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Government Regulation of the Place and Manner of Protected Speech in a Public Forum: *Ward v. Rock Against Racism*, 109 S. Ct. 2746 (1989)

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I. INTRODUCTION

The Supreme Court of the United States has long held that expression is subject to reasonable time, place, or manner restrictions.[1] Unlike the strict scrutiny which the Court applies to governmental regulations aimed at the content of one's communication,[2] a more permissive level of scrutiny is applicable when a regulation is merely content-neutral.[3] Specifically, to survive constitutional scrutiny as a permissible time, place, or manner regulation, a restriction must be "content-neutral, . . . narrowly tailored to serve a significant government interest, and [must] leave open ample alternative channels of communication."[4] Applying this

1. *See, e.g.*, Clark v. Community For Creative Non-Violence, 468 U.S. 288, 293 (1984); United States v. Grace, 461 U.S. 171, 177 (1983); Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983). *See also* Niemotko v. Maryland, 340 U.S. 268, 273 (1951) (Frankfurter, J., concurring) (summarizing the Supreme Court's early experiences with time, place, and manner regulations). Time, place, or manner regulations entail governmental restriction upon the physical impact of all communication, irrespective of content. Farber & Nowak, *The Misleading Nature of Public Forum Analysis: Content and Context in First Amendment Adjudication*, 70 VA. L. REV. 1219, 1237 (1984).

2. To survive first amendment scrutiny, a content-based governmental regulation of expression must serve a compelling state interest and be narrowly drawn to achieve that end. Carey v. Brown, 447 U.S. 455, 461 (1980). Content based restrictions limit communication on the basis of the message conveyed. Stone, *Content Neutral Restrictions*, 54 U. CHI. L. REV. 46, 47 (1987). Furthermore, they create opportunities for selective application of the law. Farber & Nowak, *supra* note 1, at 1231. Moreover, content based regulations are antithetical to first amendment values as they violate the core principle that "government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views." Renton v. Playtime Theatres, Inc., 475 U.S. 41, 48-49 (1986) (quoting Police Dept. of Chicago v. Mosley, 408 U.S. 92, 95-96 (1972)).

3. The Supreme Court would classify as "content neutral" those regulations that "are *justified* without reference to the content of the regulated speech." *Renton*, 475 U.S. at 48 (quoting Virginia Pharmacy Board v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 771 (1976) (emphasis added)). The requirement of content neutrality serves to exclude regulations that are content based from this type of analysis because content based regulations must meet a more stringent standard. *See supra* note 2.

4. *Perry Educ. Ass'n*, 460 U.S. at 45. The same test applies to all content neutral regulations regardless of the nature of the forum. Farber & Nowak, *supra* note 1, at 1239 (claiming that the Supreme Court's opinion in Members of the City Council of Los Angeles

standard last term in *Ward v. Rock Against Racism*,[5] the Supreme Court held that New York City's guideline for sound amplification in Central Park's Naumberg Bandshell was a permissible regulation of the time, place, or manner of expression because the guideline: (1) was content neutral; (2) was narrowly tailored to serve the substantial governmental interests of avoiding excessive sound volume and providing sufficient amplification within a public concert ground; and (3) left open ample alternative channels of communication.[6] Most importantly, the Court expressly stated that the content neutral regulation at issue need not be the least intrusive means of achieving a substantial governmental interest in order to be deemed narrowly tailored.[7] Rather, a regulation is narrowly tailored by a showing that the regulation promotes "a substantial governmental interest that would be achieved less effectively absent the regulation."[8]

The controversy in *Ward v. Rock Against Racism* arose when Rock Against Racism, an unincorporated association "dedicated to the espousal and promotion of anti-racist views,"[9] challenged New York City's Use Guidelines[10] for the Naumberg Bandshell in Cen-

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v. Taxpayers for Vincent, 466 U.S. 789 (1984), supports this assertion). "The first part of the [time, place, or manner test] excludes cases involving content discrimination [detection of content-based restrictions]; these cases require scrutiny under more demanding tests. The other two parts of the test are designed to ensure that the governmental regulation does not unduly restrict the channels of communication." Farber & Nowak, *supra* note 1, at 1239.

5. 109 S. Ct. 2746 (1989).

6. *Id.* at 2760.

7. *Id.* at 2757-58. *Cf.* Rock Against Racism v. Ward, 848 F.2d 367, 370 (2d Cir. 1988) ("the method and extent of [time, place, and manner] regulation must be reasonable, that is, it must be the least intrusive upon the freedom of expression as is reasonably necessary to achieve a legitimate purpose of the regulation.").

8. *Rock Against Racism*, 109 S. Ct. at 2758 (quoting United States v. Albertini, 472 U.S. 675, 689 (1985)). The Court further clarified its position by indicating that a party need only show that the regulation is "not substantially broader than necessary to achieve the government's interest . . . ." *Rock Against Racism*, 109 S. Ct. at 2758.

9. Rock Against Racism v. Ward, 658 F. Supp. 1346, 1348 (S.D.N.Y. 1987).

10. The Use Guidelines, promulgated by New York City in 1986, provide, in pertinent part:

> SOUND AMPLIFICATION
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> 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

tral Park.[11] Rock Against Racism brought suit seeking declaratory and injunctive relief, as well as compensatory and punitive damages, on the ground that the Use Guidelines were facially invalid as a prior restraint on the association's first amendment right of free expression.[12]

The United States District Court for the Southern District of New York found the Use Guidelines' requirements for sound amplification, processing fees, and vehicle permits valid, but struck down requirements for user fees and insurance, as well as time and crowd size limitations.[13] Rock Against Racism appealed the district court's ruling only to the extent that the court failed to enjoin enforcement of the city's sound amplification guideline.[14] The United States Court of Appeals for the Second Circuit reversed, refusing to uphold the validity of the city's sound amplification guideline. Relying on the Supreme Court's decision in *United States v. O'Brien*,[15] the court of appeals stated that the method and extent of government restrictions on protected speech "must be the least

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> 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.

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

The Use Guidelines also included permit requirements, including a non-refundable processing fee, a clean-up bond, a user fee of $100.00 per performance hour plus a one hour sound check, and vehicle permits for which no fee was charged; insurance in the amount required by the city's Parks Department; different time limitations for various Bandshell events; limitations on the number of spectators; and prohibitions on solicitations at Bandshell events. *Rock Against Racism*, 658 F. Supp. at 1350-59. Although the term "guidelines" was used, the city acknowledged that the guidelines were intended as enforceable regulations. *Id.* at 1350.

11. The Naumberg Bandshell is a popular open air entertainment facility used for various performances during a season which runs from mid-spring through early fall. *Id.* at 1351. In 1979, Rock Against Racism began sponsoring annual programs at the Naumberg Bandshell which included musical groups and speakers representing anti-racist views. *Rock Against Racism*, 109 S. Ct. at 2750.

12. *Rock Against Racism*, 658 F. Supp. at 1349-50.

13. *Id.* at 1351-59.

14. *Rock Against Racism v. Ward*, 848 F.2d 367, 368 (2d Cir. 1988). After the guidelines were promulgated, Rock Against Racism obtained a preliminary injunction enjoining the city from applying certain of the guidelines, including the sound amplification guideline, to Rock Against Racism. Some fifty to sixty other performances, operating in accordance with the guidelines, were held during the 1986 season. *Rock Against Racism*, 658 F. Supp. at 1352. The District Court found that Bandshell sponsors during the 1986 season were "uniformly pleased" with the city's sound amplification system and the city's technician who controlled the sound quality and volume. *Id.*

15. 391 U.S. 367 (1968).

intrusive upon the freedom of expression as is reasonably necessary to achieve a legitimate purpose of the regulation."[16] Although the court of appeals acknowledged the city's significant interest in controlling sound volume,[17] the court nevertheless held the sound amplification guideline invalid because it required the use of the city's sound system and technician, a method that the court found not to be the least intrusive means of achieving the governmental interest in volume regulation.[18]

II. THE SUPREME COURT DECISION

In a 6-3 decision, the Supreme Court reversed. Writing for the majority, Justice Kennedy[19] found that the court of appeals "erred in requiring the city to prove its regulation was the least intrusive means of furthering its legitimate governmental interests."[20] Additionally, the Court rejected Rock Against Racism's argument that the guideline was facially invalid because it "places unbridled discretion in the hands of city officials charged with enforcing it."[21] In reaching its conclusion, the Court addressed the issues of whether the Use Guidelines were content neutral and narrowly tailored to serve a substantial government interest, and whether their promulgation left open ample alternative channels of communication.[22]

After looking to the city's underlying justification for promulgating the guideline, the Court determined the sound amplification guideline was content neutral.[23] Restrictions on communication were content neutral, Kennedy claimed, if they could be "*justified* without reference to the content of regulated speech."[24] The Court found the city's desire to control noise for the purposes of retaining the sedate nature of other areas of the park and to avoid intrusion into surrounding residential areas was not motivated by the

16. *Rock Against Racism*, 848 F.2d at 370.

17. *Id.* at 371. There is no question that the government has "a substantial interest in protecting its citizens from unwelcome noise." Members of the City Council of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789, 806 (1984) (citing Kovacs v. Cooper, 336 U.S. 77 (1949)). *Cf.* Grayned v. City of Rockford, 408 U.S. 104, 116 (1972) ("If overamplified loudspeakers assault the citizenry, government may turn them down.").

18. *Rock Against Racism*, 848 F.2d at 372.

19. Chief Justice Rehnquist and Justices O'Connor, Scalia, and White joined Justice Kennedy's opinion. Ward v. Rock Against Racism, 109 S. Ct. 2746, 2750 (1989). Justice Blackmun concurred in the judgment. *Id.*

20. *Id.* at 2753.

21. *Id.* at 2755.

22. *Id.* at 2753-60.

23. *Id.* at 2754-56.

24. *Id.* at 2754 (quoting Clark v. Community for Creative Non-Violence, 468 U.S. 288, 293 (1984)) (emphasis added by the Court).

content of the communication which the guidelines sought to regulate.[25] Moreover, the Court concluded that the city's other justification—ensuring the sound quality of the performance—was similarly content neutral because the city's technician, as a rule, deferred to the sound mix requests of the performers.[26]

Next, the Court held that the Use Guidelines were a narrowly tailored means to promote a substantial government interest, thus satisfying the second prong of the time, place, or manner analysis.[27] In arriving at this determination, the Court first concluded that New York City had a "substantial interest in ensuring the ability of its citizens to enjoy whatever benefits the city parks have to offer, from amplified music to silent meditation."[28] Finding the city's justifications for the Use Guidelines to be substantial interests, the Court next had to determine whether the City's promulgation of the Use Guidelines was a narrowly tailored means to promote these interests. In answering this query, the Supreme Court most emphatically took exception to the Second Circuit's treatment of the case. Specifically, the Court found that the court of appeals had erred when it concluded that because the city failed to show "that the requirement of the use of the city's sound system

25. *Rock Against Racism*, 109 S. Ct. at 2754-55.

26. *Id.* Although the district court found that it was the city's practice to give the performers or sponsors autonomy with regard to sound quality by having the city's sound technicians do all they could to accommodate the sponsor's desires as to sound mix, Rock Against Racism v. Ward, 658 F. Supp. 1346, 1352 (S.D.N.Y. 1987), there was nothing in the guideline itself that stated that the sound technician *must* defer to the wishes of the performers or sponsors.

The Court refused to decide whether to extend to the facts of this case the body of law that permits a party to facially challenge a regulation. *Rock Against Racism*, 109 S. Ct. at 2755. The Court will find a regulation facially invalid where the regulation vests government officials with impermissibly broad authority to regulate speech. Note, *The Supreme Court—Leading Cases*, 102 HARV. L. REV. 143, 251 (1988). A statute invalid in all possible applications, as opposed to being invalid only in a specific application, is *facially* invalid. *Id.* at 251 n.1. The Supreme Court has struck down statutes as facially invalid in a number of factual scenarios. *See, e.g.*, City of Lakewood v. Plain Dealer Publishing Co., 108 S. Ct. 2138 (1988) (holding an ordinance which vests unbridled discretion in a mayor to license newspaper vending machines facially invalid); Freedman v. Maryland, 380 U.S. 51 (1965) (holding a statute requiring approval of motion pictures prior to display facially invalid). Although Rock Against Racism contended that the city could decide to provide inadequate sound based on the content of the music, the Court felt this fell short of a charge of unbridled discretion to deny the right to present musical programs altogether. *Rock against Racism*, 109 S. Ct. at 2755. Essentially, the Court determined that the guideline could not be interpreted "to [permit] selec[tion of] inadequate sound systems or to vary sound quality or volume based on the message being delivered by performers." *Id.* at 2756.

27. *Id.*

28. *Id.* at 2757. Specifically, the Court found the city to have a substantial interest in protecting its citizenry from unwelcome noise as well as in guaranteeing the adequacy of a sound amplification at Bandshell events. *Id.* at 2756-57.

and technician was the *least intrusive* means of regulating the volume," the Use Guidelines were not "narrowly tailored."[29] Claiming that the least restrictive means analysis was never a component of the time, place, or manner inquiry, the Supreme Court expressly rejected the Second Circuit's reading of "narrowly tailored" to require the "least intrusive means." Instead, the Court stated that "the requirement of narrow tailoring is satisfied so long as the . . . regulation promoted a substantial government interest that would be achieved less effectively absent the regulation."[30]

Applying this more deferential standard, the Supreme Court unequivocally found the Use Guidelines to be a narrowly tailored means to promote the city's substantial interests. The Court felt that both the city's interest in limiting sound volume, as well as its interest in guaranteeing the quality of sound at bandshell events, were promoted by the Use Guidelines' requirement that the city's sound technician operate the mixing board during bandshell events; without this requirement, the Court posited, the city's interests "would have been served less well . . . ."[31]

The Use Guidelines easily satisfied the third prong of the time, place, or manner standard—that the restriction leave open ample alternative channels of communication.[32] The Court claimed that the Use Guidelines were much less constraining than regulations it previously had upheld because the Guidelines do not prohibit any particular manner or type of communication at a particular place or time.[33] In fact, the Court reasoned, "the guideline continues to permit expressive activity in the Bandshell, and has no effect on the quantity or content of that expression beyond regulating the extent of amplification."[34] Although conceding that the city's regulation of the extent of sound amplification may have the effect of reducing the potential audience, the Court was not concerned with this consequence because, it reasoned, Rock Against Racism had not shown that the alternative channels of communication were inadequate.[35]

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29. 848 F.2d 367, 371 (2d Cir. 1988) (emphasis added).

30. *Rock Against Racism*, 109 S. Ct. at 2758 (quoting United States v. Albertini, 472 U.S. 675, 689 (1985)).

31. *Rock Against Racism*, 109 S. Ct. at 2759. The Court stressed that its finding may have been different had there not been evidence that the guidelines did not have a deleterious effect on the ability of the performers to achieve the sound they desired. *Id.*

32. *Id.* at 2760.

33. *Id.*

34. *Id.*

35. *Id.*

III. THE DISSENT

In dissent, Justice Marshall argued that by permitting the city to adopt a regulation that was not the least intrusive means necessary to achieve its interest, the majority had abandoned the requirement that government time, place, or manner regulations be narrowly tailored.[36] Further, Justice Marshall accused the majority of countenancing government control of speech prior to its dissemination, an unconstitutional prior restraint.[37]

In asserting that the majority had retreated from the narrow tailoring requirement for time, place, or manner regulations, the dissent took issue with the majority's use of *Regan v. Time*[38] and *United States v. Albertini*[39] for the proposition that the Court need not perform a least restrictive alternative analysis.[40] Specifically, Justice Marshall pointed out that Justice White's opinion in *Regan* commanded the votes of only three other Justices, and *Albertini* involved a military base, not a traditional public forum.[41]

In contrast to the majority's holding that to be narrowly tailored, a time, place, or manner regulation need only "promote[] a substantial government interest that would be achieved less effectively absent the regulation,"[42] the dissent argued that the narrowly tailored requirement necessitates an examination of alternative means of achieving the substantial government interests and "a determination whether the greater efficacy of the challenged regulation outweighs the increased burden it places on protected speech."[43]

The dissent contended that by refusing to engage in an analy-

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36. *Id.* (Marshall, J., dissenting). Justices Brennan and Stevens joined Justice Marshall's dissent.

37. *Id.*

38. 468 U.S. 641 (1984).

39. 472 U.S. 675 (1985).

40. Addressing in *Regan* the constitutionality of a federal law which criminalized the publishing of photographs of United States currency except under certain prescribed circumstances, Justice White wrote, "the less-restrictive-alternative analysis . . . has never been a part of the inquiry into the validity of a time, place and manner regulation." *Regan*, 468 U.S. at 657. In *Albertini*, the Court found a law which prohibited individuals barred from military bases from reentering to be a valid time, place, or manner restriction even though there was some imaginable alternative that may have been less burdensome on speech. *Albertini*, 472 U.S. at 689.

41. *Rock Against Racism*, 109 S. Ct. at 2761 n.2 (Marshall, J., dissenting).

42. *Id.* at 2758 (quoting *Albertini*, 472 U.S. at 698).

43. *Rock Against Racism*, 109 S. Ct. at 2761. *Cf.* Schneider v. State, 308 U.S. 147, 162 (1939) (invalidating a ban on handbill distribution on public streets where less restrictive alternatives existed to achieve the government interest in avoiding litter, congestion, and fraud).

sis of the availability of alternative means equally capable of achieving the government interest but imposing less of a burden on speech, the majority cut the "narrowly tailored" requirement off at its knees.[44] Justice Marshall stated that if the Court had performed a least-restrictive-means analysis, the city's guidelines would not have withstood constitutional scrutiny since the city's interest in avoiding noise cannot justify the city's commandeering total control over the sound equipment.[45]

Additionally, the dissent found the Use Guidelines inconsistent with the first amendment's fundamental aversion to prior restraints.[46] In fact, Justice Marshall characterized the city's seizure of exclusive control over a musician's sound equipment as a "quintessential" prior restraint.[47] Justice Marshall argued that "through its monopoly on sound equipment," the city is able to distort and silence communication in advance of its expression.[48] In essence, he found the Use Guidelines to be no less of a prior restraint because the censorship was effectuated by the "single turn of a knob," as opposed to the traditional "stroke of a pen."[49]

Having characterized the Use Guidelines as a prior restraint, Justice Marshall charged that the Court should have examined the Use Guidelines as though they were presumptively invalid.[50] If presumptively invalid, Marshall asserted, the Guidelines only would have survived constitutional scrutiny if they were "accompanied by the procedural safeguards necessary 'to obviate the dangers of a censorship system.' "[51] Specifically, Marshall argued that the city,

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44. *Rock Against Racism*, 109 S. Ct. at 2762-63.

45. *Id.* at 2762. Justice Marshall expressed a belief that the majority's treatment of the narrowly tailored requirement would have far reaching implications. In fact, he stated that the majority's approach functionally has eliminated the "narrowly tailored" requirement as a component of the time, place, or manner analysis. *Id.* at 2762. Moreover, he argued that, "logically extended," the Court's decision would render the continued inviolability of many of our people's most traditional and cherished forms of communication susceptible to the whim of governmental caprice. For example, he claimed that "after today's decision a city could claim that bans on handbill distribution or on door to door solicitation are the most effective means of avoiding littering or fraud, or that a ban on loudspeakers and radios in a public park is the most effective means of avoiding loud noise." *Id.* at 2762.

46. *Id.* at 2763.

47. *Id.*

48. *Id.*

49. *Id.*

50. *Id.* (citing Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 558 (1975) ("Any system of prior restraint, however, comes to [the Supreme Court] bearing a heavy presumption against its constitutional validity.")).

51. *Rock Against Racism*, 109 S. Ct. at 2763 (quoting Freedman v. Maryland, 380 U.S. 51, 58 (1965)).

in conjunction with the Use Guidelines, should have established "neutral criteria embodied in 'narrowly drawn, reasonable and definite standards,' in order to ensure that discretion is not exercised based on the content of speech."[52] Additionally, Marshall claimed that, as a system of prior restraint, the regulations warranted an immediate judicial determination that the communication undertaken in the Bandshell was not protected by the first amendment.[53]

Justice Marshall concluded that the Guidelines were utterly void of the requisite procedural safeguards.[54] First, he claimed that, by not defining "best sound" and "appropriate sound quality," as those phrases are used in the Guidelines, the city failed to include the requisite neutral criteria that would be embodied in "narrowly drawn, reasonable and definite standards."[55] Without these neutral criteria, Marshall averred, there is no mechanism to ensure that the city does not use its broad discretion to control the music on the basis of content.[56]

Secondly, Marshall pointed to the absence of any mechanism for prompt judicial review of the potential constraints on musical expression.[57] He claimed that because the city technician controls expression by making decisions about the sound mix and volume throughout each performance,[58] neither Rock Against Racism, nor any other program sponsor, could attempt to have any of the technician's discrete decisions judicially reviewed.[59] As Marshall poignantly notes: "There is, of course, no time for appeal in the middle of a song."[60] That being the case, the Use Guidelines impermissibly restrained communication because "no court ever determined that

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52. *Rock Against Racism*, 109 S. Ct. at 2763 (quoting Niemotko v. Maryland, 340 U.S. 268, 271 (1951)).

53. *Rock Against Racism*, 109 S. Ct. at 2763 (citing Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 70 (1963)).

54. *Rock Against Racism*, 109 S. Ct. at 2763.

55. *Id.*

56. *Id.* at 2764.

57. *Id.* at 2763.

58. Justice Marshall described the immense amount of discretion the city's sound technician possesses:

> The city's sound technician consults with the performers for several minutes before the performance and then decides how to present each song or piece of music. During the performance itself, the technician makes hundreds of decisions affecting the mix and volume of sound. The music is played immediately after each decision.

Id. at 2764.

59. *Id.*

60. *Id.* at 2764-65.

a particular restraint on speech is necessary."[61] Justice Marshall concluded that with no mechanism for prompt judicial review, and in light of the absence of detailed, neutral standards to curb the city's discretion in restricting expression, the Use Guidelines are an unconstitutional prior restraint.[62]

IV. ANALYSIS

In *Ward v. Rock Against Racism* the Supreme Court addressed a number of issues that go to the heart of first amendment jurisprudence. While the Court reaffirmed the essential role of the content neutral/content based distinction in first amendment cases, it more significantly clarified the narrow tailoring requirement essential to judicial scrutiny of time, place, or manner restrictions. Additionally, the Court prescribed a deferential role for the judiciary when evaluating the constitutionality of these governmental efforts to control the time, place, or manner of otherwise protected speech.

The Court correctly determined the sound amplification guidelines to be content neutral. In doing so, it distinguished content based regulations from those at issue in *Rock Against Racism*.[63] As the Court correctly noted, "[t]he government's purpose is the controlling consideration" for a court assessing the content neutrality of a regulation limiting speech.[64] Primarily a court must ask "whether the government has adopted a regulation of speech because of disagreement with the message it conveys."[65] Clearly, the Use Guidelines applied across the board to all who chose to perform at the Naumberg Bandshell—irrespective of a group's message. In fact, both the majority and the dissent agreed that the City's justifications of noise control and sound quality were not directed at the content of a particular performance. Therefore, by definition, the regulations were content neutral.[66]

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61. *Id.* at 2765.

62. *Id.*

63. The Court cited Boos v. Barry, 485 U.S. 312 (1988), and noted that an inquiry as to whether less restrictive alternatives are available is appropriate where content based, but not content neutral, regulations are at issue. *Rock Against Racism*, 109 S. Ct. at 2758 n.6.

64. *Id.* at 2754.

65. *Id.*

66. *See supra* note 3 (discussing content neutrality). In what the dissent found to be a dangerous inroad, *Rock Against Racism*, 109 S. Ct. at 2761 n.1 (Marshall, J., dissenting), the majority claimed that a regulation serving "purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others." *Id.* at 2754 (citing Renton v. Playtime Theatres, Inc., 475 U.S. 41 (1986)). Consequently, even if Rock Against Racism had been impacted more by the regulations than

The Court's analysis of the narrow tailoring requirement is more nettlesome. In deciding *Rock Against Racism*, the Second Circuit used the standard articulated in *United States v. O'Brien*:[67] incidental restrictions on first amendment freedom should be no greater than essential to further a substantial government interest.[68] The court of appeals interpreted *O'Brien's* language to require an analysis of alternatives to the sound amplification guideline; consequently, the court of appeals construed the "narrowly tailored" requirement of the time, place, or manner calculus as necessitating nothing more than an inquiry into whether the regulation was the least restrictive means of achieving the intended objective.[69]

As the dissent pointed out, the Court in *Frisby v. Schultz*[70] defined "narrowly tailored" as a regulation targeting and eliminating "no more than the exact source of evil [it] seeks to remedy."[71] The dissent saw *Frisby* as evidence that the Court had not rejected the least-restrictive-alternative analysis.[72] However, the majority interpreted the *Frisby* language to mean that the regulation cannot be substantially broader than necessary to achieve a substantial government interest.[73] The majority's reading of *Frisby* established a rule of great deference for the lower courts to follow when examining a governmental entity's time, place, or manner regulation.

In any event, the decision of the Supreme Court is not surprising. In several other cases subsequent to *O'Brien*, the Court chose not to engage in a least-restrictive-means analysis.[74] Like *Rock Against Racism*, one of these post-*O'Brien* cases—*Clark v. Community for Creative Non-Violence*[75]—involved a time, place, or

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other performers, this effect would not be determinative of the Guidelines content neutrality.

67. 391 U.S. 367 (1968).

68. *Id.* at 377. *See Rock Against Racism*, 109 S. Ct. at 2757 (claiming that the Second Circuit "drew its least-intrusive-means requirement from [*O'Brien*].")

69. *Id.*

70. 108 S. Ct. 2495 (1988).

71. *Id.* at 2502.

72. *Rock Against Racism*, 109 S. Ct. at 2761.

73. *Id.* at 2758.

74. *See, e.g.*, United States v. Albertini, 472 U.S. 675, 689 (1985) (noting regulations are not "invalid simply because there is some imaginable alternative that may be less burdensome on speech . . . . [A]n incidental burden on speech is no greater than is essential, and therefore is permissible under *O'Brien*, so long as the neutral regulation promotes a substantial government interest that would be achieved less effectively absent the regulation."); Clark v. Community for Creative Non-Violence, 468 U.S. 288, 299 (1984) (claiming that the existence of alternatives that are less restrictive of speech and which still would achieve the government interest cannot legitimize invalidating a regulation).

75. 468 U.S. 288 (1984). In 1982, the National Park Service granted the Community

manner regulation of speech in a traditional public forum. As in *Rock Against Racism*, the Court in *Clark* did not perform a least-restrictive-alternative analysis. If the Court had performed a least-restrictive-alternative analysis in *Clark*, the *Rock Against Racism* Court arguably would have been bound to examine the regulation with greater scrutiny.[76] However, because the Court refused to employ this analysis in *Clark*, the *Rock Against Racism* Court may have been correct in refusing to apply it as well. Today, after the *Rock Against Racism* Court's refusal to apply the more demanding standard, judicial review of time, place, or manner regulations now is tilted all the more toward a deferential analysis and away from the protection of free expression.

The majority's conclusion that the city's Use Guidelines did not constitute a prior restraint is technically incorrect. Because the city does possess the authority to deny use of the forum in advance of expression by turning down the volume, the city effectively could prevent the communication of Rock Against Racism's message, thereby exercising a prior restraint.[77] The majority viewed the city's stated goals—ensuring sound quality and controlling volume—as implicitly forbidding less than adequate sound. The majority also looked to the district court's finding that the city, in practice, accommodated the music performers and other sponsors by submitting to their wishes as to sound quality and conferred with performers and sponsors as to their desired sound volume.[78] However, the problem inherent in the Court's argument is that nowhere did the guideline explicitly state that the city technician was required to defer to the wishes of the performers and sponsors with

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for Creative Non-Violence (CCNV) a permit to conduct a demonstration in Washington, D.C.'s Lafayette Park and the Mall for the purpose of highlighting the plight of America's homeless. *Id.* at 291-92. In accordance with the permit, CCNV erected two symbolic tent cities. *Id.* at 292. The lawsuit arose when the Park Service denied CCNV's request that demonstrators be allowed to sleep in the tents. *Id.* The denial was based upon the National Park Service regulations that only permitted camping in campgrounds designated for that purpose. *Id.* at 290. As neither Lafayette Park nor the Mall had been designated for camping, the request was denied. *Id.* The Supreme Court held that the application of the Park Service regulations was permissible as a reasonable time, place, or manner restriction. *Id.* at 293-99.

76. As the dissent points out, the majority admonished the court of appeals for examining the degree to which speech may be restricted to serve a governmental interest and for analyzing available alternatives. Yet, as the dissent notes, if a court cannot make this inquiry, it becomes difficult, if not impossible, for a court to determine whether the government's regulation burdens speech substantially more than necessary. *Rock Against Racism*, 109 S. Ct. at 2762 (Marshall, J., dissenting).

77. *Id.* at 2763 (Marshall, J., dissenting).

78. *Id.* at 2756.

respect to sound quality or even to confer with them as to sound volume levels. Further, the Use Guidelines lack narrowly drawn, reasonable, and definite standards to ensure that the city does not abuse its discretion when it has the capability to exercise a prior restraint. The city's standards are vague, at best, and although it may be "that perfect clarity and precise guidance have never been required even of regulations that restrict expressive activity,"[79] the Court in *Ward* opened the door even further to highly discretionary governmental control of speech in public forums.

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79. *Id.* at 2755.

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