpayers for Vincent*, 466 U.S. at 810).

[78] *Id.* at 296. In reaching this decision, Justice White asserted that the regulation adopted in *Community for Creative Non-Violence* "responds precisely to the substantive problems which legitimately concern the [Government]." *Id.* at 297 (quoting *Taxpayers for Vincent*, 466 U.S. at 810).

[79] *Id.* at 297.

channels of communication be available to disseminate the information, the Court held that the regulation did not obstruct the respondents' ability to demonstrate.[80] Recognizing that sufficient alternative avenues of communication remained open, the majority determined that the regulation satisfied the final requirement of the analysis.[81] The *Community For Creative Non-Violence* Court further emphasized that judicial disagreement with legislative conclusions as to the most effective means of achieving a legitimate government objective is not determinative as to the regulation's validity.[82] Hence, the majority qualified the level of scrutiny applicable to a time, place, or manner restrictions on protected speech by expressly mandating judicial deference to legislative decisions.[83]

---

[80] *Id.* at 295. The majority refused to accept the proposition that the inability to sleep in the park prevented the demonstrators from focusing attention on the "plight for the homeless." *Id.* The Court maintained that this message could be communicated in other ways such as: posting signs, erecting model villages, attaining media coverage, and participating in day-and-night vigils. *Id.*

[81] *Id.*

[82] *Id.* at 299. Specifically, the Court stated:

> We do not believe, however, that . . . time, place, or manner decisions assign to the judiciary the authority to replace the Park Service as the manager of the Nation's parks or endow the judiciary with the competence to judge how much protection of park lands is wise and how that level of conservatism is to be attained.

Id.

[83] *Id.* In a vigorous dissent, Justice Marshall, joined by Justice Brennan, denounced the majority's failure to subject the government's regulation of speech to the requisite strict scrutiny standard mandated by the first amendment. *Id.* at 301 (Marshall, J., dissenting). Although the dissent credited the Court's adoption of the correct standard of review, Justice Marshall criticized the majority's interpretation of the requirement of narrow tailoring. *Id.* at 308-12 (Marshall, J., dissenting). Moreover, Justice Marshall vehemently stated that "[t]he First Amendment requires the Government to justify *every* instance of abridgment." *Id.* at 309 (Marshall, J., dissenting) (citing Associated Press v. United States, 326 U.S. 1, 20 (1945)) (emphasis in original). Conceding the possibility of the existence of a legitimate government interest, Justice Marshall, nonetheless, concluded that the regulation was neither narrowly drawn nor did it directly advance a significant government interest. *Id.* at 308-12 (Marshall, J., dissenting). The dissent further opposed the increased deference given to content-neutral restrictions on speech, asserting that the continuous utilization of a two-tiered approach between content-neutral and content-based restriction "has led to [the] unfortunate diminution of First Amendment protection." *Id.* at 313 (Marshall, J., dissenting).

This distinction drawn between content-based and content-neutral restrictions on expressive activity is exemplified in Boos v. Barry, 485 U.S. 312 (1988). In *Boos*, the

In 1988, the Supreme Court further broadened the already expanded concept of narrow tailoring to accommodate public policy.[84] In *Frisby v. Schultz*,[85] the Court reviewed a facial challenge to a municipal ordinance which prohibited all picketing in front of any residence or dwelling.[86] The respondent adopted the anti-picketing regulation in response to numerous complaints concerning pro-life demonstrations outside the residence of a physician who was allegedly performing abortions in a nearby clinic.[87] Applying the modified test espoused by the Court in *O'Brien*, the majority determined that the ordinance applied even-handedly to all demonstrations.[88] The Court summarily accepted the lower court's conclusion that the ordinance was content-neutral.[89]

Next, the Court addressed the constitutional mandate requiring that

---

Court invalidated a District of Columbia statute which prohibited "the display of any sign within 500 feet of a foreign embassy if that sign tends to bring that foreign government into 'public odium' or 'public disrepute.'" *Id.* at 313. Because it characterized the regulation as a content-based restriction on protected speech, the Court subjected the statute to the most arduous scrutiny. *Id.* at 321. The Court stipulated that although the statute applied even-handedly to all demonstrators, "a regulation that 'does not favor either side of a political controversy' is nonetheless impermissible because the 'First Amendment's hostility to content-based regulation[s] extends . . . to [the] prohibition of public discussion of an entire topic.'" *Id.* at 319 (citations omitted). *See generally*, Stone, *Content-Neutral Restrictions*, 54 U. CHI. L. REV. 46 (1987); Redish, *The Content Distinction in First Amendment Analysis*, 34 STAN. L. REV. 113 (1981).

[84] Frisby v. Schultz, 487 U.S. 474 (1988). For a discussion of *Frisby v. Schultz*, see Neubauer, *Freedom of Speech/Equal Protection/Residential Picketing*, 78 ILL. B.J. 202 (1990).

[85] 487 U.S. 474 (1988).

[86] *Id.* at 476. The ordinance provided in relevant part, that "[i]t is unlawful for any person to engage in picketing before or about the residence or dwelling of any individual in the Town of Brookfield." *Id.*

[87] *Id.* Although the demonstrations were generally peaceful and orderly, they were found to generate substantial controversy thereby necessitating legislative intervention. *Id.* The respondent enacted the ordinance in order to protect and preserve the sanctity of one's home, curtail the physical and emotional tolls taken on individuals continuously subjected to harassment, and prevent the obstruction of public sidewalks and roadways. *Id.*

[88] *Id.* at 481. The original ordinance, adopted on May 7, 1985, "prohibited all picketing in residential neighborhoods except for labor picketing." *Id.* at 476. One week later, when the city council was informed that the Supreme Court had previously invalidated a similar regulation in Carey v. Brown, 447 U.S. 455 (1980), the ordinance was repealed and replaced with a "flat ban on all residential picketing." *Frisby*, 487 U.S. at 476-77.

[89] *Frisby*, 487 U.S. at 482.

the regulation leave open ample alternative channels for communication.[90] Justice O'Connor, writing for the majority, emphasized the respondent's showing that the statute had been applied only to demonstrators targeting an individual's home or residence[91] and, therefore, concluded that the ordinance satisfied the third prong of the test enunciated in *Community For Creative Non-Violence*.[92]

Underscoring the state's significant interest in protecting its citizenry and maintaining order,[93] the Court then considered whether an ordinance, banning an entire means of expression, could satisfy the narrowly tailored requirement.[94] Defining a narrowly tailored statute as one which "targets and eliminates no more than the exact source of the 'evil' it seeks to remedy[,]"[95] the Court concluded that "[a] complete ban can be narrowly tailored, but only if each activity within the proscription's scope is an appropriately targeted evil."[96] Justice O'Connor characterized the picketing of the doctor's home as offensive since it was directed at the physician and his family and not to the general public,[97] and declared that the first amendment affords no protection for such a targeted intrusion on residential privacy.[98] The majority maintained that the first amendment restriction on a state's ability to prohibit communicative activity pertains to the public

---

[90] *Id.*

[91] *Id.* at 483-84. Justice O'Connor noted that "the limited nature of the prohibition makes it virtually self-evident that ample alternatives remain." *Id.*

[92] *Id.* at 483. The majority supported this conclusion by reiterating the Court's practice of interpreting statutes in such a way as to avoid constitutional difficulties. *Id.* at 483-84 (citing Erznoznik v. City of Jacksonville, 442 U.S. 205, 216 (1975); Broadrick v. Oklahoma, 413 U.S. 601, 613 (1973)).

[93] *Id.* at 484. *See* Carey v. Brown, 447 U.S. 455, 471 (1980) ("The State's interest in protecting the well-being, tranquility, and privacy of the home is certainly of the highest order in a free and civilized society."). *See also supra* note 87 and accompanying text (discussing the purposes for adopting the regulation).

[94] *Frisby*, 487 U.S. at 485.

[95] *Id.* (quoting City Council of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789, 808-10 (1984)).

[96] *Id.* at 485. *See Taxpayers for Vincent*, 466 U.S. at 808 (upholding an ordinance which proscribed the posting of signs on public property as a reasonable time, place, or manner restriction).

[97] *Frisby*, 487 U.S. at 486.

[98] *Id.* at 487. Emphasizing the targeted individual's inability to avoid the unwanted speech, the Court asserted that this type of offensive activity warranted legislative intervention. *Id.*

dissemination of that information, not the picketing of an individual.[99] Based on these findings, the Court concluded that the ordinance was a valid time, place, and manner restriction on protected speech.[100]

It was against this background that the Supreme Court decided *Ward v. Rock Against Racism*.[101]

III. TIME, PLACE, OR MANNER RESTRICTIONS ON PROTECTED SPEECH

A. JUSTICE KENNEDY'S CURTAILMENT OF INDIVIDUAL LIBERTY

Justice Kennedy[102] began the majority's analysis in *Rock Against Racism* by emphasizing the impact music has had on society, and by reaffirming the constitutional prohibition against maintaining political control through censorship.[103] The Court concluded that music is a form of expression protected by the fundamental principles of the first amendment.[104]

Recognizing the intimate relationship between speech and music,[105] Justice Kennedy, nevertheless, limited the issue solely to the constitutionality of New York City's Sound Amplification Guidelines[106] and their restraint on musical expression.[107] The Court quickly dismissed consideration of whether a state's proprietary interest extends

---

[99] *Id.* at 486 (quoting Organization for a Better Austin v. Keefe, 402 U.S. 415, 420 (1971)).

[100] *Id.* at 488.

[101] 491 U.S. 781 (1989).

[102] Justice Kennedy, writing for a 6-3 Court, was joined by Chief Justice Rehnquist and Justices White, O'Connor, and Scalia; Justice Blackmun concurred with no opinion. *Id.* at 783.

[103] *Id.* at 790. The Court denounced the practice of suppressing musical expression, which may promote independent thought and conduct, to hold on to political power. *Id.*

[104] *Id.*

[105] *Id. See supra* notes 7-9 and accompanying text (discussing RAR's sponsored events).

[106] *Rock Against Racism*, 491 U.S. at 790. *See supra* notes 13-14 and accompanying text (discussing the Use Guidelines).

[107] *Rock Against Racism*, 491 U.S. at 790.

to a publicly-held performance facility.[108] Based on the Bandshell's availability for public use, Justice Kennedy classified it as a public forum, thereby mandating that government restrictions on expression comport with the protections afforded under the first amendment.[109] Accordingly, Justice Kennedy reiterated the three independent requirements to which a state must adhere in imposing a constitutional restriction on protected speech in a public forum; namely, that the restriction must be content-neutral, narrowly tailored to serve a significant government interest, and leave open ample alternative avenues for the communication of the information.[110]

1. *Content-Neutral Restrictions*

Addressing the initial issue of content neutrality,[111] Justice Kennedy emphasized that a state's motive for imposing a restriction on first amendment freedoms determines whether a particular regulation is constitutional.[112] Justice Kennedy stated that in determining whether a statute is content-neutral, the principle inquiry is whether the state adopted the regulation on speech because it disagrees with the message

---

[108] *Id. See* Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 570-74 (1975) (Rehnquist, J., dissenting). Justice Rehnquist's dissent in *Conrad* focused on the authority of a state, as a property owner, to regulate the use of a publicly owned facility. *Id.* at 571 (Rehnquist, J., dissenting). Justice Rehnquist noted that although the state's power does not rise to the level of that which is retained by a private theater owner, the Constitution recognizes some control vested within the state. *Id.*

Justice Kennedy's justification for the exclusion of this issue stemmed from the city's motive in implementing this measure. *Rock Against Racism* 491 U.S. at 790. Justice Kennedy recognized the city's interest in insuring high quality performances in the Bandshell, but concluded that the regulation was designed to safeguard against excessive noise. *Id. See supra* note 14 and accompanying text (discussing the city's justifications for the imposition of the Use Guidelines).

[109] *Rock Against Racism*, 491 U.S. at 790-91. *See* Frisby v. Schultz, 487 U.S. 474, 480-81 (1988) (citing Perry Educ. Ass'n v. Perry Educators' Ass'n, 460 U.S. 37, 45 (1983)) (States are limited in their ability to restrict the free expression of first amendment activities in places generally characterized as public forum.); United States v. Grace, 461 U.S. 171, 177 (1983) (Streets, sidewalks, and parks are considered public forums due to their historical association with the free exercise of expressive activities; in these areas, the state is subject to strict limitations in its ability to control or restrict first amendment protected conduct.).

[110] *Rock Against Racism*, 491 U.S. at 791 (quoting Clark v. Community for Creative Non-Violence, 468 U.S. 288, 293 (1983)).

[111] *Id.*

[112] *Id.*

the speech purports to convey.[113] Defining a content-neutral restriction as one which makes no reference to the substance of regulated speech, Justice Kennedy noted that the state may constitutionally curtail some forms of expression absent a content-based animus.[114] After refuting the respondent's argument that the Use Guidelines infringe upon a performer's freedom of artistic expression,[115] Justice Kennedy observed that the regulations do not make reference to the substance of the regulated speech, and thus, satisfy the requirement of content neutrality.[116]

Next, the Court addressed the respondent's facial challenge to the

---

[113] *Id.* (citing *Community for Creative Non-Violence*, 468 U.S. at 295).

[114] *Id.* (quoting *Community for Creative Non-Violence*, 468 U.S. at 293). *See* Renton v. Playtime Theaters Inc., 475 U.S. 41, 54 (1986) (upholding a zoning ordinance which prohibited adult motion picture theaters from locating within a specific distance of a residential zone). In *Renton*, Justice Rehnquist, writing for a 7-2 Court, held that a state's regulation of expressive activity in a public forum is not impermissible so long as the denial does not rest upon the state's favor or disfavor of the message to be conveyed. *Id.* at 48-49 (citing Police Dep't of Chicago v. Mosley, 408 U.S. 92, 95-96 (1972)). *See also* Boos v. Barry, 485 U.S. 312, 320 (1988) (A regulation is properly categorized as content-neutral provided that the justifications for the regulation do not concern its content.).

[115] *Rock Against Racism*, 491 U.S. at 792. Addressing the respondent's contention that the city was attempting to control the artistic expression of Bandshell performers in violation of the first amendment, Justice Kennedy articulated that, although the argument had merit, it was inapplicable to the case at bar. *Id.* Justice Kennedy concluded that the city's lack of intent to impose its own views of artistic expression, coupled with the district court's factual findings of deference by the city to Bandshell performers, implied that the city's interest in the sound quality of Bandshell performances merely concerned the avoidance of the problems associated with poor sound amplification. *Id.* at 792-93. *See supra* note 16 and accompanying text for a discussion of the district court's factual findings of the city's practice of deferring to the wishes of Bandshell performers. *See also supra* note 14 and accompanying text for a discussion of the ill-effects of inadequate amplification at Bandshell performances.

[116] *Rock Against Racism*, 491 U.S. at 793. Justice Kennedy noted that the Use Guidelines were imposed to control the noise level at Bandshell events, maintain quiet in secluded areas of the park for peaceful activities, and protect nearby residents from undue noise intrusions. *Id.* The Court concluded that the city's Use Guidelines satisfied the element of content neutrality because the regulations did not pertain to the substance of the message sought to be conveyed. *Id.* (quoting Boos v. Barry, 485 U.S. 312, 321 (1988)). Noting that government imposed restrictions designed to control artistic expression raise serious first amendment concerns, the Court concluded that *Rock Against Racism* provided no opportunity to address them. *Id.*

Use Guidelines.[117] As a preliminary matter, the Court stated that, traditionally, facial challenges to regulations "have generally involved licensing schemes that 'ves[t] unbridled discretion in a government official over whether to permit or deny expressive activity.'"[118] The Court distinguished the traditional type of challenge from that raised by the respondent because of the respondent's failure to assert that the city possessed unrestrained discretion to deny expressive activity altogether.[119] Rather, the respondent alleged that the implementing city official *could* provide inadequate sound amplification for performers if the city official disagreed with or disapproved of the message to be conveyed.[120] Justice Kennedy concluded that the city's past application of the Use Guidelines, coupled with its custom of deferring to the performer's requests,[121] sufficiently remedied any potential facial inadequacy.[122] Moreover, although the majority found the Use

---

[117] *Id.* As an alternative to the argument that the regulations were content-based, the respondent asserted that the Guidelines were facially unconstitutional. *Id.* RAR claimed that city officials were vested with unbridled discretion because the language of the regulation did not set forth specific standards to prevent arbitrary and discriminatory enforcement. *Id.*

[118] *Id.* (quoting City of Lakewood v. Plain Dealer Publishing Co., 486 U.S. 750, 760 (1988)). In *Plain Dealer*, the Court held that "a facial challenge lies whenever a licensing law gives a government official or agency substantial power to discriminate based on the content or viewpoint of speech by suppressing disfavored speech or disliked speakers." *Plain Dealer*, 486 U.S. at 760. *See* Freedman v. Maryland, 310 U.S. 51, 56 (1965) (Facial challenges to a statute are concerned with the reservation of unbridled discretion to officials who are charged with its enforcement.).

[119] *Rock Against Racism*, 491 U.S. at 793-94. Justice Kennedy distinguished this case from those in which a facial challenge was permitted due to the type and degree of discretion involved. *Id.* Justice Kennedy explained that the respondent's challenge concerned the city's ability, through exercising its right to regulate sound, to provide inadequate amplification for a Bandshell performer based on the city's view of the message to be conveyed, rather than the contention that government officials are vested with unbridled discretion to discriminatorily deny permits altogether. *Id.* at 794.

[120] *Id.* The Court maintained that the respondent's claim does not fall "within the narrow class of permissible facial challenges to allegedly unconstrained grants of regulatory authority." *Id.* Justice Kennedy stated that the principal inquiry in determining whether a statute is facially invalid is "whether the challenged regulation authorizes [the] suppression of speech in advance of its expression." *Id.* at 795 n.5.

[121] *Id.* *See supra* note 16 and accompanying text for a discussion of the city's intent and deference to the performer's requests.

[122] *Rock Against Racism*, 491 U.S. at 795-96. Justice Kennedy stipulated that the city's interpretation and implementation of the regulation precludes a facial challenge "[e]ven if the language of the guideline [was] not sufficient on its face to withstand challenge . . . ." *Id.* at 795. *See* Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455

Guidelines to be flexible, allowing for a degree of discretionary enforcement, the Court emphasized that "perfect clarity and precise guidance have never been required even of regulations that restrict expressive activity."[123]

2. *Narrowly Tailored*

The Court next addressed the second requirement mandating that a regulation on protected speech be narrowly tailored to serve a significant government interest.[124] The Court reaffirmed its position that states have a significant interest in shielding their citizens from unwelcomed noise.[125] Such an interest, the Court postulated, extends to ensuring adequate sound quality at Bandshell performances, as well as to limiting the volume of music emanating from the Bandshell.[126] Emphasizing this point, Justice Kennedy pronounced that the city's regulation was

---

U.S. 489, 494 n.5 (1982) (citing Grayned v. City of Rockford, 408 U.S. 104, 110 (1972)) ("In evaluating a facial challenge to a state law, a federal court must . . . consider any limiting construction that a state court or enforcement agency has proffered.").

[123] *Rock Against Racism*, 491 U.S. at 794. *See Grayned*, 408 U.S. at 114 (Some degree of police judgment is necessary to insure fairness in law enforcement application.). Justice Kennedy acknowledged that the government is vested with the raw power to forcefully suppress speech, but noted that the Guidelines were adopted to prevent the necessity of "pull[ing] the plug" on Bandshell performers. *Rock Against Racism*, 491 U.S. at 795 n.5. *Cf.* City of Lakewood v. Plain Dealer Publishing Co., 486 U.S. 750, 772 (1988) (ordinance which granted city officials absolute authority to ban the placement of newsracks on public property declared unconstitutional). In *Plain Dealer*, Justice White argued that the majority erred in allowing facial challenges in situations where there is a mere possibility that a licensing requirement may prohibit some form of expressive conduct. *Id.* at 774 (White, J., dissenting). Justice White contended that facial challenges should only be permitted when the law, through the use of licensing requirements, prohibits a broad range of first amendment activity. *Id.*

[124] *Rock Against Racism*, 491 U.S. at 796.

[125] *Id. See* Carey v. Brown, 447 U.S. 455, 471 (1980) ("The state's interest in protecting the well-being, tranquility, and privacy of the home is certainly of the highest order in a free and civilized society."); Kovacs v. Cooper, 336 U.S. 77, 97 (1949) (Jackson, J., concurring) ("[The] operation of mechanical sound amplification devices conflicts with [the] quiet enjoyment of [the] home and park . . . and . . . is constitutionally subject to regulation or prohibition by the state or municipal authority.").

[126] *Rock Against Racism*, 491 U.S. at 796. *See supra* note 14 and accompanying text (discussing the adverse effects of inadequate sound amplification at Bandshell performances). *See also* Clark v. Community for Creative Non-Violence, 468 U.S. 288, 296 (1984) (The government has a substantial interest in maintaining its parks in an attractive condition which is readily available to all those who wish to utilize its many facets for their personal enjoyment.).

"narrowly tailored to serve a significant governmental interest."[127] The Court acknowledged the Second Circuit's recognition of the city's substantial interest in regulating the noise level emanating from the Bandshell,[128] but criticized that court's failure to apply the appropriate standard of review.[129] Justice Kennedy explained that a time, place, or manner restriction on protected speech is not unconstitutional simply because there exists some imaginable alternative that may be less restrictive on speech.[130] The majority proclaimed that the "less-restrictive-alternative analysis . . . has never been a part of the inquiry into the validity of a time, place, [or] manner regulation."[131] In contrast, the Court expostulated, "the requirement of narrowly tailored is satisfied 'so long as the . . . regulation promotes a substantial government interest that would be achieved less effectively absent the

---

[127] *Rock Against Racism*, 491 U.S. at 796 (quoting *Community for Creative Non-Violence*, 468 U.S. at 293).

[128] *Rock Against Racism*, 491 U.S. at 797. *See supra* note 17 and accompanying text (discussing the Second Circuit's finding of a significant government interest in regulating the volume of Bandshell performances).

[129] *Rock Against Racism*, 491 U.S. at 797. *See supra* note 19 and accompanying text (discussing the appellate court's adoption of the "least restrictive alternative analysis"). Justice Kennedy criticized the lower court for examining every conceivable alternative method of regulating sound volume to determine if the city's response was the least burdensome on first amendment rights. *Rock Against Racism*, 491 U.S. at 797. Furthermore, the majority observed that the court of appeals erred in its overly stringent application of the *O'Brien* test. *Id.* at 797-98. *See supra* notes 45-52 and accompanying text (discussing United States v. O'Brien, 391 U.S. 367 (1968)). Reiterating a portion of the Court's opinion in *Community for Creative Non-Violence*, where the Court rejected reasoning indistinguishable from that *sub judice*, Justice Kennedy emphasized the Court's previous veto of the least intrusive means requirement in a time, place, or manner restriction on protected speech. *Rock Against Racism*, 491 U.S. at 797-98 (quoting *Community for Creative Non-Violence* 468 U.S. at 298-99).

[130] *Rock Against Racism*, 491 U.S. at 797 (quoting United States v. Albertini, 472 U.S. 675, 689 (1985)).

[131] *Id.* (quoting Regan v. Time, Inc., 468 U.S. 641, 657 (1984)). Recognizing that a content-neutral restriction of protected speech must be narrowly tailored to serve a significant government interest, Justice Kennedy explained that the regulation does not necessitate the application of the least restrictive alternative analysis. *Id.* at 798. *Cf.* Boos v. Barry, 485 U.S. 312, 321 (1988) (quoting Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983)) (A content-based restraint of protected speech in a public forum, if imposed by the government, is subject to the most arduous scrutiny.).

regulation.'"[132] Justice Kennedy then declared that a judge should not substitute his own beliefs or opinions concerning the appropriateness of the regulation, but should defer to the expertise of the legislature.[133]

The Court concluded that the city's significant interests in imposing the regulation,[134] which would otherwise be less well served, are directly and effectively promoted by the implementation of the Use Guidelines.[135] Based on these findings, the Court held that the Sound Amplification Guidelines were narrowly tailored.[136]

---

[132] *Rock Against Racism*, 491 U.S. at 799 (quoting *Albertini*, 472 U.S. at 689). Justice Kennedy cautioned, however, that this standard does not furnish government entities unbridled discretion to proscribe first amendment activities. *Id.* Justice Kennedy explained that a state may not impose a time, place, or manner regulation which "may burden *substantially* more speech than is necessary to further the government's legitimate interests." *Id.* (emphasis added). Justice Kennedy further articulated that the "Government may not regulate expression in such a manner that a substantial portion of the burden on speech does not serve to advance its goals." *Id.*

Rejecting the dissent's argument that the Use Guidelines were the equivalent of a complete ban on expressive conduct, the Court maintained that the regulations were not an absolute prohibition of music. *Id.* at 800 n.7. Justice Kennedy stressed that the Guidelines were designed to eliminate the adverse effects of inadequate sound amplification and did not significantly restrict unrelated activities. *Id.* The Justice noted, however, that "a complete ban can be narrowly tailored but only if each activity within the proscription's scope is an appropriately targeted evil." *Id.* at 800 (quoting Frisby v. Schultz, 487 U.S. 474, 485 (1988)). Reiterating the inapplicability of the least restrictive alternative analysis, Justice Kennedy concluded that a regulation will not be declared unconstitutional so long as it is "not substantially broader than necessary" to achieve the government's significant interest. *Id.*

[133] *Id.* The Court criticized the court of appeals for "failing to defer to the city's reasonable determination that its interest in controlling volume would be best served by requiring Bandshell performers to utilize the city's sound technician." *Id.* Justice Kennedy stated that "[b]y providing competent sound technicians and adequate amplification equipment, the city eliminated the problems of inexperienced technicians and insufficient sound volume that had plagued some Bandshell performers in the past." *Id.* at 801. The majority recognized the inapplicability of this concern to the respondent's concerts due to its elaborate equipment, but stated that "the validity of the regulation depends on the relation it bears to the overall problem the government seeks to correct, not the extent to which it furthers the government's interests in an individual case." *Id.*

[134] *See supra* note 14 and accompanying text (discussing the ill-effects of inadequate sound amplification at Bandshell performances).

[135] *Rock Against Racism*, 491 U.S. at 801.

[136] *Id.* Stressing the factual findings of the district court regarding the deference given to Bandshell performers by city officials, the Court concluded that the Use Guidelines were "not 'substantially broader than necessary' to achieve the City's legitimate end." *Id.* at 802 (quoting City Council v. Taxpayers for Vincent, 466 U.S. 789, 808 (1984)); *see supra* note 16 and accompanying text (discussing the city's

3. *Alternative Channels of Communication*

Lastly, the *Rock Against Racism* Court addressed the final requirement of a valid time, place, or manner restriction on protected speech; specifically, that the regulation leave open ample alternative channels for communication of the information.[137] The majority summarily dismissed any challenge to this requirement, positing that the Use Guidelines are much less restrictive than previously upheld regulations on speech because they do not prohibit expressive activity.[138] Justice Kennedy further noted that the Guidelines merely regulate excessive noise and permit the continual freedom of artistic expression by Bandshell performers.[139] The Court, citing the respondent's failure to provide sufficient evidence establishing an unreasonable limitation on the remaining avenues of expression, found its claim that the regulation may limit a performer's potential audience to be without merit.[140]

Holding that the Sound Amplification Guidelines were content-neutral, narrowly tailored to serve a significant government interest, and left open ample alternative channels of communication of information, the Supreme Court reversed the decision of the court of appeals, and held that the city's Use Guidelines constitute a reasonable time, place, or manner restriction on protected speech.[141]

---

accommodation to a performer's artistic expression). The Court further dismissed the respondent's claim that the regulation was overbroad because there was no evidence presented to show that the regulation prohibits protected speech that does not fall within the scope of the purported problem the city is attempting to correct. *Rock Against Racism*, 491 U.S. at 802. *See Taxpayers for Vincent*, 466 U.S. at 808 (A statute is narrowly tailored if it targets and eliminates no more than the exact source of the evil it seeks to remedy.).

[137] *Rock Against Racism*, 491 U.S. at 802.

[138] *Id. See supra* notes 85-100 and accompanying text (upholding an ordinance prohibiting *all* picketing in the immediate area of an individual's residence or dwelling); *supra* notes 72-83 and accompanying text (discussing a constitutional regulation prohibiting *all* sleeping in a public park); City of Renton v. Playtime Theaters Inc., 475 U.S. 41, 54 (1986) (upholding a zoning ordinance which *absolutely* prohibited the maintenance of an adult movie theater within a prescribed distance of a residential area).

[139] *Rock Against Racism*, 491 U.S. at 802.

[140] *Id.*

[141] *Id.* at 803.

B. JUSTICE MARSHALL'S CALL FOR PROTECTION OF INDIVIDUAL RIGHTS

In a vigorous dissent,[142] Justice Marshall, joined by Justices Brennan and Stevens,[143] criticized the majority for imposing mandatory judicial deference to legislative solutions rather than providing the requisite first amendment protection of expressive conduct.[144] The dissent acknowledged the city's significant interest in curtailing the adverse effects of excessive noise, but insisted that a restriction on protected speech requires the application of the least restrictive alternative analysis.[145] Furthermore, Justice Marshall contended that the majority's standard of review grants government entities the power to suppress protected speech prior to its dissemination, thereby constituting an impermissible prior restraint.[146]

In its first criticism of the majority's opinion, the dissent conceded the content-neutral nature of the Use Guidelines[147] and the significance of the city's interest,[148] but characterized the majority's reliance on *City of Renton v. Playtime Theaters, Inc.*[149] as misplaced.[150]

---

[142] *Id.* at 803 (Marshall, J., dissenting).

[143] *Id.*

[144] *Id.*

[145] *Id. See supra* notes 18-19 (discussing the "least restrictive alternative" analysis).

[146] *Rock Against Racism*, 491 U.S. at 803 (Marshall, J., dissenting).

[147] *Id.* at 804 (Marshall, J., dissenting). Justice Marshall agreed that the Guidelines are applicable to all Bandshell performers without regard to the message to be conveyed. *Id. See supra* notes 111-14 and accompanying text (discussing the Court's finding of content neutrality).

[148] *Rock Against Racism*, 491 U.S. at 804 (Marshall, J., dissenting). Justice Marshall explained that the petitioner's dominion over the sound equipment permitted it to regulate excessive noise in public places. *Id.*

[149] 475 U.S. 41 (1986). *See supra* note 114 for a discussion of the Court's reliance on *Renton.*

[150] *Rock Against Racism*, 491 U.S. at 804 n.1 (Marshall, J., dissenting). Justice Marshall characterized the majority's reliance on *Renton* as "unnecessary and unwise." *Id.* Justice Marshall explained that the *Renton* decision was adopted for the purpose of regulating the supply of sexually explicit materials and was, therefore, only applicable in that particular fact scenario. *Id.* (citing *Renton*, 475 U.S. at 49 & n.2). Referring to Justice Brennan's concurrence in Boos v. Barry, 485 U.S. 312, 335-38 (1988) (Brennan, J., concurring), in which Justice Brennan criticized the Court's application of the "secondary effects doctrine" to political speech, Justice Marshall cautioned that such unauthorized application of *Renton's* subjective standard would encourage widespread government censorship. *Rock Against Racism*, 491 U.S. at 804 n.1 (Marshall, J.,

Characterizing the majority's interpretation of the narrow tailoring requirement as "distorted," Justice Marshall condemned the Court's abandonment of the least restrictive means test.[151] Contesting the majority's reliance on *United States v. Albertini*[152] and *Regan v. Time, Inc.*,[153] Justice Marshall stressed that, in practice, the Court's interpretation of the narrow tailoring requirement mandates an examination of alternative means of promoting the asserted governmental interest "and a determination whether the greater efficacy of the challenged regulation outweighs the increased burden it places on protected speech."[154]

Indicating the ramifications that may result from the Court's decision, Justice Marshall asserted that the majority's effective

---

dissenting) (citing *Renton*, 475 U.S. at 47-49) (A content-based restriction of first amendment activity may be redefined as content-neutral if the focus of the regulation concerns the "secondary effects" of the expression.).

[151] *Id.* at 804 (Marshall, J., dissenting). The dissent disagreed with the majority's assertion that the Court had previously vetoed the use of strict scrutiny to determine the constitutional validity of a time, place, and manner restriction of expressive activity. *Id.* Relying on the language set forth in *Frisby*, Justice Marshall stressed that the Court has defined a narrowly tailored statute as one which "targets and eliminates no more than the exact source of the 'evil' it seeks to remedy." *Rock Against Racism*, 491 U.S. at 804 (Marshall, J., dissenting) (quoting Frisby v. Schultz, 487 U.S. 474, 484-85 (1988)).

[152] 472 U.S. 675 (1985).

[153] 468 U.S. 641 (1984).

[154] *Rock Against Racism*, 491 U.S. at 805 (Marshall, J., dissenting). Justice Marshall distinguished *Albertini* based on the fact that *Albertini* involved a military base which has never been characterized as a public forum. *Id.* at 805 n.2 (Marshall, J., dissenting) (citing *Albertini*, 472 U.S. at 687). In addition, Justice Marshall criticized the majority's adoption of the *Regan* language which states that "[t]he less-restrictive-alternative analysis . . . has never been a part of the inquiry into the validity of a time, place, and manner regulation," because it was representative of only four Justices' opinions. *Id.* (quoting *Regan*, 468 U.S. at 657 (White, J., concurring)). For support of Justice Marshall's attack on the majority's distortion of the "narrowly tailored" requirement, see Schneider v. State, 308 U.S. 147, 164 (1939), where the Court held unconstitutional an ordinance that prohibited the distribution of handbills on public property due to the existence of alternative methods of promoting the state's interest which were less burdensome on speech. *See also* Martin v. Struthers, 319 U.S. 141, 149 (1943) (ordinance which prohibited door-to-door distribution of handbills struck down due to the existence of effective alternatives that were less restrictive on speech).

Justice Marshall commented that the majority's reliance on Clark v. Community for Creative Non-Violence, 468 U.S. 288 (1984), directly contradicts the Court's analysis. *Rock Against Racism*, 491 U.S. at 805 n.3 (Marshall, J., dissenting). The Justice explained that in *Community for Creative Non-Violence*, "the Court engaged in an inquiry similar to the one the majority now rejects; it considered whether the increased efficacy of the challenged regulation warranted the increased burden on speech." *Id.*

abandonment of the narrowly tailored requirement will likely render the judiciary a mere "rubber stamp" to validate legislative solutions to societal problems.[155] Justice Marshall reasoned that the Court's interpretation of the narrowly tailored requirement only prohibits restrictions on a broad range of expressive activities that do not serve to promote the government's goals,[156] and thus, prevents only the most egregious restrictions on first amendment activities.[157] The majority's strict instructions of deferral, in the dissent's view, renders the judiciary powerless to make independent determinations as to whether the regulation unconstitutionally restricts more expressive activity than is necessary to promote the state's significant interest.[158]

The dissent concluded that the Use Guidelines could not have withstood constitutional scrutiny had the Court applied the appropriate standard of narrow tailoring, adding that the state's interest in curtailing the adverse effects of inadequate sound amplification cannot justify a grant to the city of absolute dominion over sound equipment.[159] Accordingly, the dissent found no need to determine whether the Guidelines provide sufficient alternative channels for communication outside the public forum since the existence of such avenues do not validate an unconstitutional governmental restriction.[160]

In its next criticism, the dissent found the majority's countenance of the city's monopoly over the Bandshell's sound equipment

[155] *Rock Against Racism*, 491 U.S. at 806 (Marshall, J., dissenting). Justice Marshall interpreted the new narrowly tailored standard adopted by the majority as requiring the government to "show that its interest cannot be served as effectively without the challenged restriction." *Id.* Based on this interpretation, Justice Marshall hypothesized that any measure enacted to address a significant governmental interest would satisfy this requirement. *Id.* Justice Marshall concluded that a logical extension of this theory would allow far reaching restrictions on expressive activity. *Id.*

[156] *Id.* *See supra* note 132 (discussing the Court's alleged limitation on the government's ability to suppress speech).

[157] *Rock Against Racism*, 491 U.S. at 806 (Marshall, J., dissenting).

[158] *Id.* at 807 (Marshall, J., dissenting).

[159] *Id.* The dissent maintained that this legitimate governmental concern "can be effectively and less intrusively served by directly punishing the evil—the persons responsible for excessive sounds . . . ." *Id.* Thus, Justice Marshall declared, the majority stripped the requirement of narrow tailoring of all its meaning. *Id.*

[160] *Id.* at 807 n.6 (Marshall, J., dissenting). *See* Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 556 (1975) (quoting Schneider v. State, 308 U.S. 147, 163 (1939)) (The government may not justify restrictions on expressive activities in public forums on the premise that first amendment expression may be exercised in other areas.).

constitutionally flawed as a system of prior restraint.[161] Justice Marshall explained that the city's exclusive control over a performer's ability to express and amplify his message enables government officials to censor speech prior to its dissemination.[162] Justice Marshall criticized the majority's contention that the restriction does not qualify as a system of prior restraint because government officials are not vested with unbridled discretion to prohibit expressive activity altogether.[163] The dissent proffered that there is no substantive distinction between denying a performer access to the Bandshell altogether and permitting access while silencing or distorting the performer's message; both restrictions, according to the dissent, result in censorship.[164]

The dissent next declared the Use Guidelines presumptively invalid as a prior restraint on protected speech.[165] Determining that the requisite procedural safeguards necessary "to obviate the dangers of a

---

[161] *Rock Against Racism*, 491 U.S. at 808 (Marshall, J., dissenting). *See* Near v. Minnesota, 283 U.S. 697, 722-23 (1931) (A statute prohibiting the production, publication, or circulation of malicious, scandalous, and defamatory newspaper held unconstitutional as a form of prior restraint.).

[162] *Rock Against Racism*, 491 U.S. at 808 (Marshall, J., dissenting). Justice Marshall explained that:

> In 16th and 17th century England, government controlled speech through its monopoly on printing presses. . . . Here, the city controls the volume and mix of sound through its monopoly on sound equipment. In both situations, government's exclusive control of the means of communication enable public officials to censor speech in advance of its expression.

Id. *See Conrad*, 420 U.S. at 553 (Granting government officials the absolute power to forbid the use of a public forum prior to actual expression is an unconstitutional form of censorship.).

[163] *Rock Against Racism*, 491 U.S. at 808 (Marshall, J., dissenting).

[164] *Id.* Justice Marshall emphasized this point by quoting Chief Justice Rehnquist's opinion in FEC v. Nat'l Conservative Political Action Comm., 470 U.S. 480 (1985), stating, "the First Amendment means little if it permits government to 'allo[w] a speaker in a public hall to express his views while denying him the use of an amplifying system.'" *Rock Against Racism*, 491 U.S. at 808-09 (quoting *Nat'l Political Action Comm.*, 470 U.S. at 493). *See also Conrad*, 420 U.S. at 556 n.8 (Total suppression need not result in order to characterize a licensing system as a prior restraint.).

[165] *Rock Against Racism*, 491 U.S. at 809 (Marshall, J., dissenting). *See Conrad*, 420 U.S. at 558 (A system of prior restraint on expressive activity, although not unconstitutional per se, bears a heavy presumption of unconstitutionality.). *See also* Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 70 (1963) ("Any system of prior restraint of expression comes to this Court bearing a heavy presumption against its constitutional validity.").

censorship system" had not been incorporated into the Use Guidelines,[166] Justice Marshall concluded that the city did not overcome its presumption of unconstitutionality.[167] In the dissent's view, the Use Guidelines failed to include the detailed and neutral standards necessary to prevent the city from restricting expression based on its disapproval of the message to be conveyed.[168] Emphasizing the majority's concession that the Guidelines vest considerable discretion in those charged with their implementation,[169] Justice Marshall refuted the Court's conclusion that the requisite limitations on city officials are implicit within the regulations.[170] The dissent, therefore, concluded that the Use Guidelines constituted an unconstitutional prior restraint.[171]

---

[166] *Rock Against Racism*, 491 U.S. at 809 (Marshall, J., dissenting) (quoting Freedman v. Maryland, 380 U.S. 51, 58 (1965)). Justice Marshall stated that "[t]he city must establish neutral criteria embodied in 'narrowly drawn, reasonable and definite standards,' in order to ensure that discretion is not exercised based on the content of the speech." *Id.* (quoting Niemotko v. Maryland, 340 U.S. 268, 271 (1951)). Furthermore, Justice Marshall stipulated that "there must be 'an almost immediate judicial determination' that the restricted material was unprotected by the First Amendment." *Id.* (quoting *Bantam Books*, 372 U.S. at 70).

[167] *Id.* at 809-10 (Marshall, J., dissenting). *See supra* note 165 (discussing the presumptive invalidity of a government imposed prior restraint on protected speech).

[168] *Rock Against Racism*, 491 U.S. at 810 (Marshall, J., dissenting) (quoting *Niemotko*, 340 U.S. at 271). Justice Marshall suggested that the lack of specificity in the language of the regulation permits city officials to subjectively discriminate against artistic expression by asserting their power to control excessive volume. *Id.*

[169] *Id.* *See supra* note 123 and accompanying text (discussing the majority's concession that the Guidelines vest considerable discretion with the implementing official).

[170] *Rock Against Racism*, 491 U.S. at 810 (Marshall, J., dissenting). Justice Marshall argued that "[a] promise to consult . . . does not provide the detailed 'neutral criteria' necessary to prevent future abuses of discretion . . . ." *Id.* at 810-11 (Marshall, J., dissenting). Justice Marshall further asserted that "a presumption that city officials will act in good faith and adhere to standards absent from a regulation's face is 'the very presumption that the doctrine forbidding unbridled discretion disallows.'" *Id.* at 811 (Marshall, J., dissenting) (quoting City of Lakewood v. Plain Dealer Publishing Co., 486 U.S. 750, 768-69 (1988)).

Justice Marshall further noted that the majority's reliance on the city's practice of deferral is flawed, stating that "if the City always defers to a performer's wishes . . . then it is difficult to understand the need for a city technician to operate the mixing console." *Id.* at 811 n.8 (Marshall, J., dissenting).

[171] *Id.* at 811-12 (Marshall, J., dissenting).

III. CONCLUSION: EXPANSION OF THE NARROWLY TAILORED ANALYSIS

In *Ward v. Rock Against Racism*, the Supreme Court attempted to elucidate the appropriate standard by which courts must appraise government restrictions upon protected speech. However, the Court's entertainment of superfluous issues, coupled with its use of ambiguous language, has created two distinct problems. First, by elaborately discussing the respondent's facial challenge to the Use Guidelines, the majority implied that such a challenge was applicable. Second, the language employed by Justice Kennedy, while articulating the requisite standard of "narrowly tailored," effectively eliminated any such requirement from the time, place, or manner analysis.

A. THE MAJORITY'S RESOLUTION OF THE PRIOR RESTRAINT ARGUMENT

Although Justice Kennedy correctly refuted the respondent's threshold contention that the Use Guidelines constitute a prior restraint on expressive activity, the Court's analysis seems flawed. Initially, the majority implied that a facial challenge could not be brought absent a licensing requirement permitting city officials to discriminatorily deny the use of a public forum based upon the content of the message sought to be conveyed.[172] The majority, however, refused to explicitly hold that

---

[172] *Id.* at 793-94. The Court found that all applicable precedent concerned an implementing official's unbridled discretion to determine *whether* to apply the regulation. *See supra* notes 118-19 and accompanying text (discussing the limited area of cases in which the Court has permitted facial challenges). The dissent and at least one contemporary commentator, however, seem to have confused the question of the respondent's ability to assert a facial challenge with the viability of such a challenge on the merits. *See* Note, *Government Regulation of the Place and Manner of Protected Speech in a Public Forum*, 7 ENT. & SPORTS L. REV. 103, 115 (1989). The dissent further confused the argument advanced in *Plain Dealer* and its progeny by asserting that a regulation constitutes a prior restraint if it vests unbridled discretion in the implementing official in determining *how*, rather than *whether*, to apply the restriction. *See supra* notes 161-71 and accompanying text (discussing the dissent's finding of prior restraint). The threshold question before the Court was not whether the city possessed the authority to deny use of the forum in advance of expression, but rather whether the Use Guidelines, as narrowed through prior application, reserved such authority to the city. *Rock Against Racism*, 491 U.S. at 793-94; *cf.* Note, *supra*, at 114-15. The former characterization of the threshold issue ignores the narrowing construction provided by past application of the Guidelines and the Court's emphasis on this evidence. *Rock Against Racism*, 491 U.S. at 793-94. Whether the Court properly considered past application of the Guidelines in evaluating the petitioner's facial challenge is perhaps the proper, and more

a facial challenge was inapplicable to the facts of *Rock Against Racism*.[173] Rather, Justice Kennedy disposed of respondent's prior restraint argument on its merits.[174] In so doing, the majority either implicitly extended the applicability of facial challenges to regulations such as the Use Guidelines, or engaged in an unnecessary discussion of respondent's unwarranted facial challenge.

At best, this dicta will create confusion among practitioners and courts alike. At worst, litigators will seize upon this inconsistency as a means of challenging statutes based upon a theoretically unconstitutional application; hypothetically speaking, any regulation *could* be implemented in an unconstitutional manner. Nevertheless, the majority's failure to expressly limit the applicability of facial challenges to previously well-defined factual scenarios[175] may well spawn specious first amendment litigation. Given the clear inapplicability of the prior restraint doctrine to the facts of *Rock Against Racism*, such a result would be particularly egregious.

Moreover, the majority's emphasis on the need for judicial deference to legislative decisions[176] suggests the Court's grave concern over our nation's overcrowded courts and judicial disregard of the federalist model. The logical inconsistency found in the majority's opinion, however, will thoroughly frustrate the practical objective of judicial deference if lawyers and judges interpret the opinion as extending the applicability of facial challenges to regulations such as the Use Guidelines.

B. The Majority's Articulation of Narrow Tailoring

Since its decision in *Rock Against Racism*, the Supreme Court has expounded upon the narrowly tailored requirement in the context of regulations upon *commercial* speech.[177] In *Fox v. Board of Trustees of*

---

pressing question in this context.

[173] *Rock Against Racism*, 491 U.S. at 794 ("We need not decide . . . whether the 'extraordinary doctrine' that permits facial challenges to some regulations of expression should be extended to the circumstances of this case . . . .").

[174] *See supra* notes 117-23 and accompanying text (discussing the majority's dismissal of the respondent's facial challenge on the merits).

[175] *See supra* note 118 and accompanying text (discussing the well-defined factual scenarios in which the Court has permitted facial challenges).

[176] *See supra* note 133 and accompanying text (discussing the Court's emphasis on the need for deference to legislators).

[177] Fox v. Board of Trustees of S.U.N.Y., 492 U.S. 469 (1989).

S.U.N.Y.,[178] Justice Scalia cited *Rock Against Racism* for the proposition that a regulation of expressive conduct must avoid "burden[ing] substantially more speech than is necessary to further the government's legitimate interest."[179] The *Fox* majority also devoted a substantial portion of its discussion to emphasizing that first amendment caselaw mandates that courts apply stricter scrutiny to regulations of expressive conduct than to restrictions upon commercial speech.[180] In *Rock Against Racism*, however, which concerned "pure speech," Justice Kennedy stated that "the requirement of narrow tailoring is satisfied 'so long as the . . . regulation promotes a substantial government interest that would be achieved less effectively absent the regulation.'"[181] Therefore, the standard enunciated in *Fox* seems to be substantially more stringent than the one articulated in *Rock Against Racism*.

Although one could argue that, after *Fox*, governmental restrictions of non-commercial expressive conduct must at least comport with the *Fox* majority's interpretation of the narrow tailoring requirement, lower courts have not followed this logical conclusion.[182] In 1989, the New York City Transit Authority banned "the use of amplifiers on subway platforms."[183] Relying heavily on the language of *Rock Against Racism*, the Second Circuit upheld the ban.[184] Specifically, in addressing the issue of narrow tailoring, the Second Circuit quoted *Rock Against Racism*, stating that "the requirement of narrow tailoring is satisfied 'so long as the . . . regulation promotes a substantial government interest that would be achieved less effectively absent the regulation.'"[185] Emphasizing the importance of judicial deference, the court of appeals, as the dissent in *Rock Against Racism* feared, acted as a "rubber stamp" validating this legislative act.[186]

Because the Use Guidelines would satisfy Justice Scalia's narrowly

---

[178] 492 U.S. 469 (1989).

[179] *Id.* at 478 (quoting Ward v. Rock Against Racism, 491 U.S. 781, 799 (1989)).

[180] *Id.* at 477.

[181] *Rock Against Racism*, 491 U.S. at 799 (quoting United States v. Albertini, 472 U.S. 675, 689 (1985)).

[182] *See, e.g.*, Carew-Reid v. Metropolitan Transp. Auth., 903 F.2d 914 (2d Cir. 1990).

[183] *Id.* at 915.

[184] *Id.* at 919.

[185] *Id.* at 917 (quoting *Rock Against Racism*, 491 U.S. at 799 (quoting *Albertini*, 472 U.S. at 689)).

[186] *See supra* note 155 and accompanying text (discussing Justice Marshall's concern over judicial deference to legislative acts).

tailored analysis in *Fox*, as well as the more ambiguous definition offered by the *Rock Against Racism* majority, the outcome of *Rock Against Racism* would remain unchanged if subjected to the heightened *Fox* standard. Unfortunately, the ambiguous nature of Justice Kennedy's holding may foster many more inaccurate interpretations of the narrow tailoring requirement.[187]

More importantly, the prospective consequences of basing the federal Constitution's minimum requirements in judicial deference gravely affects parties not before the Court. Justice Kennedy's articulation of the Court's holding[188] allows legislators, whose perspectives are already necessarily majoritarian, to enact laws impinging upon the rights of individuals without seriously considering the constitutional ramifications of such regulations. Concomitantly, members of the judiciary may rely on Justice Kennedy's language in *Rock Against Racism* to ratify clearly unconstitutional laws under the guise of jurisprudential conservatism. As the only branch of the federal government insulated from repercussion at the polls, the judiciary remains the sole protector of fundamental individual rights. When it voluntarily abdicates its constitutional duties in such a summary fashion, the bench removes an implicit constitutional safeguard against the tyranny of the majority.

While the *Fox* Court may have proffered its analysis as a necessary clarification of the somewhat ambiguous, and overly-permissive language employed in *Rock Against Racism*,[189] the language of *Rock Against Racism* provides an avenue for further abrogation of paramount first amendment interests.

---

[187] *See, e.g.*, Carew-Reid v. Metropolitan Transp. Auth., 903 F.2d 914, 919 (2d Cir. 1990) (An "amplifier ban constitutes a reasonable time, place[,] or manner restriction as a matter of law.").

[188] The *Rock Against Racism* Court held that "the requirement of narrow tailoring is satisfied 'so long as the . . . regulation promotes a substantial government interest that would be achieved less effectively absent the regulation.'" Ward v. Rock Against Racism, 491 U.S. 781, 799 (1989) (quoting United States v. Albertini, 472 U.S. 675, 689 (1985)).

[189] *See* Fox v. Board of Trustees of S.U.N.Y., 492 U.S. 469, 478 & n.3 (1989), where the Court discusses, in dicta, the narrow tailoring requirement as it has evolved in the context of time, place, or manner restrictions on protected speech in public forums. In *Fox*, Justice Scalia articulated the standard for evaluating government restrictions on commercial speech as requiring the state to demonstrate a reasonable nexus between the legislative objectives and the means chosen to achieve them. *Id.* at 480 (quoting In re R.J.M., 455 U.S. 191, 203 (1982)).