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Ward v. Rock against Racism: Reasonable Regulations and State Sponsored Sound

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Notes and Comments

Ward v. Rock Against Racism: Reasonable Regulations and State Sponsored Sound†

I. Introduction

This Note examines the nature and extent of free speech on publicly owned property in light of a recent controversial decision by the United States Supreme Court. In *Ward v. Rock Against Racism*,[1] the Court diminished the protection of the first amendment by relaxing the standards used to judge the constitutionality of time, place, or manner restrictions[2] on protected speech in a public forum.[3] While the majority discusses the case in terms of whether and to what extent municipalities may regulate "noise" in a public park, the controversy actually centers on the proper analysis to be used to determine when such regulations impermissibly infringe on the constitutional right of free speech. "Unfortunately, the majority plays to our shared impatience with loud noise to obscure the damage that it does to our First Amendment rights."[4]

At issue in the case was the constitutionality of regulations issued by the New York City Department of Parks and Recreation which vested in city employees exclusive control over the sound produced by speakers and musicians using public park

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† This fledgling attempt at scholarly writing is dedicated to Justice William J. Brennan, Jr. His words, the ideals he aspired to, and his ceaseless struggle for individual rights inspired me to enter law school and kept me there.

1. 109 S. Ct. 2746 (1989).

2. *See infra* notes 16-19 and accompanying text.

3. All parties to the case agreed that the area in Central Park involved in the dispute was a traditional public forum. Rock Against Racism v. Ward, 658 F. Supp. 1346, 1350 (S.D.N.Y. 1987). *See infra* notes 20-38 and accompanying text.

4. Ward v. Rock Against Racism, 109 S. Ct. 2746, 2760 (1989) (Marshall, J., dissenting).

land.[5] Upholding the regulations as a valid exercise of police power, the Court expressly repudiated the requirement that municipalities which restrict the time, place, or manner of protected speech in a public forum seek out the least intrusive manner by which to accomplish their goals.[6] Moreover, even though these regulations "gave public officials the power to deny use of a forum in advance of actual expression,"[7] the Court declined to discuss the obvious prior restraint issue. Such an omission has broad constitutional significance.

Part II of this Note examines the evolution of the public forum doctrine and resulting standards of judicial review that are applied to governmental restrictions on the time, place, or manner of constitutionally protected free speech. This section also discusses the doctrine of prior restraint and its application to the public forum. The facts, procedural history, and underlying reasoning of the majority and dissenting opinions are discussed in Part III, while Part IV examines the implications and potential repercussions of the decision on first amendment jurisprudence. This Note concludes, in Part V, that the balance the Supreme Court has historically attempted to maintain between the individual's right to free speech and the state's right to preserve and maintain an orderly society has been substantially al-

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5. The regulations regarding sound amplification provided as follows:
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 assure appropriate sound quality balance with respect for nearby residential neighbors and the mayorally decreed quiet zone of Sheep Meadow, all sponsors may use only the Department of Parks and Recreation sound system. DEPARTMENT OF PARKS AND RECREATION IS TO BE THE SOLE AND ONLY PROVIDER OF SOUND AMPLIFICATION, INCLUDING THOUGH NOT LIMITED TO AMPLIFIERS, SPEAKERS, MONITORS, MICROPHONES, AND PROCESSORS.

Clarity of sound results from a combination of amplification equipment and a sound technician's familiarity and proficiency with that system. Department of Parks and Recreation will employ a professional sound technician [who] will be fully versed in sound bounce patterns, daily air currents, and sound skipping within the Park. The sound technician must also consider the Bandshell's proximity to Sheep Meadow, activities at Bethesda Terrace, and the New York City Department of Environmental Protection recommendations.

109 S. Ct. at 2751 n.2.

6. *Id.* at 2757.

7. Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 553 (1975).

tered by this decision.

II. Background

A. *Permissible Limitations on Free Speech: There Are No Guarantees*

The first amendment to the United States Constitution, which applies to the states through the fourteenth amendment,[8] provides that "Congress shall make no law . . . abridging the freedom of speech . . . or the right of the people peaceably to assemble . . . ."[9] However, in an effort to strike and maintain the delicate balance between individual rights and state police powers, these constitutional protections have been limited by the Supreme Court.[10] Although the first amendment "rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public,"[11] the individual's right to free speech must be balanced against the state's interest in preserving order.[12] Even as early as the beginning of this century, the Supreme Court recognized that it is in society's best interest to prohibit an individual from yelling "fire" in a crowded theater.[13]

Our society places great importance on freedom of expression because of the potential for excessive governmental interference.[14] Thus, a specialized body of law has developed around the regulation of speech in public places.[15] While a government may not flatly prohibit speech in public places,[16] it may regulate

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8. *See* Douglas v. City of Jeannette, 319 U.S. 157, 162 (1943).

9. U.S. CONST. amend. I.

10. *See* Elrod v. Burns, 427 U.S. 347, 360 (1976). The terms "abridging" and "freedom of speech" require interpretation; limits on expression "for appropriate reasons" may be permitted. *Id.*

11. Associated Press v. United States, 326 U.S. 1, 20 (1945).

12. *See generally* Stone, *Fora Americana: Speech in Public Places*, 1974 SUP. CT. REV. 233.

13. Schenck v. United States, 249 U.S. 47, 52 (1919).

14. *See, e.g.*, Southeast Promotions, Ltd. v. Conrad, 420 U.S. 546 (1975). "[T]he danger of censorship and of abridgement of our precious First Amendment freedoms is too great where officials have unbridled discretion . . . ." *Id.* at 553.

15. For a thorough discussion, see Kalven, *The Concept of the Public Forum: Cox v. Louisiana*, 1965 SUP. CT. REV. 1.

16. Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983) (the government may not prohibit all communicative activity in places which by tradition or

the time, place, or manner of communicative activity to protect the state's interest in maintaining order.[17] Time, place, or manner restrictions involve government's power to regulate what are otherwise constitutionally protected activities. For example, a municipality may

> constitutionally regulate the number of residential picketers, the hours during which a residential picket may take place, or the noise level of such a picket . . . . But to say that picketing may be substantially regulated is not to say that it may be prohibited in its entirety . . . .
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> . . . .
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> A valid time, place, or manner law neutrally regulates speech only to the extent necessary to achieve a substantial governmental interest, and no further.[18]

The rationale for this limitation is that "[c]ivil liberties, as guaranteed by the Constitution, imply the existence of an organized society maintaining public order without which liberty itself would be lost in the excesses of unrestrained abuses."[19]

B. *The Public Forum Doctrine*

The public forum doctrine is of recent constitutional vintage.[20] Prior to its formulation, municipalities were free to prohibit citizens from using public property for public address in spite of the express language of the Constitution.[21] For example, in *Davis v. Massachusetts*,[22] the Supreme Court upheld the constitutionality of a city ordinance disallowing any public address

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government fiat have been devoted to assembly and debate).

17. Cox v. New Hampshire, 312 U.S. 569 (1941) (a municipality may impose regulations to assure the safety and convenience of people using the public highway).

18. Frisby v. Schultz, 108 S. Ct. 2495, 2507-08 (1988) (Brennan, J., dissenting). For a general discussion of time, place, or manner restrictions, see Baker, *Unreasoned Reasonableness: Mandatory Parade Permits and Time, Place, and Manner Regulations*, 78 NW. U.L. REV. 937 (1983).

19. *Cox*, 312 U.S. at 574.

20. *See generally* Stone, *supra* note 12.

21. *See* Davis v. Massachusetts, 167 U.S. 43 (1897).

22. *Davis* involved a Boston city ordinance which prohibited public address on public property without a permit. Holmes, then Chief Justice for the Supreme Judicial Court of Massachusetts, writing for the majority, held that an absolute ban on the use of public parks for speech purposes would be permissible. 162 Mass. 510, 511 (1895). On appeal, the Supreme Court adopted Holmes' view. *See infra* note 23 and accompanying text.

on publicly owned property without a permit. The Court likened the prohibition of speech in a public place to a private person restricting speech in his home, and held that such restrictions were permissible.[23]

The right of government to regulate the use of public property was reexamined by Justice Roberts in *Hague v. CIO*,[24] the decision in which the public forum doctrine was first articulated.[25] This case also involved a constitutional challenge to an ordinance which forbade all public meetings in streets and public places.[26] Striking down the ordinance, Justice Roberts provided a foundation which has been used ever since to balance the rights of individuals against the state's interest in maintaining peace and order. In this memorable and often quoted opinion,[27] Justice Roberts said:

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

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23. 167 U.S. at 47. The Court borrowed Holmes' language: "[T]o forbid public speaking in a highway or public park is no more an infringment of the rights of a member of the public than for the owner of a private house to forbid it in his house." *Id.* (quoting Davis v. Massachusetts, 162 Mass. 510, 511 (1895)).

24. 307 U.S. 496 (1939) (an ordinance forbidding all public meetings in public places was invalidated). *See also* Stone, *supra* note 12, at 238. Professor Stone explains that Justice Roberts based his decision on the common law property theories of adverse possession and public easements, rather than relying on constitutional principles. *Id.*

25. The term "public forum" was coined by Kalven, *supra* note 15.

> [I]n an open democratic society, the streets, the parks and other public places are . . . an important facility for public discussion and political process. They are in brief a public forum that the citizen can commandeer; the generosity and empathy with which such facilities are made available is an index of freedom.

Id. at 11-12.

26. *Hague*, 307 U.S. at 502.

27. This opinion did not command a majority of the Court. Justice Roberts was joined only by Justice Black; Chief Justice Hughes concurred in part; Justices Stone and Reed concurred in the result; Justices McReynolds and Butler dissented; and Justices Frankfurter and Douglas did not participate.

> convenience, and in consonance with peace and good order; but it must not, in the guise of regulation, be abridged or denied.[28]

Justice Roberts' recognition of a protected right of free discourse on public property has formed the basis of the modern public forum doctrine.[29] It has also resulted in separate but related branches of jurisprudence which employ different standards for judicial review of governmental restrictions of speech on public property.[30]

Modern public forum doctrine includes three separate categories of publicly owned property with different limitations on the extent to which a state may regulate speech.[31] Traditional public property includes public places such as streets,[32] sidewalks,[33] and parks.[34] Nontraditional public property includes public places designated by the government for expressive activities by the public including libraries[35] and government offices.[36] Finally, nonpublic property includes government properties such as military bases[37] and jailhouses,[38] which are not public forums by tradition or designation. The characterization of a particular place as a traditional, nontraditional, or nonpublic forum deter-

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28. *Hague*, 307 U.S. at 515-16.

29. *See* Stone, *supra* note 12, at 239.

30. *See infra* notes 39-59 and accompanying text.

31. *See* Stone, *supra* note 12, at 239-56. Justice Brennan, for one, has argued that these categories should not be determinative because they "disregard[] the First Amendment's central proscription against censorship . . . in any forum, public or nonpublic." Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 57 (1983) (Brennan, J. dissenting).

32. Schneider v. State (Town of Irvington), 308 U.S. 147 (1939) (an ordinance prohibiting a person from handing out leaflets on a public street without a permit was invalid).

33. United States v. Grace, 461 U.S. 171 (1983) (an ordinance prohibiting display of flags or banners on the public sidewalk surrounding the United States Supreme Court building was unconstitutional).

34. Hague v. CIO, 307 U.S. 496 (1939). *See generally*, Wolin v. Port of New York Auth., 392 F.2d 83, 90 (2d Cir. 1968), *cert. denied*, 392 U.S. 940 (1968) (setting forth the criteria used to determine whether a particular place is a public forum).

35. Brown v. Louisiana, 383 U.S. 131 (1966) (a breach-of-the-peace statute was unconstitutionally applied to five blacks who engaged in a sit-in to protest a library's segregation policy).

36. *See* Stone, *supra* note 12, at 245.

37. United States v. Albertini, 472 U.S. 675 (1985) (the government's interest in assuring the security of military installations permits exclusion of the public).

38. Adderley v. Florida, 385 U.S. 39 (1966) (the arrest of demonstrators on the grounds of a county jail was upheld).

mines the standard of judicial review applied by the Court to regulations affecting speech.

C. *Judicial Review of Public Forum Regulations*

Generally, while government action which infringes upon freedom of expression in public forums is limited,[39] government does have a right to regulate expressive conduct which has a harmful effect on others.[40] A distinction has been drawn between pure speech, or actual discourse, and symbolic speech which involves the communication of ideas by conduct.[41] For first amendment purposes, "speech" has been broadly defined to include both political and ideological discourse,[42] and symbolic speech such as picketing,[43] marching,[44] wearing armbands,[45] and musical and artistic expression.[46] Excessive noise on public lands has been held to be the subject of legitimate regulation by municipalities.[47]

However, depending upon whether the area involved is categorized as a traditional, nontraditional, or nonpublic forum, the level of scrutiny applied by a court to determine the constitutionality of restrictive government regulations will differ.[48] As explained in a recent Supreme Court decision:

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39. United States v. Grace, 461 U.S. 171, 177 (1983).

40. Members of the City Council v. Taxpayers for Vincent, 466 U.S. 789, 810 (1984) (an ordinance prohibiting the posting of all signs on public property was upheld because it protected citizens from the "evil of visual blight").

41. *See* Cox v. Louisiana, 379 U.S. 536, 555 (1965).

42. Schad v. Borough of Mount Ephraim, 452 U.S. 61, 65 (1981) (an ordinance prohibiting live entertainment, including nude dancing, was found unconstitutional under the first amendment).

43. Grayned v. City of Rockford, 408 U.S. 104 (1972) (an ordinance prohibiting picketing near a school was unconstitutional).

44. Shuttlesworth v. City of Birmingham, 394 U.S. 147 (1969) (an ordinance prohibiting parades and demonstrations without a permit was unconstitutional without narrow, objective, and definite standards to guide the licensing authority).

45. Tinker v. Des Moines Independent Community School District, 393 U.S. 503 (1969) (students could not be prohibited from wearing black armbands in protest of the Vietnam War).

46. Cinevision Corp. v. City of Burbank, 745 F.2d 560 (9th Cir. 1984) (a contract between a city and concert promoter which allowed the city to cancel any show featuring "hard rock" because it had the potential for creating a public nuisance violated the first amendment), *cert. denied*, 471 U.S. 1054 (1985).

47. *Grayned*, 408 U.S. at 116.

48. Board of Airport Comm'rs v. Jews for Jesus, Inc., 482 U.S. 569, 572-73 (1987).

> In balancing the government's interest in limiting the use of its property against the interests of those who wish to use the property for expressive activity . . . proper First Amendment analysis differs depending on . . . [the] category. In a traditional public forum or a public forum by government designation, we have held that First Amendment protections are subject to heightened scrutiny . . . . [But] access to a nonpublic forum may be restricted by government regulation . . . [that] 'is reasonable and not an effort to suppress expression merely because officials oppose the speaker's view.'[49]

It follows from this analysis that if a court concludes that a particular place is a public forum, it will apply heightened scrutiny to government regulations restricting freedom of expression whether the forum is categorized as traditional or nontraditional.[50] Conversely, if a court decides that a particular place is a nonpublic forum, it will apply a less stringent standard of review, and will uphold reasonable government regulations. For example, in *Schneider v. State* (Town of Irvington),[51] an ordinance prohibiting a person from handing out leaflets on a public street was found to be unconstitutional even though it was the most effective way for the municipality to prevent littering. The Court held that the fundamental right of free speech required an astute examination of the effect of any regulation prohibiting the right to speak, write, print, or distribute information or opinion.[52] The Court noted that the municipality could lawfully regulate the conduct of those using the streets by enforcing traffic regulations, or by enacting laws against littering.[53] Con-

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49. *Id.* (quoting Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45-46 (1983).

50. *See generally*, Stone, *Content-Neutral Restrictions*, 54 U. CHI. L. REV. 46 (1987). Professor Stone analyzes a number of cases involving content-neutral restrictions and the varying levels of scrutiny actually applied to determine their constitutionality. *Id.* at 48-54. The Court generally tests content-neutral restrictions using a balancing approach. "[T]he greater the interference with the marketplace of ideas, the greater the burden on government to justify the restriction." *Id.* at 58. However, the Court's analysis is often ambiguous and result-oriented. "When the challenged restriction has a relatively severe effect, the Court invokes strict scrutiny. When the challenged restriction has a significant but not severe effect, the Court employs intermediate scrutiny. And when the restriction has a relatively modest effect, the Court applies deferential scrutiny." *Id.*

51. 308 U.S. 147 (1939).

52. *Id.* at 161.

53. *Id.* at 160-61.

versely, in *United States v. Albertini*,[54] the Court found that the government's interest in assuring the security of a military installation permitted exclusion of the public.[55]

In order for restrictions on the time, place, or manner of free speech in traditional public forums to be upheld, they must be content-neutral,[56] narrowly tailored to serve a significant government interest,[57] and leave alternative means for communication of the information.[58] In making this determination, the "crucial question is whether the manner of expression is basically incompatible with the normal activity of a particular place at a particular time."[59]

D. *Free Speech and Prior Restraint*

Prior restraint occurs when an official restriction is imposed on any form of expression in advance of actual publication.[60] Rather than imposing a penalty after the communication takes place, a system of prior restraint seeks to prevent communication from occurring at all.[61] It paints with a broad brush, subjecting all expression, the "innocent and borderline as well as the offensive," to government scrutiny and approval.[62]

The doctrine of prior restraint has its roots in sixteenth century English licensing systems which required that no written material could be published without prior government ap-

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54. 474 U.S. 675 (1985).

55. *Id.* at 689.

56. Unlike content-based restrictions, which limit communication because of the message conveyed, content-neutral restrictions limit expression without regard to the content or communicative impact of the message. Stone, *supra* note 50 at 47-48.

57. Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983). *See also* Boos v. Berry, 485 U.S. 312, 329 (1988) (a statute is not narrowly tailored when a less restrictive alternative is available); Frisby v. Schultz, 108 S. Ct. 2495, 2502, (1988) (a statute is not narrowly tailored when it targets and eliminates more than the exact source of evil it seeks to remedy).

58. Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. at 45. *See also* Frisby v. Schultz, 108 S. Ct. 2495 (1988) (an ordinance which prohibited picketing in front of a particular individual's residence was upheld because it did not prohibit picketing in neighborhoods generally, door-to-door proselytizing and distribution of literature, or contacting residents by phone or mail).

59. Grayned v. City of Rockford, 408 U.S. 104, 116 (1972).

60. Emerson, *The Doctrine of Prior Restraint*, 20 LAW & CONTEMP. PROBS. 648 (1955).

61. *Id.*

62. *Id.* at 656.

proval.[63] This system expired at the end of the seventeenth century as the concept of freedom of the press gradually assumed the status of a common law right.[64] The underlying theory of the doctrine was well articulated by Blackstone: "The liberty of the press is essential to the nature of a free state; but this consists in laying no previous restraints upon publications, and not in freedom from censure for criminal matter when published."[65]

Although the doctrine of prior restraint most clearly applies to the suppression of written material,[66] it has evolved to encompass the infringement of any first amendment right.[67] "[P]rior restraints on speech . . . are the most serious and the least tolerable infringement on First Amendment rights."[68] Because it is considered a more drastic infringement on speech than subsequent punishment, there is a strong presumption against the constitutional validity of any prior restraint on expression.[69]

Today, the doctrine continues to rest on the theory that prior restraint is unnecessarily stifling and more restrictive than subsequent punishment.[70] It focuses on the method of the restraint instead of the substance of the speech or conduct.[71] For example, government may impose restrictions relating to obscenity, but it may not do so by screening all books and

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63. *Id.* at 650-52.

64. *Id.* Emerson maintains that the demise of the licensing system occurred, not because of opposition to any infringement on freedom of expression, but because the system had become unwieldy. He quotes Lord Macaulay: "The Licensing Act [of 1662] is condemned, not as a thing essentially evil, but on account of the petty grievances . . . incidental to it." *Id.* at 651

65. 4 W. BLACKSTONE, COMMENTARIES, 814 (1892), *quoted in* Emerson, *supra* note 53, at 651.

66. *See* Near v. Minnesota, 283 U.S. 697 (1931) (a statute which allowed courts to enjoin the dissemination of future issues of a newspaper because its past issues had been found offensive was an unconstitutional prior restraint).

67. State v. I, A Woman Part II, 53 Wis.2d 102, 112-13, 191 N.W.2d 897, 902-03 (1971).

68. Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 559 (1976). Justice Brennan recognized that: "[T]he First Amendment . . . accords greater protection against prior restraints than it does against subsequent punishment for a particular speech . . . ." *Id.* at 589 (Brennan, J., concurring).

69. Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 70 (1963). "It is characteristic of the freedoms of expression in general that they are vulnerable to gravely damaging yet barely visible encroachments." *Id.* at 66.

70. Barnett, *The Puzzle of Prior Restraint*, 29 STAN. L. REV. 539, 543 (1977).

71. *Id.*

magazines in advance of their publication.[72] To censor magazines in this way is a prior restraint. "In other words, restrictions which could be validly imposed when enforced by subsequent punishment are, nevertheless, forbidden if attempted by prior restraint."[73] This is so because "a free society prefers to punish the few who abuse rights of speech *after* they break the law than to throttle them and all others beforehand."[74]

Because of the necessity to regulate in the public interest, the prior restraint doctrine is less rigorous when applied to first amendment protections other than pure speech in a public forum context.[75] Such regulations often take the form of permit or license requirements mandated by local ordinance.[76] Among the clearest forms of prior restraint are arbitrarily issued public assembly permits.[77] To prevent officials from having unbridled discretion over a forum's use, permits or licenses regulating access to public forums, like parks, must be administered "under procedural safeguards designed to obviate the dangers of a censorship system."[78] Such procedures must delineate narrow, objec-

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72. *See Bantam Books*, 372 U.S. 58 (holding a system of administrative procedures resulting in informal censorship violates the constitution).

73. Emerson, *supra* note 60, at 648.

74. Southeast Promotions, Ltd. v. Conrad, 420 U.S. 546, 559 (1975) (emphasis in original) (denial of a municipal facility for the showing of the controversial rock musical "Hair" because officials felt the provision was not in the best interest of the community was an unconstitutional prior restraint).

75. Barnett, *supra* note 70, at 544-45. *See also* Walker v. City of Birmingham, 388 U.S. 307 (1967). In *Walker*, the Court explicitly recognized the heightened protection given to actual discourse. The Court noted:

> We have consistently recognized the strong interest of state and local governments in regulating the use of their streets and other public places . . . . 'We emphatically reject the notion . . . that the First and Fourteenth Amendments afford the same kind of freedom to those who would communicate ideas by conduct such as patrolling, marching, and picketing on streets and highways, as these amendments afford to those who communicate ideas by pure speech.'

Id. at 315-16 (quoting Cox v. Louisiana, 379 U.S. 536, 555 (1965)).

76. For a discussion of the deleterious effects of requiring licenses and permits, see Baker, *supra* note 18. Professor Baker argues that permit requirements effectively make spontaneous demonstrations unlawful. Furthermore, they force would-be protesters to "symbolically bow" to the very authorities they believe are illegitimate. Baker's strongest criticism, however, is that local authorities often use permit requirements as a tool for harassment. *Id.* at 1013-18.

77. Emerson, *supra* note 60, at 655.

78. Freedman v. Maryland, 380 U.S. 51, 58 (1965). *See also* Emerson, *supra* note 60. Professor Emerson argues that a system of prior restraint allows government to rule against free expression "by a simple stroke of the pen." *Id.* at 657. In addition, prior

tive, and definite standards.[79]

The burden of proving that the material sought to be restrained is not constitutionally protected rests with the censor.[80] To avoid constitutional infirmity, any restraint prior to judicial review must be brief and only for the purpose of preserving the status quo.[81] Finally, a prompt final judicial determination must be assured.[82] For example, in *Freedman v. Maryland*,[83] a statute which required submission of all motion pictures for prior approval was struck down because it did not contain adequate safeguards to protect against unwarranted censorship.[84] The statute required those denied exhibition of a film to initiate judicial action, and to persuade the court that the film was protected by the first amendment.[85] Furthermore, the statute provided no assurance for prompt judicial review, and exhibition was suspended during this time.[86] Thus, it had a chilling effect on speech.[87]

III. *Ward v. Rock Against Racism*

A. *The Facts*

Ward v. Rock Against Racism arose from a disagreement between Rock Against Racism (RAR), an unincorporated association dedicated to promoting antiracist views,[88] and the City of New York (City).[89] RAR had sponsored a political rally/rock concert at the Naumberg Bandshell (Bandshell) in New York

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restraint increases the potential for discrimination and other abuses. According to Professor Emerson: "The long history of prior restraint reveals over and over again that the personal and institutional forces inherent in the system nearly always end in a stupid, unnecessary, and extreme suppression." *Id.* at 659.

79. Shuttlesworth v. City of Birmingham, 394 U.S. 147, 150-51 (1969). *See also* Southeast Promotions, Ltd. v. Conrad, 420 U.S. 546, 553 (1975).

80. *Freedman*, 380 U.S. at 58.

81. *Id.* at 59.

82. *Id.*

83. 380 U.S. 51 (1965).

84. *Id.* at 59.

85. *Id.* at 59-60.

86. *Id.* at 60.

87. *Id.* at 61.

88. Appendix to Petition for Certiorari at 3, Ward v. Rock Against Racism, 109 S. Ct. 2746 (1989) (No. 88-226).

89. Rock Against Racism v. Ward, 658 F. Supp. 1346, 1349 (S.D.N.Y. 1987), *aff'd in part, rev'd in part*, 848 F.2d 367 (2d Cir. 1988), *rev'd*, 109 S. Ct. 2746 (1989).

City's Central Park every year since 1979.[90] The relationship between the City and RAR throughout their association can fairly be described as strained, each accusing the other of irresponsible, uncooperative behavior.[91]

RAR commenced litigation against the City after its request to use the Bandshell for its 1985 rally/concert was denied.[92] After extensive negotiations, a settlement was reached, and RAR was issued a permit.[93] The following year RAR received formal guidelines several weeks prior to its rally/concert which outlined duties and responsibilities of all sponsors of events in the park. These guidelines covered a wide range of topics including permits, hours and dates of use, insurance, and sound amplification.[94]

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90. Ward v. Rock Against Racism, 109 S. Ct. 2746, 2750 (1989). These demonstrations consisted of political speeches and music. Joint Appendix at 14, Ward v. Rock Against Racism, 109 S. Ct. 2746 (1989) (No. 88-226) [hereinafter Joint Appendix].

91. RAR offered testimony indicating it had experienced difficulty almost every year, either in obtaining a permit for the Bandshell or in completing events without interference from park officials or police. For example, a witness testified that in 1983 the Parks Department wanted to know the content of their show because it was scheduled to take place on Mother's Day. Brief for Respondent at 4-5, Ward v. Rock Against Racism, 109 S. Ct. 2746 (1989) (No. 88-226) [hereinafter Brief for Respondent]. In the same year, police surrounded RAR's sound technician during the performance of a band whose name expressed antipathy toward police and turned the volume knob down in a jarring fashion. Police ultimately "pulled the plug" on the event because of excessive noise although no meters were used to determine the decibel level. *Id.* at 5. A witness testified that in 1985 he overheard two police officers ridiculing a Native American folk singer. *Id.* at 2 n.2. In the same year, police threatened to pull the plug if the volume was not turned down even though no complaints were received about the RAR event. *Id.* at 8. In 1986, RAR was informed by the City that the choice of performers was to be left to the newly-appointed Program Director for the Parks Department. *Id.* at 5.

The Deputy Commissioner of Operations for the Department of Parks and Recreation characterized RAR in a court proceeding as "dishonorable." Joint Appendix, *supra* note 90, at 341. He felt that negotiations with the group were difficult and that RAR violated the terms of their agreements with the City. *Id.* According to the Deputy Commissioner, the event inevitably extended past the time allotted and included vehicles for which permits were not obtained. Furthermore, summonses issued were never paid. Brief for Petitioners at 12, Ward v. Rock Against Racism, 109 S. Ct. 2746 (1989) (No. 88-226) [hereinafter Brief for Petitioner]. Volume of sound was an on-going problem. The Deputy Commissioner indicated that the regulations were enacted after the Parks Department had received complaints for several years about the level of noise from the concerts. *Id.* at 11.

92. *Ward*, 658 F. Supp. at 1349.

93. *Id.*

94. The Guidelines set forth the New York City Department of Parks' policies on twelve subjects: 1. Permits; 2. Hours and dates of use; 3. Attendance; 4. Sound Amplifi-

The Sound Amplification Guidelines (Guidelines) formed the heart of the appeal ultimately heard in the Supreme Court.[95] They provided in relevant part that the Department of Parks and Recreation would be the "sole and only provider of sound amplification" equipment and would employ its own professional sound technician to operate it.[96] This city-employed sound technician was vested with exclusive control over the mixing board which controlled the balance of various sounds produced on stage, special effects desired by performers, and the volume of sound. In short, the City's sound technician had ultimate control over the quality as well as the volume of sound produced at RAR's event.[97]

The City claimed that the regulations were promulgated in response to complaints by other park users and nearby residents of excessive noise.[98] The City also wanted to ensure consistent quality sound at all Bandshell events.[99] RAR, citing numerous past difficulties in obtaining permits and interference by park officials and police, claimed that the regulations violated their first amendment right to freedom of expression.[100] Specifically, RAR claimed that the regulations gave the City unfettered control over the sound quality, tone, and mix produced by RAR's musical guests. RAR claimed that its right to exercise control

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cation; 5. Insurance; 6. Vehicles; 7. Concession of Goods; 8. Revenue; 9. Safety; 10. Portable Toilets; 11. Cleanup; and 12. Evaluation. Brief for Respondent, *supra* note 91, at 2.

95. *See supra* note 5.

96. Joint Appendix, *supra* note 90, at 375-76.

97. Ward v. Rock Against Racism, 109 S. Ct. 2746, 2751 n.1 (1989).

> The amplified sound heard at a rock concert consists of two components, volume and mix. Sound produced by the various instruments and performers on stage is picked up by microphones and fed into a central mixing board, where it is combined into one signal and then amplified through speakers to the audience. A sound technician is at the mixing board to select the appropriate mix, or balance, of the various sounds produced on stage, and to add other effects as desired by the performers. In addition to controlling the sound mix, the sound technician also controls the overall volume of sound reaching the audience. During the course of a performance, the sound technician is continually manipulating various controls on the mixing board to provide the desired sound mix and volume. The sound technician thus plays an important role in determining the quality of the amplified sound that reaches the audience.

Id.

98. *Id.* at 2750.

99. Rock Against Racism v. Ward, 848 F.2d 367, 372 (2d Cir. 1988).

100. *See supra* note 91.

over these factors was essential to artistic expression.[101]

B. *The District Court Decision*

In April 1986, RAR filed an application in the Southern District of New York for an order to show cause why the Guidelines should not be held to violate the first and fourteenth amendments.[102] The district court ruled that, absent a significant government interest, the provisions relating to sound amplification were unenforceable, and it granted a preliminary injunction.[103] The court found that protection of musical expression under the first amendment extended "not only [to] the words and songs presented," but also to the sound "emanat[ing] from the amplification system."[104] The court recognized that music could be "substantially affected by the amplification itself and who controls it."[105]

In November 1986, RAR filed an amended complaint seeking final declaration that the guidelines were unconstitutional, and requesting compensatory and punitive damages.[106] The dis-

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101. Brief for Respondent, *supra* note 91, at 12. *See supra* note 97 (discussing the importance of mix and volume to artistic expression).

102. Rock Against Racism v. Ward, 636 F. Supp. 178, 179 (S.D.N.Y. 1986). The 1986 concert was scheduled for May 4. The Guidelines were issued on March 21, 1986 but not received by RAR until the end of the month. After receipt, RAR requested the City to waive the Guidelines for them that year. On April 9, the attorney for RAR was informed that the Guidelines would be enforced. He subsequently left the state to conduct a trial in Arizona. RAR filed application to the district court on April 23. The court required the defendant to respond on May 1 to allow time to confront the constitutional issues. Oral argument was heard and the decision rendered that same day. In the opinion, Judge Haight stated that "[t]he timing [did] not permit [for] extended analysis or discussion." *Id.* Furthermore, because the record consisted only of opposing affidavits, RAR was entitled only to relief appearing "as a matter of law from the face of the papers." *Id.*

103. *Id.* at 179. Specifically, the court found that requiring RAR to "abandon its own system, which it used without complaint by the City last year . . . [to] use different equipment whose knobs and dials would be twisted by the hands of strangers[,]" amounted to prospective constraint. "There is no reason to assume . . . [RAR] will [breach the park regulations which limit sound] this year." *Id.*

104. *Id.*

105. *Id.*

106. Rock Against Racism v. Ward, 658 F. Supp. 1346 (S.D.N.Y. 1987). RAR challenged the constitutionality of seven of the twelve areas addressed by the Guidelines. The areas challenged were: permits, hours and dates of use, attendance, sound amplification, insurance, vehicles, and revenue. *Id.* at 1350. An additional subject area, distribution of literature, was removed by the Parks Department after their attorney advised them that it represented an unconstitutional burden on Bandshell users' first amend-

trict court upheld the constitutionality of the Guidelines.[107] The court acknowledged that RAR had a first amendment right to use sound equipment capable of producing the quality of sound it desired at a level "necessary to reach throughout the audience area."[108] The court, nonetheless, held that RAR's interest in using its own equipment and engineer was too attenuated for constitutional protection.[109]

C. *The Court of Appeals Decision*

The Court of Appeals for the Second Circuit unanimously reversed the district court's decision.[110] The court concluded that the City failed to show its regulation did not "unnecessarily intrude on the right of artistic expression."[111] While sustaining the City's right to limit the volume of performances broadcast from the Bandshell, the court pointed to less restrictive alternatives which would not penalize those who did not abuse noise levels.[112] Because the Guidelines were not the least restrictive

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ment rights. *Id.* at 1349 n.3.

107. *Id.* at 1353. Of the remaining areas challenged, the court ruled that several were unconstitutional. The fee the City sought to charge for use of its sound system was found unconstitutional because it exceeded the cost incurred by the City to provide it. *Id.* at 1355. The insurance portion of the regulations were held unconstitutional because it vested unfair discretion in Parks Department administrators. This requirement simply stated that insurance could be required; it did not state how much, what type, or when it might be required. *Id.* at 1356. The attendance limitation of 3,000 spectators impinged RAR's first amendment rights because it limited RAR's "right to reach willing listeners" and was not narrowly tailored since larger crowds had attended Bandshell events. *Id.* at 1358. The prohibition against solicitation of funds violated the first amendment. *Id.* at 1359.

108. *Id.* at 1353.

109. *Id.*

110. Rock Against Racism v. Ward, 848 F.2d 367, 369 (2d Cir. 1988).

111. *Id.* at 371.

112. *Id.* The court noted that the City had failed to show that the use of a device to limit sound output was not technologically feasible. *Id.* Other alternatives included monitoring noise levels and directing sponsors at the control board to adjust the controls. In the event a sponsor was uncooperative, the City always had the alternative to "pull the plug." Likewise, city technicians could be allowed to control only excess volume, or install volume limiting devices and place them in possession or control of city employees. *Id.* The district court noted that even when a city employee operated the mixing board to control volume, another city official had to actually monitor the noise level and instruct the technician as necessary to keep the volume within accepted levels. *Rock Against Racism*, 658 F. Supp. at 1352. The dissent in the Supreme Court decision noted that the City had an ordinance restricting noise already on the books, which it chose not

means of controlling the sound level of public performances, the court found them constitutionally impermissible.[113]

D. *The Supreme Court Decision*

On petition by the City of New York, the Supreme Court granted certiorari "to resolve the important First Amendment issues presented."[114] The Supreme Court reversed the decision of the court of appeals and held that the Guidelines were a valid exercise of a municipality's police powers.[115]

1. *The Majority Opinion*

Justice Kennedy delivered the opinion of the Court,[116] which held that New York City's Sound Amplification Guidelines were valid under the first amendment as a reasonable time, place, or manner regulation.[117] Since the Guidelines were administered to all users of the Bandshell without regard to the message being conveyed, the Court found they were content-neutral.[118] The Court also found that the regulations served the City's legitimate interest in limiting loud noise in public places.[119] Moreover, while the Court conceded that the potential audience for respondent's speech was reduced as a direct result of the regulation, it found that the avenue of communication allowed was adequate because the regulations did not impose an outright ban on a manner or type of expression.[120]

In its application of that part of the test requiring the government regulation to be narrowly tailored,[121] the Court con-

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to enforce. Ward v. Rock Against Racism, 109 S. Ct. 2746, 2762 (1989) (Marshall, J., dissenting). It also pointed out that to control volume at similar events, the National Park Service monitors sound levels on the perimeter of an event, communicates with event sponsors, and, if necessary, turns off the power. *Id.* at 2756 n.5.

113. *Rock Against Racism v. Ward*, 848 F.2d at 372.

114. *Ward*, 109 S. Ct. at 2750.

115. *Id.* at 2760.

116. Chief Justice Rehnquist, and Justices White, O'Connor, and Scalia joined in the majority opinion. Justice Blackmun concurred in the judgment, while Justices Marshall, Brennan, and Stevens dissented.

117. *Ward*, 109 S. Ct. at 2760.

118. *Id.* at 2754.

119. *Id.* at 2756.

120. *Id.* at 2760.

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

cluded that the City was not required to consider a less intrusive alternative.[122] Indeed, the Court declared that a less restrictive alternative analysis has never been part of the inquiry in these instances.[123] Rather, the Court found that the requirement of narrow tailoring is satisfied as long as the City's interest would be "achieved less effectively absent the regulation."[124] The majority opinion also strongly intimated that the courts should defer to a municipality's own reasonable determination as to how its interests could best be served.[125] The Guidelines were not substantially broader than necessary, even though the sound mix was placed entirely in the hands of the City's sound technician, because the City's sound technician would attempt to accommodate the sponsor's desires.[126] The majority's discussion of prior restraint, in stark contrast to the extensive analysis of the dissent, was relegated to a footnote claiming the issue was inapplicable.[127]

2. *The Dissent*

The dissent agreed with the majority that the regulations were content-neutral,[128] and served the City's significant interest in limiting loud noise in public places.[129] They took issue, however, with the majority's conclusion that the Guidelines were narrowly tailored and that they left open ample alternative channels for communication.[130] Joined by Justices Brennan and Stevens, Justice Marshall accused the majority of abandoning the requirement that time, place, or manner regulations must be narrowly tailored.[131] Moreover, Justice Marshall charged that

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122. *Ward*, 109 S. Ct. at 2757-58.

123. *Id.* at 2757 (quoting Regan v. Time, Inc., 468 U.S. 641, 657 (1984).

124. *Id.* at 2758 (quoting United States v. Albertini, 472 U.S. 675, 689 (1985)).

125. *Id.* at 2759 ("The Court of Appeals erred in failing to defer to the City's determination that its interest . . . would be best served . . . .") *Id.*

126. *Id.*

127. *Id.* at 2756 n.5.

128. *Id.* at 2760-61 (Marshall, J., dissenting).

129. *Id.* at 2761.

130. *Id.* at 2761-63.

131. *Id.* at 2760. Justice Marshall further stated:

> Because I conclude that the Guidelines are not narrowly tailored, there is no need to consider whether there are ample alternative channels for communication. I note only that the availability of alternative channels of communication outside a

the Court allowed government virtual free reign to achieve its policy ends even so far as to permit a prior restraint.[132]

The dissent argued that the majority had taken "language in a few opinions . . . out of context" to support its assertion that the less restrictive alternative analysis had "clearly" been rejected.[133] Justice Marshall pointed out that, historically, the Court's interpretation of the narrowly tailored requirement mandated an examination of alternative methods of serving the asserted governmental interest.[134] It also required a determination as to whether the benefit of the challenged regulation outweighed the increased burden it placed on protected speech.[135] The dissent expressed dismay at the noticeable absence of the Court's past concern for a balance between the government's interest in regulating conduct and the burden that such regulation places on protected speech.[136] Justice Marshall quoted a recent decision in which the Court found that a narrowly tailored statute is one which "targets and eliminates no more than the exact source of the 'evil' it seeks to remedy."[137]

The dissent further argued that the majority's instruction to lower courts to defer to the City's reasonable determination of how much control is appropriate "robbed" those courts of the analytical tools necessary to make a proper inquiry.[138] In Justice Marshall's view, the majority's new standard is apparently satisfied if a "regulation advances the government's interest only in the slightest, for any differential burden on speech that results

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public park does not magically validate a government restriction on protected speech within it. "[O]ne is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place."

Id. at 2762-63 n.6 (citation omitted) (quoting Schneider v. State (Town of Irvington), 308 U.S. 147, 163 (1939)).

132. *Id.* at 2760.

133. *Id.* at 2761.

134. *Id. See also infra* notes 165-66 and accompanying text.

135. *Id.* at 2765.

136. *Id.* at 2761-62. Justice Marshall lamented that "after . . . [the *Ward*] decision, a city could claim that bans on handbill distribution or on door-to-door solicitation are the most effective means of avoiding littering and fraud, or that a ban on loudspeakers and radios in a public park is the most effective means of avoiding loud noise[ ]" to justify intrusive regulations. *Id.* at 2762.

137. *Id.* at 2761 (quoting Frisby v. Schultz, 108 S. Ct. 2495, 2502 (1988)).

138. *Id.* at 2762.

does not enter the calculus."[139]

While the City promised to "accommodate" the desires of musicians with regard to mix,[140] the dissent pointed out that no express language in the regulation required it to do so. A presumption that city officials will act in good faith, absent express language, is "the very presumption that the doctrine forbidding unbridled discretion disallows."[141] The dissent found the Guidelines constituted a quintessential and unconstitutional prior restraint.[142] Whether accomplished by means of "a simple stroke of the pen,"[143] or "by a single turn of a knob,"[144] exclusive control over the means of communication gives public officials the power to censor speech. Ironically, the dissent quoted Chief Justice Rehnquist, a member of the majority in *Rock Against Racism*, who had written in an earlier case that the first amendment meant little if government "allow[ed] a speaker in a public hall to express his views while denying him the use of an amplifying system."[145] In the dissent's view, whether a municipality has the discretion to silence or distort a performer's music, the result is the same: the municipality censors speech.[146] According to the dissent, the City's refusal to impose sanctions under an already existing sound ordinance because "the necessary litigation [was] too costly and time consuming," underscored its "contempt for the need for judicial review of restrictions on speech."[147]

139. *Id.*

140. *See supra* text accompanying note 126.

141. *Ward*, 109 S. Ct. at 2764 (Marshall, J., dissenting) (quoting Lakewood v. Plain Dealer Publishing Co., 108 S. Ct. 2138, 2158). *See supra* notes 75-87 and accompanying text.

142. *Id.* at 2765.

143. *Id.* at 2763 (quoting Emerson, *supra* note 53, at 657).

144. *Id.*

145. *Id.* (quoting FEC v. National Conservative Political Action Comm., 470 U.S. 480, 493 (1985)) (striking down portions of a statute which effectively limited political expression).

146. *Ward*, 109 S. Ct. at 2763.

147. *Id.*

IV. Analysis

A. *To Balance or Not to Balance? That Is the Question*

The Supreme Court has traditionally been concerned with balancing the individual's right to free speech against the state's interest in preserving order.[148] The decision in *Rock Against Racism*, however, has tipped the scales in government's favor at the individual's expense. The regulations upheld by the Court in this case require political speech, consisting of words and music, to be filtered through the government's sound system before it reaches the audience. As Judge Dorsey aptly stated, "[t]he music goes round and round, but it comes out *here*."[149] By taking control of the sound system, the City actually participates in the expression.[150]

In upholding the Guidelines as a valid exercise of state police power, the Court ignored its own mandate that both the operation and effect of restraints on free speech must be subjected to "close analysis and critical judgment . . . ."[151] Evidently, the Court is willing to take the risk that the City of New York will not exercise its option to standardize all expression taking place within Central Park. This is exactly what the first amendment seeks to prevent.[152]

As a result of this decision, deference will be given to a government determination that time, place, or manner restrictions are valid. By removing a balancing approach to determine when these restrictions unnecessarily diminish opportunity for free expression, first amendment rights are eviscerated. As the dissent correctly points out, the majority's emphasis on the effectiveness of government regulations, and de-emphasis of the traditional balancing approach, would have validated the ban on the distribution of pamphlets in *Schneider*.[153] But the Court did not hesi-

148. *See supra* notes 9-19 and accompanying text.

149. Rock Against Racism v. Ward, 636 F. Supp. 178, 179 (S.D.N.Y. 1986) (emphasis in original).

150. Brief for Respondent, *supra* note 91, at 15.

151. Speiser v. Randall, 357 U.S. 513, 520 (1958).

152. *See* Thomas v. Collins, 323 U.S. 516, 545 (1945). The purpose of the first amendment is to "foreclose public authority from assuming a guardianship of the public mind through regulating the press, speech, and religion." *Id.*

153. *Ward*, 109 S. Ct. at 2762. *See supra* notes 51-53 and accompanying text.

tate to find that ordinance unconstitutional even though it provided the most effective means of preventing littering. Balancing the interests involved, the *Schneider* Court concluded that the City's interest in preventing littering was insufficient to justify the resulting infringement on free speech. In the words of the Court, "[a]ny burden imposed on the city . . . as an indirect consequence of such distribution results from the constitutional protection of the freedom of speech . . . ."[154] As the *Schneider* Court recognized, in a situation where it is difficult to balance the interests of both individuals and government, the Court must err on the side of free speech.[155] Otherwise, society incurs the "risk of gradual erosion of the opportunities for effective free expression."[156]

B. *"Roll Over Beethoven" and Justice Roberts; The Public Forum Doctrine Revisited*

The public forum doctrine has been an effective vehicle for achieving a desirable balance between individual freedom of expression and government needs. It is disturbing that *Rock Against Racism* presages a return to the pre-*Hague* private property approach espoused by Justice Holmes.[157] While the approved regulations do not forbid political discussion per se, they presume, in essence, that the government, not the speaker, knows best how to say it.[158]

The words of Justice Roberts bear repeating: "The privilege of a citizen . . . to use . . . parks for communication of views on national questions may be regulated in the interest of all; . . . but it must not, in the guise of regulation, be abridged or denied."[159] Without expressly overruling *Hague*, the majority has ignored its language. The Court's reasoning does little to clarify

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154. Schneider v. State (Town of Irvington), 308 U.S. 147, 162 (1939).

155. Stone, *Content-Neutral Restrictions*, 54 U. CHI. L. REV. 46, 79 (1987).

156. *Id.* at 80.

157. *See supra* notes 20-23 and accompanying text.

158. Riley v. National Fed'n of the Blind of North Carolina, 108 S. Ct. 2667, 2674 (1988) (the solicitation of charitable contributions is protected speech; and government, even with the purest motives, may not substitute its judgment regarding how best to speak).

159. Hague v. CIO, 307 U.S. 496, 515-16 (1939). *See supra* notes 24-30 and accompanying text.

the rights of individuals to exercise free speech in traditional public forums like Central Park.

Arguably, Justice Roberts' distinction between traditional, nontraditional, and nonpublic forums has been obliterated. The purpose of these three classifications has been to define the limits of government's ability to regulate constitutionally protected activities on public property.[160] The classification of a property was indicative of the level of scrutiny applied to determine the constitutionality of restrictions.[161] In this case, however, the Court has virtually eliminated these distinctions for the purpose of judicial review. While the Court classified Central Park as a traditional public forum,[162] its analysis simultaneously stripped this distinction of any significance. While paying lip-service to the three categories of public property, the Court has blurred their respective levels of judicial review to the point of rendering the doctrine useless.

C. *Fine-Tuning the Art of "Linguistic Prestidigitation"*

As noted earlier, restrictions on freedom of expression in traditional public forums have been subjected to heightened scrutiny.[163] Although the Court confirms that this analysis is still appropriate, the majority has actually undermined the traditional method of approach to its application. To validate the regulation in this case, the Court had to find that the regulation was narrowly tailored to serve a significant government interest.[164] However, in order to make this finding the Court virtually redefined the meaning of the term "narrowly tailored" so as to eliminate the least restrictive means requirement.

In the past, the Court has expressly stated that a statute is not narrowly tailored when "a less restrictive alternative is readily available."[165] It has also said that "[a] statute is narrowly tailored if it targets and eliminates no more than the exact source of the 'evil' it seeks to remedy."[166] Although this language is

160. *See supra* notes 31-38 and accompanying text.
161. *See supra* notes 48-55 and accompanying text.
162. Ward v. Rock Against Racism, 109 S. Ct. 2746, 2753 (1989).
163. *See supra* notes 48-55 and accompanying text.
164. *See supra* notes 56-59 and accompanying text.
165. Boos v. Berry, 485 U.S. 312, 329 (1988).
166. Frisby v. Schultz, 108 S. Ct. 2495, 2502 (1988) (citing City Council of Los Ange-

clear, Justice Kennedy, nevertheless, felt compelled to clarify it. Referring to the less restrictive alternative requirement, Justice Kennedy cited *Regan v. Time, Inc.*[167] to support his proposition that it "has never been . . . a part of the inquiry into the validity of a time, place, or manner regulation."[168] This language can hardly be taken as binding, however, as it was extrapolated from a portion of the *Regan* plurality opinion which was approved by only a minority of the Court.[169]

The Court appears to be saying that if time, place, or manner regulations are content-neutral, the Court will apply a reasonable deference standard even in cases involving traditional public forums. This contravenes the essence of the public forum doctrine, which mandates that "[i]n a traditional public forum . . . First Amendment protections are subject to heightened scrutiny . . . ."[170]

This "clarification" of the narrowly tailored prong of the three-part test amounts to no less than what Justice Brennan has called "linguistic prestidigitation."[171] Not content with simply eliminating the less intrusive alternative as it relates to content-neutral limitations on free speech in traditional public forums, the Court proceeds to use a less-effective-governmental-regulation analysis as a substitute. That is, as long as the City's interest would be achieved less effectively absent the regulation, there is no need to balance interests or consider less intrusive

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les v. Taxpayers for Vincent, 466 U.S. 789, 808-10 (1984)). A statute which allows the government to control the quality of sound in order to control the volume is clearly not narrowly tailored under this definition.

167. 468 U.S. 641 (1984) (holding that a portion of a federal statute which made it a crime to photograph United States currency absent newsworthiness or educational value was an invalid content-based time, place or manner regulation).

168. Ward v. Rock Against Racism, 109 S. Ct. at 2749.

169. Justice White announced the judgment of the Court and delivered this part of the plurality opinion in which only Chief Justice Burger, Justice Rehnquist, and Justice O'Connor joined.

170. Board of Airport Comm'rs v. Jews for Jesus, Inc., 482 U.S. 569, 573 (1987) (citing Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45-46 (1983)). *See also supra* notes 49-55 and accompanying text.

171. City of Lakewood v. Plain Dealer Publishing Co., 108 S. Ct. 2138, 2150 (1988) (Through recharacterization, a host of protected activities is "define[d] away." For example, "[t]he right to demonstrate becomes the right to demonstrate at noise levels proscribed by law; the right to parade becomes the right to parade anywhere in the city 24 hours a day; and the right to circulate newspapers becomes the right to circulate newspapers by way of newsracks placed on public property.").

methods. Justice Kennedy's admonition of the lower court's failure to defer to the municipality's own determination of the proper extent of its power effectively appoints the fox guardian of the chicken-coop.[172]

D. *When Is a Prior Restraint Not a Prior Restraint?*

The Supreme Court has apparently forgotten that the doctrine of prior restraint does not require a choice between regulation or no regulation, but forbids control that smothers free communication.[173] Rather, the Court has concluded that as long as a municipality does not forbid expression in a traditional public forum altogether, it can impose any restrictions it likes.[174] In doing so, the Court has failed to distinguish between government's ability to control those who engage in excessive noise, and government's ability to control every speaker and musician regardless of whether they have, or will, violate limitations on noise levels.

The Court says the statute "merely permits the city to regulate volume *to the extent necessary to avoid excessive noise*"[175] even though it punishes all park users in advance of their expression. But, as *Schneider* teaches, a city's interest in regulating must be sufficient to justify an infringement on free speech.[176] "This constitutional protection [of free speech] does not deprive a city of all power to prevent littering. There are obvious methods of preventing littering. Amongst these is the punishment of those who actually throw papers on the streets . . . ."[177] Similarly, there are other obvious ways of preventing excessive noise, such as monitoring noise levels and directing sponsors at the control board to adjust the controls as the na-

172. In its haste to uphold the regulations, the Court did not even touch on the crucial issue: the compatability of the expression at issue with the normal activity of a particular place at a particular time. *See supra* note 59 and accompanying text.

173. Emerson, *supra* note 60, at 670. Prophetically, Professor Emerson added that "systems of prior restraint [are] even more dangerous today in view of the growing pressures for preventive controls over many forms of expression. Thus, the perils that presently threaten democratic rights in this country confirm the basic soundness of the rule against prior restraint." *Id.*

174. *Ward*, 109 S. Ct. at 2756 n.5.

175. *Id.* (emphasis added).

176. *See supra* notes 153-56 and accompanying text.

177. Schneider v. State (Town of Irvington), 308 U.S. 147, 162 (1939).

tional park system does, or by enforcing the noise restriction ordinance already in place.[178]

A prior restraint is an official restriction which subjects all expression, "the innocent and borderline as well as the offensive," to government scrutiny and approval before it may be communicated.[179] Rather than punish the few who abuse noise levels, the Supreme Court would throttle RAR and all others beforehand.[180] With a "stroke of the pen," the Supreme Court of the United States has validated a prior restraint on speech.[181]

V. Conclusion

It has been said "that the [Supreme] Court has the power and duty to right wrongs . . . ."[182] Unfortunately, it does not always do so. In this case, the Court has chosen to eviscerate the cherished protections that the first amendment extends to freedom of expression. Acknowledging at the outset that the case presented important first amendment issues, the Court proceeded to trivialize them.[183] In circumstances which clearly warranted application of the doctrine of prior restraint, the Court concluded without discussion that it was inapplicable.[184] It then proceeded, in Orwellian style,[185] to redefine the narrowly tailored requirement, holding that municipalities have never been required to consider the least intrusive means to implement restrictions on the time, place or manner of constitutionally protected free speech.[186]

Justifying its decision on the need to effectively regulate loud noise, the Court condones and encourages government action which seriously jeopardizes the most fundamental of our rights. To anyone who "assume[s] the general principle that,

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178. *See supra* note 112 and accompanying text.

179. Emerson, *supra* note 60, at 656. For a discussion of prior restraint, see *supra* notes 60-87 and accompanying text.

180. *See supra* note 74 and accompanying text.

181. Emerson, *supra* note 60, at 657.

182. McCLOSKEY, THE AMERICAN SUPREME COURT, 192 (1960).

183. *See supra* note 114 and accompanying text.

184. *See supra* text accompanying note 127.

185. G. ORWELL, NINETEEN EIGHTY FOUR (1949). "[T]he speaker had switched from one line to the other actually in mid-sentence, not only without a pause, but without even breaking the syntax." *Id.* at 182.

186. *See supra* notes 165-69 and accompanying text.

under the First Amendment and our notions of a democratic society, freedom of expression is the rule and constraint the exception[,]" this decision is particularly disconcerting.[187]

Through this decision, the Court encourages "less rather than more communication of ideas; it leaves out . . . those bolder individuals who may wish to express their opinions and are willing to take some risk; and it implies a philosophy of willingness to conform to official opinion and . . . timidity in asserting rights that bodes ill for a spirited and healthy expression of unorthodox and unaccepted opinion."[188] One can only hope the Court does not proceed further down this path.

Kate Mishkin

187. *See* Emerson, *supra* note 60, at 655.
188. *Id.* at 659.