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Ward v. Rock Against Racism: How Time, Place And Manner Further Restrict The Public Forum

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NOTES

WARD v. ROCK AGAINST RACISM: HOW TIME, PLACE AND MANNER FURTHER RESTRICT THE PUBLIC FORUM

INTRODUCTION

Of the numerous ideas that form the core of American consciousness, it is the constitutional paradigm that provides a foundation for our society. The Framers - names handed down in history books as the inspiration for a nation - created a constitution. Whether it retains the meaning that Adams, Jefferson and their colleagues intended is the subject of continuing scholarship within and without the legal community. Of all the Framers, James Madison most profoundly influenced the rights guaranteed to United States citizens. His Bill of Rights articulated fundamental notions of individual liberty implicit within the evolving American polity. None have had more impact than those guarantees contained in the first amendment.[1]

Often the first amendment is misconstrued as an affirmative guarantee of rights. In fact, it operates only as a prohibition on Congress, subsequently applied to the states through the fourteenth amendment.[2] The Constitution's proscription of laws abridging free speech explains, in part, judicial focus on the legality of state regulations inhibiting freedom of expression. The "public forum" doctrine emerged in the 1930's and 1940's when the Supreme Court, in a series of suits brought mainly by the Jehovah's Witnesses, held that "leafleting, parading, and other speech-related uses of streets, sidewalks, and parks could be neither banned nor subjected to discretionary licensing."[3] The doctrine's subsequent interpretations,

1. U.S. Const. amend. I. "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

2. U.S. Const. amend. XIV. Section 1. "All persons born or naturalized in the United States, and subject to the jurisdicition thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." *See, e.g.*, Edwards v. South Carolina, 372 U.S. 229 (1963); Gitlow v. New York, 268 U.S. 652 (1925).

3. L. TRIBE, AMERICAN CONSTITUTIONAL LAW 986, n.2 (2d ed. 1988). *See* Saia v. New York, 334 U.S. 558 (1948); Martin v. City of Struthers, 319 U.S. 141 (1943); Jamison v. Texas, 318 U.S. 413 (1943); Cox v. New Hampshire, 312 U.S. 569

however, do not reflect the forthright standard handed down at its inception. In truth, the Court has been plagued by its inability to apply the doctrine's tests consistently to the numerous fact patterns it has encountered. Years later, the law resembles nothing but flux and contradiction and ultimately, confusion.

Nowhere is this more evident than "the time, place and manner restrictions" branch of the public forum doctrine. Classical time, place and manner restrictions, in forums public and nonpublic, restrict access to the forum based on the time when the speech is to be delivered, the place where speech is to be heard, or the manner of expression involved.[4] The Court, in *Ward v. Rock Against Racism*[5] (hereinafter *Rock Against Racism*), made a noble attempt to resolve the ambiguities in its application of time, place and manner restrictions, holding that the "least intrusive means" test lies without the constitutional analysis traditionally applied to such restrictions.

Part I of this Note will discuss the "public forum" doctrine and focus on time, place and manner restrictions. Part II addresses the Court's interpretation of these restrictions in *Rock Against Racism* and analyzes its impact on traditional applications of the doctrines. Part III of this Note will apply this Court's standard of scrutiny of time, place and manner restrictions to the facts of a prior case to identify whether the test Justice Kennedy articulated in *Rock Against Racism* would change its result. This Note concludes with recommendations designed to clarify a cluttered area of constitutional law and reduce its speculative nature.

I. THE PUBLIC FORUM DOCTRINE AND ITS RELATIONSHIP TO TIME, PLACE AND MANNER RESTRICTIONS

A. *Public Forums*

1. Brief History

To understand the nuances of the public forum doctrine today, the clock must be turned back decades to a post-Depression American

(1941); Schneider v. State, 308 U.S. 147 (1939); Hague v. C.I.O., 307 U.S. 496 (1939).

4. *See* Grayned v. City of Rockford, 408 U.S. 104 (1972). In assessing reasonable time, place and manner restrictions, the Court in *Grayned* set forth valid examples that isolated each aspect of a proper restriction. *Id.* at 115-17. Justice Marshall concluded that the "crucial question is whether the manner of expression is basically incompatible with the normal activity of a particular place at a particular time." *Id.* at 116. *But cf.*, L. TRIBE at 994 n.50, who questions whether the Court in *Grayned* actually applied an incompatibility standard, or merely articulated one.

5. 491 U.S. 781 (1989), *reh'g denied*, 110 S.Ct. 23 (1989). Since the official United States Reporter has not published this opinion, all subsequent references to this case will cite the Supreme Court Reporter citation — 109 S.Ct. 2746 (1989).

yesterday. The first amendment as yet had not become the watchtower of individual liberties; at least its parameters remained largely untested by the judiciary. While a world watched the German juggernaut launch its war machine, a seminal battle began in the courtrooms of the United States. To what lengths did liberty go? So asked Jehovah's Witnesses as they challenged a New Jersey ordinance prohibiting distribution of their circulars.[6]

In *Schneider v. State*, Justice Roberts identified the foundation of the public forum: "[T]he streets are natural and proper places for the dissemination of information and opinion; and one 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."[7] Roberts' opinion ushered in a new era in constitutional theory and, in effect, established concrete protections against state regulation the exercise of speech.

The Jehovah's Witnesses returned to court frequently to adjudicate their rights. In *Martin v. City of Struthers*,[8] Justice Black further explored the protective scope of the first amendment. Black intimated a proletariat philosophy underlying the public forum doctrine by affirming that door to door distribution is "essential to the poorly financed causes of the little people."[9] His not too subtle reference to the "little people" of the world repeatedly appears throughout Supreme Court analysis of the public forum. Not surprisingly, Black found the statute to be invalid because it failed to safeguard the constitutional rights of free speech and press.

In *Cox v. New Hampshire*,[10] however, Chief Justice Hughes up-

6. Schneider v. State, 308 U.S. 147 (1939). Schneider involved a challenge to municipal ordinances in the cities of Los Angeles, Califorinia; Milwaukee, Wisconsin; Worcester, Massachusetts; and Irvington, New Jersey.

7. *Id.* at 163. [Each city's] primary motive in enacting the prohibitive legislation was the "prevention of littering of the streets," and although nothing in the record showed the Jehovah's Witnesses to be guilty of littering, [Los Angeles] argued that their distributions "encouraged or resulted in such littering." *Id.* at 162. In contrast, the Irvington ordinance was designed to guard against fraudulent solicitation.

8. 319 U.S. 141 (1943). Black cited no less an authority than Thomas Jefferson on the Framers' intent for the expressive freedoms guaranteed by the first amendment. Jefferson wrote Lafayette: "The force of public opinion cannot be resisted, when permitted freely to be expressed. The agitation it produces must be submitted to. It is necessary to keep the waters pure." *Id.* at 143 n.3.

9. *Id.* at 146. Black viewed the issue in this case to be a balancing of conflicting interests: (1) the individual's civil rights to distribute information, (2) the individual homeowner's right to determine whether he or she will receive such information, and (3) the community's interest in protecting, through regulation, the interest of its citizens. *Id.* at 143. Black ultimately concluded that the community's interest in prohibiting distribution did not outweigh an individual's right to communicate. *Id.* at 149.

10. 312 U.S. 569 (1941). In *Cox*, the Jehovah's Witnesses met at city hall to engage in an information march. At choice spots throughout the city, the defend-

held a state provision requiring a license to conduct a parade on a public street. Hughes argued that a municipality's authority to control the use of its public streets must include considerations of the time, place, and manner in which those streets will be used.[11] The opinion represents the Court's initial validation of time, place and manner restrictions, and as such, provides clues to their purpose. The very least that can be said with confidence is that these restrictions were upheld because they did not unduly interfere with free speech — the touchstone of a debate which has vexed the Court ever since.[12]

2. Public Forum Doctrine: Its Nuts and Bolts

The Court, in *Perry Education Association v. Perry Local Educators' Association*,[13] established three categories of fora: (1) traditional public forums; (2) limited purpose or quasi-public forums; and (3) nonpublic forums.[14] Justice White identified traditional public fora as streets and parks which 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."[15] In such forums, Justice White argued that the government may not prohibit all communicative activity, and therefore, the State's interest in enforcing a content-based regulation must be compelling.[16]

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ants marched single file along the sidewalks with signs. *Id.* at 572. The New Hampshire statute prohibited parades without a license. *Id.* at 571. Chief Justice Hughes held that the statute, as applied by the state court, did not contravene any constitutional right. *Id.* at 576.

11. *Id.* at 576.

12. The public forum doctrine included two other major segments which I have called the "Noisy Speaker Cases" and the "Demonstration Cases." The former include Saia v. New York, 334 U.S. 558 (1948), and Kovacs v. Cooper, 336 U.S. 77 (1949). *Kovacs* held that a city ordinance prohibiting the use on public streets of "loud" and "raucous" sound trucks does not deny freedom of speech in violation of the fourteenth amendment. *Id.* at 87. The latter include Cox v. Louisiana, 379 U.S. 559 (1965), Walker v. City of Birmingham, 388 U.S. 307 (1967), and National Socialist Party v. Skokie, 432 U.S. 43 (1977). *Cox* reversed a conviction of nearly 2000 black students for obstructing a public passageway near a courthouse, but left open the possibility that a nondiscriminatory closing of streets and other public facilities to parades might be permissible.

13. 460 U.S. 37 (1983).

14. *Perry*, 460 U.S. at 45-48. *Perry's* essential problem revolved around a provision in a collective bargaining agreement between a school district and its union (Perry Education Association or PEA) giving that union exclusive access to teacher mailboxes and the interschool mail system. A rival union (Perry Local Educators' Association or PLEA) brought suit contending that PEA's preferential access to the internal mail system violated the first amendment and the Equal Protection Clause of the fourteenth amendment. *Id.* at 39-41.

15. *Id.* at 45. (citing Hague v. CIO, 307 U.S. 496, 515 (1939)).

16. *Id.* In other words, Justice White's first category focuses on content-based restrictions in a public forum; the regulation's goal is to restrict the message the

To be a quasi-public forum, the State opens public property for use by the public as a place for expressive activity.[17] Nothing requires the State to keep the forum open, but so long as it does so, the standards of the public forum doctrine apply to it. Nonpublic forums, the third category, consist of public property which is "not by tradition or designation a forum for public communication . . . ."[18] Here, the State may restrict speech so long as it is not an attempt to suppress expression because the "public officials oppose the speaker's view."[19]

Generally, whenever the Court is confronted with issues concerning property access for expressive purposes, it will attempt to pigeonhole the facts within one of these three categories. The analysis does not end here — the next stage usually amounts to an evaluation of the regulation's purpose and whether it is based on content.[20] If the regulation is content-based, the government must establish that the regulation is necessary to support a compelling government interest. If the regulation is content-neutral, however, the law becomes murky. The Supreme Court holds these regulations to an amalgam of strict and intermediate scrutiny, but that language and the resulting interpretation changes from case to case. When the regulation at issue ignores content, the Court will inquire into "such factors as the place of the speech, the character of the particular activity being regulated, and the nature of the restriction imposed."[21] These factors frequently give rise to time, place or man-

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speaker wants to convey. Content-neutral time, place and manner restrictions, in this context, are categorized separately, but will be discussed in depth *infra*.

17. *Perry*, 460 U.S. at 45. Quasi-public fora include fairs and schoolgrounds which the government opens to the public. The distinction turns on the fact that government opens a facility traditionally closed to the public. L. TRIBE at 987. *See also* Carey v. Brown, 447 U.S. 455 (1980). Time, place and manner restrictions also apply to quasi-public forums under Justice White's analysis.

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

19. *Id. See* United States Postal Serv. v. Council of Greenburgh Civic Assns., 453 U.S. 114 (1981); Greer v. Spock, 424 U.S. 828 (1976); Adderley v. Florida, 385 U.S. 39 (1966).

The Court in *Perry* held that school mail facilities fall into the third category because general school policies do not open such facilities to the general public; therefore the internal mail system is not a traditional public forum. Moreover, the Court found that use by such organizations as the YMCA and Cub Scouts does not transform the mail system into a "limited" public forum. 460 U.S. at 46-47. Consequently, a strict scrutiny standard does not apply to these facts and the School District need only show that the policy "rationally further[s] a legitimate state purpose." *Id.* at 54.

20. Professor Laurence Tribe divided the analysis into two tracks. The first track concerns content-based regulations where the government wishes to restrict speech because of the message or idea it contains. Track-two focuses on content-neutral restrictions — regulations blind to content, but nevertheless restricting the expression itself. TRIBE, at 977-78.

21. TRIBE, at 988.

ner restrictions.

B. *Time, Place and Manner Restrictions*

1. The Four-Part Test

"[T]he essence of time, place or manner regulation lies in the recognition that various methods of speech, regardless of their content, may frustrate legitimate governmental goals."[22] Theoretical justification for the "essence" of time, place and manner restrictions can be found in earlier cases. In *Schneider,*[23] the Court expressly stated that its decision did not prevent the town from fixing reasonable hours when the Jehovah's Witnesses could canvass a neighborhood. Moreover, the Court held in *Cox*[24] that a municipality's authority to control the streets for parades and processions must include authority to consider the "time, place and manner [of the activity] in relation to the other proper uses of the streets."[25] Later Courts established a multi-faceted test to give meaning to this language. The test varies depending on the restriction's purpose, the forum's nature and the breadth of the method employed,[26] but the test at bottom is less exacting than that afforded content-based restrictions.[27]

For present purposes, assuming the existence of a public forum, the Court has established a four-part test for valid time, place and manner restrictions. Essentially, the restriction must (1) be content-

22. Consolidated Edison Co. v. Public Serv. Comm'n, 447 U.S. 530, 536 (1980)(regulation prohibiting controversial public policy inserts in monthly bills of electric utility declared invalid).

23. *See supra* note 6, at 163-65.

24. *See supra* note 3.

25. 312 U.S. at 576.

26. L. TRIBE at 988. *See* Note, *Noncommercial Door-To-Door Solicitation and the Proper Standard of Review for Municipal Time, Place, and Manner Restrictions,* 55 FORDHAM L. REV. 1139, 1144-45 (1987). The author asserts a number of rationales for valid time, place and manner restrictions:

(1) "afford[s] the speaker the opportunity to deliver his message free from the interference of other voices." *See* Grayned v. City of Rockford, 408 U.S. 104, 115 (1972);

(2) "ensure[s] that the listener has the opportunity to receive clear messages" (footnote omitted);

(3) facilitates the orderly flow of ideas which "enhances the overall effectiveness of protected first amendment activity," *see* Breard v. Alexandria, 341 U.S. 622, 642 (1951);

(4) "accommodate[s] the government's power to protect legitimate social interests and individual rights." (footnote omitted);

(5) "offer[s] the state the means of restricting expressive activity when necessary to protect the community against crime and fraud, the individual against invasion of his privacy as well as other societal interests." (footnotes omitted).

27. *See* Note, *A Unitary Approach to Claims of First Amendment Access to Publicly Owned Property,* 35 STAN. L. REV. 121, 125 (1982). *See also* Consolidated Edison Co. v. Public Serv. Comm'n, 447 U.S. 530, 536 (1980).

neutral;[28] (2) serve a significant government interest; (3) be narrowly tailored to serve that interest; and (4) leave open ample alternative modes of communication.[29] The restriction's validity further hinges on each part of the test being independently satisfied.

Court decisions are in general agreement as to the meaning of and the requirements necessary to satisfy the content-neutral prong of the test. Its essence lies in its aim - not the content of expression, but a desire to serve some "significant" governmental interest.[30] To be significant, an interest must not suppress speech based on the content of the message;[31] rather the governmental interest seeks, for example, to protect national parks,[32] advance esthetic concerns,[33] or guard citizens from crime, fraud and undue annoyance.[34]

Regulations most frequently fail the narrow tailoring prong of the four part test. An ordinance is narrowly tailored when "the effect [on first amendment freedoms] is no greater than necessary to accomplish the City's purpose."[35] In reality, much of the debate over time, place and manner restrictions centers on the narrowness of the regulation at issue. Generally, if the Court finds the regulation to restrict more speech than is necessary, it will be struck down. In contrast, if the Court finds that the regulation is designed to burden

28. "The Court has held that content-based restrictions generally are not permitted under the first amendment because they are disruptive of the free and uncensored flow of information to the public." Note, *see supra* note 26, at 1145 (footnote omitted)(citing Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60, 75 (1983); Linmark Assocs. v. Township of Willingboro, 431 U.S. 85, 95-97 (1977); Virginia Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 770 (1976)). "The restrictions are permissible only when they are necessary to protect a compelling state interest and are enforced only if they are the least restrictive method of meeting that end. *Id.* at 1146 (footnotes omitted)(citing Cornelius v. NAACP Legal Defense & Educ. Fund, Inc., 105 S.Ct. 3439, 3448 (1985); United States v. Grace, 461 U.S. 171, 177 (1983); Widmar v. Vincent, 454 U.S. 263, 270 (1981); United States v. Robel, 389 U.S. 258, 268 & n. 20 (1967); Shelton v. Tucker, 364 U.S. 479, 488 (1960).

29. *See* 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, 45-46 (1983).

30. *See* Note, *supra* note 26 at 1146 n.44. *See also* Consolidated Edison v. Public Serv. Comm'n, 447 U.S. 530, 535-36 (1980). Here, the Court uses "significant" as part of its standard. *But see* Heffron v. Intern. Soc. for Krishna Consciousness, 452 U.S. 640, 654 (1981), where the Court holds that the time, place and manner restriction must serve a "substantial state interest", and Grayned v. City of Rockford, 408 U.S. 104, 116-17 (1972), where the Court stated that the restriction must serve the "State's legitimate interest."

31. TRIBE at 988.

32. *See, e.g.*, Clark v. Community for Creative Non-Violence, 468 U.S. 288 (1984).

33. *See, e.g.*, City Council v. Taxpayers for Vincent, 466 U.S. 789 (1984).

34. *See, e.g.*, Village of Schaumburg v. Citizens for a Better Env't, 444 U.S. 620 (1980).

35. *See* Note, *supra* note 26, at 1147 n. 55.

only that speech which must be burdened to serve the governmental interest, the regulation survives constitutional challenge.

A final hurdle is that which requires "ample alternatives" to communication to be left open. Usually equivalent to a judicial afterthought, most courts quickly dispense with this prong because the narrow tailoring requirement effectively swallows the necessity of ample alternatives. Rarely (if ever) has the Court found a regulation to be narrowly tailored and yet struck it down because ample alternatives to communicate were not left open.[36] Yet, each Court that considers the validity of a time, place or manner restriction mechanically sifts through the facts to see if alternative opportunities to communicate exist. The hurdle is not high and therefore affords little additional protection to those seeking to express themselves in a public forum.[37] The State consequently need only point to other viable means of communicating the desired speech. So long as the other means is not unduly onerous, financially or otherwise, an ample alternative remains open to the speaker.[38]

Presently, the Court tentatively agrees that these four factors determine the validity of a time, place or manner regulation with regard to a public forum. How each factor is applied often depends

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36. The "ample alternatives" prong has received greater attention in commercial speech cases. *See, e.g.*, Linmark Assocs. v. Township of Willingboro, 431 U.S. 85, 93 (1977)(township ordinance banning "For Sale" and "Sold" signs from residential property held invalid under the first amendment); Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748 (1976)(statutory ban on advertising of prescription drug pricing held invalid under the first and fourteenth amendment).

One commentator has argued that the significant government interest now familiar to the time, place and manner test was borrowed from commercial speech cases. It appears the Court also borrowed the ample alternatives standard from the commercial speech cases and incorporated it into the time, place, and manner test. *See also* Note, *supra* note 27, at 126.

37. *See Community for Creative Non-Violence* , 468 U.S at 294-97. In *Community for Creative Non-Violence* (CCNV), the Court upheld a National Park Service regulation that prohibited camping in certain parks, specifically Lafayette Park and the Mall in Washington, D.C. According to Justice White, "[t] he regulation otherwise left the demonstration intact, with its symbolic city, signs, and the presence of those who were willing to take their turns in a day-and-night vigil. Respondents do not suggest that there was, or is, any barrier to delivering to the media, or to the public by other means, the intended message concerning the plight of the homeless." *Id.* at 295.

38. L. Tribe at 985. "The principle that government must incur affirmative costs in order to facilitate commuicative activity is not lightly extended to cases in which private individuals are asked to be cost-bearers. . . ." *See also* Ward v. Rock Against Racism, 109 S.Ct. 2746, 2760 (1989). In *Rock Against Racism*, the Court upheld a New York City statute which restricted those seeking use of a Central Park Bandshell to the equipment and technician the City provided. Justice Kennedy wrote, "That the city's limitations on volume may reduce to some degree the potential audience for respondent's speech is of no consequence, for there has been no showing that the remaining avenues of communication are inadequate." *Id.*

on who writes the opinion. Moreover, for over a decade, the Court has debated whether another factor belongs in the analytical crucible. This factor is further complicated by its variety of aliases. Its most popular version appears to be the "least restrictive means" test, though that is by no means an authoritative conclusion.[39]

2. Towards A Fifth Prong

One scholar has argued that the discussion of less restrictive alternatives in cases where content-neutral regulations are at issue is a genuine part of the analysis itself: "the availability of such alternatives is relevant to deciding whether government has in fact left too little opportunity for communicative activity, whether for speakers or for listeners."[40] Given its relevance, the least restrictive means test is derived in part from the "overbreadth doctrine".[41] Generally, where a statute is substantially overbroad - in this context burdening more freedoms than necessary - the courts will strike it down. Early case law, however, provides the roots of the concept, even before it earned a name.

In *Martin v. City of Struthers*, partial justification for the Court's decision revolved around the fact that distribution could "so easily be controlled by traditional legal methods."[42] In other words, the law of trespass provided sufficient protection to the average homeowner without constricting the Jehovah's Witnesses' right to distribute their information. Subsequent cases more fully developed the idea until it became entrenched.[43] Unfortunately, the passage of time only served to skew the original design of the least restrictive means standard until few could say with confidence when or why it applied. This sober truth further complicates an area already full of doctrines, standards, and tests as interchangeable as the machine tool.[44] Justice Kennedy, in *Ward v. Rock Against Ra-*

39. Variations on this theme include: "least restrictive alternative", "least intrusive means", "less drastic means", "less drastic alternative", "less intrusive alternative", "precision of regulation", and "necessary means". *See also* Note, *supra* note 26, at 1148 n. 57.

40. TRIBE at 985 (footnote omitted). Professor Tribe, however, cites only one case in support of this conclusion - Nixon v. Administrator of General Services, 433 U.S. 425 (1977). The Court's recent decisions militate against this proposition, although none of the decisions have commanded a decisive majority. *But see* Justice Marshall's dissent in *CCNV*, 468 U.S. at 313, which includes reference to a context in which facially content-neutral regulations are nonetheless subjected to strict scrutiny. *See, e.g.*, Landmark Communications, Inc. v. Virginia, 435 U.S. 829 (1978)(regulation vests standardless discretion in state officials).

41. TRIBE at 1037. *See* Note, *The First Amendment Overbreadth Doctrine*, 83 Harv. L. Rev. 844, 917-18 (1970).

42. 319 U.S. at 147. *See* TRIBE at 1037.

43. *See, e.g.*, Shelton v. Tucker, 364 U.S. 479, 488 (1960); *see generally* Note, *Less Drastic Means and the First Amendment*, 78 Yale L.J. 464 (1969).

44. Attempts to decipher the puzzle confound legal scholars and neophytes

cism,[45] enunciated the Court's latest effort at resolving such inconsistency.

II. WARD v. ROCK AGAINST RACISM: A NEW CHORD, BUT THE SAME OLD SONG

A. *The Facts*

On June 22, 1989, the Supreme Court decided *Ward v. Rock Against Racism*.[46] The facts of the case are crucial to the application of the time, place and manner analysis. Rock Against Racism (hereinafter RAR) is an unincorporated association " 'dedicated to the espousal of and promotion of antiracist views.' "[47] It sponsors speeches and rock concerts at the Naumberg Acoustic Bandshell in Central Park in New York City. Previously, RAR supplied sound equipment and a technician to the performing groups at the concerts. Over the years, the city received numerous complaints about the noise from park users and nearby residents. The record indicates RAR was uncooperative when the city requested it lower the volume at its concerts.[48]

Prior to a 1984 concert, the city met with RAR where the two mutually agreed that the city would monitor the noise level of RAR sponsored events at the edge of the concert ground and would revoke their permit if specific limits were exceeded. During the concert, the city repeatedly warned RAR about the noise level without effect. The city then issued two citations for excessive volume. When the city eventually shut off the power, "the audience became abusive and disruptive."[49]

The next year, the city refused RAR a permit for the bandshell, but suggested other city-operated facilities. Although discussion continued, RAR declined this offer and filed suit in the Federal District Court for the Southern District against the city seeking an injunction directing issuance of the permit. The parties eventually reached an agreement after RAR agreed to abide by all applicable regulations;

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alike. E.g. Do valid time, place and manner restrictions only occur within a public forum? *See, e.g.*, Note, *Ward v. Rock Against Racism: Reasonable Regulations and State Sponsored Sound*, 10 PACE L. REV. 633 (1990). How about a limited or non-public forum? Which standard applies to such restrictions? Must the government exhibit a compelling, significant or legitimate interest? (Language can be found advocating each standard.) In what context does the least restrictive alternative apply?

45. 109 S.Ct. 2746 (1989). In a six to three decision, Justice Kennedy's opinion was joined by Justices Rehnquist, White, O'Connor and Scalia; Justice Blackmun concurred in the judgment.

46. *Id.*

47. *Id.* at 2750 (quoting App. to Pet. for Cert. 3).

48. *Id.*

49. *Id.* at 2750.

RAR dropped the suit and a permit was issued. Pursuant to the agreement, the city developed use guidelines which specified that the city would "furnish high quality sound equipment and retain an independent, experienced sound technician for all performances at the Bandshell."[50]

Upon learning it would be expected to comply with the guidelines for its 1986 concert, RAR returned to the District Court to file a motion for an injunction against enforcement of the guidelines. In May of 1986, the District Court responded by preliminarily enjoining enforcement of the sound amplification guidelines. Alone among that season's performers, RAR used its own sound equipment and technician. The 1986 concert, however, again generated complaints about excessive noise.[51]

The District Court heard the case in 1987 and upheld the city's guidelines as valid time, place and manner restrictions. The Second Circuit reversed on the theory that "the method and extent of such 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."[52] The Supreme Court, however, disagreed. Justice Kennedy, writing for the major-

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50. *Id.* at 2751. The pertinent part of the Use Guidelines provides:

"To provide the best sound for all events Department of Parks and Recreation has leased a sound amplification system designed for the specific demands of the Central Park Bandshell. To insure appropriate sound quality balanced with respect for nearby residential neighbors and the mayorally decreed quiet zone of Sheep Meadow, all sponsors may use only the Department of Parks and Recreation Sound System.

DEPARTMENT OF PARKS AND RECREATION IS TO BE THE SOLE AND ONLY PROVIDER OF SOUND AMPLIFICATION, INCLUDING THOUGH NOT LIMITED TO AMPLIFIERS, SPEAKERS, MONITORS, MICROPHONES, AND PROCESSORS.

"Clarity of sound results from a combination of amplification equipment and a sound technician's familiarity and proficiency with that system. Department of Parks and Recreation will employ a professional sound technician [who] will be fully versed in sound 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." *Id.* at 2751-52 n. 2.

51. *Rock Against Racism*, 109 S.Ct. at 2752.

52. *Id.* (quoting Rock Against Racism v. Ward, 848 F.2d 367 (2d Cir. 1988)). The Circuit Court suggested pulling the plug on the sound equipment as a less restrictive alternative, but as discussed *infra* , this proved to be impracticable. 848 F. 2d. at 372 n. 6; *see also* United States v. O'Brien, 391 U.S. 367, 377 (1968). The Second Circuit relied on the test enunciated by the *O'Brien* Court. In *O'Brien*, the Court upheld an ordinance that punished knowing destruction or mutilation of draft cards. Their analysis included a version of the least restrictive alternative test: "[the regulation is justified if] the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest." 391 U.S at 377.

ity, took issue with the Second Circuit's reasoning and set down to rectify what he believed to be their reversible error.

B. *The Law: A Dissonant Chord*

Justice Kennedy's initial comments track the analytical framework of traditional public forum doctrine cases. Indeed, the majority specifically decided the case as one in which the Bandshell is a traditional public forum. As such, they stated that the government's right to regulate expression is subject to first amendment protection. Kennedy then reiterated the familiar test:

> . . . even in a public forum the government may impose reasonable restrictions on the time, place, or manner of protected speech, provided the restrictions "are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information."[53]

Justice Kennedy then applied each part of the test in turn. Here, he found the regulation to be content-neutral because the city's main justification for the sound-amplification guideline was the "desire to control noise levels at Bandshell events, [retain] the character of the Sheep Meadow,[54] and [avoid] undue intrusion into residential areas. . . . "[55] Great care had been taken by the city's attorneys to avoid the content-based category. By offering consistently neutral reasons for the regulation, the city escaped a strict scrutiny standard, thereby easing their burden of proof.

Similarly, the ample alternatives prong of the test proved to be nothing more than a paper tiger.[56] In fact, the majority admitted that the requirement is easily met.[57] In comparison to other regulations this Court has upheld, the use guideline was found by the majority to be far less restrictive.[58] In fact, the guideline permitted

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53. *Id.* at 2753. (quoting *Community for Creative Non-Violence*, 468 U.S. at 293); *see* Heffron v. International Society for Krishna Consciousness, Inc. 452 U.S. 640, 648 (1981).

54. The Mayor, by municipal ordinance, has decreed this park area a quiet zone.

55. 109 S.Ct. at 2754. "The only other justification offered [by the court] below was the city's interest in 'ensur[ing] the quality of sound at Bandshell events.' " The Court found this interest to be content-neutral as well because the city's concern extends only to sound amplification and avoidance of problems associated with inadequate sound mix. *Id.*

56. *Id.* at 2760. The majority saved this prong for last, but disposed of it post haste.

57. *Id.*

58. *Id. Compare* Frisby v. Schultz, 487 U.S. 474, 483-84 (1988)(upholding town ordinance which prohibited picketing at the residence of any individual in the town) *and* Clark v. Community for Creative Non-Violence, 468 U.S. 288, 295

expressive activity in the Bandshell, but had no effect on the quantity or content of that expression beyond regulating the extent of amplification.[59] Since the guideline did not close down the forum, the Court held that ample alternatives for communication remained.[60] The real issue, therefore, was whether the use guideline was narrowly tailored to further the city's substantial interest.

The Second Circuit had concluded that the sound-amplification guideline was not narrowly tailored to further the city's substantial interest because it was not the least intrusive means of regulating the volume.[61] Justice Kennedy responded unequivocally that the "less-restrictive-alternative analysis . . . has never been a part of the inquiry into the validity of time, place, and manner regulation."[62] Instead, Kennedy forcefully argued that time, place or manner restrictions are not invalid "simply because there is some imaginable alternative that might be less burdensome on speech."[63] Here, the fact that the city could have regulated the sound short of imposing use of their equipment and technician did not make the regulation invalid.

The significance of this case lies in the debate over the applicability of the "less-restrictive-alternative" analysis. In a larger sense, the dispute highlights the overarching problem with the public forum doctrine itself. What level of scrutiny shall control in forums, public and otherwise? Specifically, to what standard will the Court hold time, place or manner restrictions in public forums? That is the essence of the problem and the answer has consistently eluded the Supreme Court.

The majority appears to recognize the contorted nature of the law. However, at a threshold level, Kennedy's opinion suffers from the malady plaguing the Court, past and present. Within a three page span, the majority articulates the requisite governmental interest four times.[64] Unfortunately, they identify three different standards. Initially, Justice Kennedy stated that the city's regulation must serve a *significant* governmental interest.[65] Then, he pointed to the city's

(1984)(upholding application of Park Service regulation which permitted camping only in designated areas to prevent demonstrators' sleeping in symbolic tents erected with permit for demonstration to call attention to the plight of the homeless).

59. 109 S.Ct. at 2760.

60. *Id.*

61. 848 F.2d at 370-72.

62. 109 S.Ct. at 2757 (quoting Regan v. Time, Inc. 468 U.S. 641, 657 (1984)).

63. *Id.* (quoting United States v. Albertini, 472 U.S. 675, 689 (1985). Justice Kennedy concluded that this least-intrusive-means requirement came from United States v. O'Brien, 391 U.S. 367, 377 (1968), where the Court upheld a statute prohibiting individuals from defacing, mutilating, or destroying their draft cards.

64. 109 S.Ct. at 2756-58.

65. *Id.* at 2756. (citing Community for Creative Non-Violence, 468 U.S. at 293.)

substantial interest in ensuring its citizens' enjoyment of whatever the city parks have to offer.[66] In a final reaffirmation of the time, place or manner analysis, Justice Kennedy referred to the government's *legitimate* content-neutral interests.[67] These three standards rarely, if ever, have been interpreted as equivalents by the courts; therefore, it is understandable why confusion remains.[68] The majority here did nothing analytically unusual; rather they relied on precedent and language from good case law. It is a telling indictment of the cases which allowed this constitutional imbroglio to persist.

Regardless of their treatment of the necessary governmental interest, the majority proceeded to whittle away authority for the less-restrictive-alternative argument. Justice Kennedy first used *Regan v. Time, Inc.*[69] to impeach the less-restrictive-alternative theory's validity. As mentioned in *Regan*, the Court refuted the notion that this theory had ever been part of the inquiry regarding the validity of time, place, and manner regulation.[70] Interestingly enough, Justices Brennan and Marshall dissented in *Regan* partially because the substantial government interest aimed at the prevention of counterfeiting "could be sufficiently served by measures less destructive of First Amendment interests."[71] Here, in *Rock Against Racism*, Justice Marshall in dissent pointed out that the majority in *Regan* commanded the votes of only three other Justices, and therefore should not be construed as the Court's definitive explication of the narrowly tailored requirement.[72]

Narrow tailoring, according to *Rock Against Racism's* majority, is satisfied "so long as the . . . regulation promotes a substantial gov-

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66. *Id.* at 2757. Apparently, Justice Kennedy took this standard from *Community for Creative Non-Violence*, 468 U.S. at 296.

67. *Id.* at 2757-58. The irony here is Kennedy's introduction: "Lest any confusion on this point remain, we reaffirm today that a regulation of the time, place, or manner of protected speech must be narrowly tailored to serve the government's legitimate content-neutral interests . . . " *Id.* Later, he reiterated that the city had a "legitimate governmental interest." *Id.* at 2759.

68. *See infra* note 82.

69. 468 U.S. 641 (1984).

70. In *Regan*, the Court upheld a federal statute (18 U.S.C. § 504) regulating the photographing of money for use in a magazine cover. The statute really amounted to an anti-counterfeiting statute. The publisher of Sports Illustrated brought the suit when federal agents informed Time, Inc.'s legal department that the illustration on the cover of the February 16, 1981, issue of Sports Illustrated violated federal law and that it would be necessary for the Secret Service to seize all plates and materials used for production of the cover. *Id.* at 646.

Justice White, writing for a plurality, held Section 504's purpose requirement (used only for philatelic, numismatic, educational, historical, or newsworthy purposes) to be unconstitutional. He upheld, however, the remaining portions of the statute imposing color and size limitations. *Id.* at 659.

71. *Id.* at 686 (quoting Schaumburg v. Citizens for a Better Environment, 444 U.S. 620, 636 (1980) (Brennan, J., concurring in part and dissenting in part)).

72. *Rock Against Racism*, 109 S.Ct. at 2761, n. 2.

ernment interest that would be achieved less effectively absent the regulation."[73] This language, which appeared in *United States v. Albertini*,[74] further reduced the scrutiny applied to a regulation to ascertain whether it passes the narrow tailoring requirement. The State's resulting burden therefore is less difficult to meet. Justice Marshall distinguished *Albertini* on the ground that a military base is not a place traditionally dedicated to freedom of expression.[75] In *Albertini*, Justice O'Connor contested the notion that the power of a commanding officer to exclude civilians from his base should be analyzed in the same manner as government regulation of a traditional public forum.[76] If true, then the majority's reliance on *Albertini* seems somewhat misplaced.

The majority in *Rock Against Racism* did caution that narrow tailoring does not permit time, place or manner regulations to burden substantially more speech than necessary.[77] This statement is loosely derived from language in *Frisby v. Schultz* which states that a "statute is narrowly tailored if it targets and eliminates no more than the exact source of the 'evil' it seeks to remedy."[78] Coupled with their view of *Albertini's* "absent the regulation" language, this Court's interpretation of *Frisby's* "source of evil" test effectively eviscerates the narrow tailoring standard.

The majority, in truth, argued that the exact source of evil in *Rock Against Racism* was the volume. The sound-amplification guide-

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73. *Id.* at 2758 (quoting United States v. Albertini, 472 U.S. 675, 689 (1985)). In *Albertini*, the defendant was convicted for illegal entry onto a military base following receipt of a bar letter from the commanding officer. The letter informed the defendant that he was forbidden from entering the base without written permission from the commanding officer. Title 18 U.S.C. Sec. 1382 makes it unlawful to reenter a military base after having been ordered not to by an officer in charge. The defendant challenged the conviction on three grounds, but especially that his presence at the base was protected by the first amendment. 472 U.S. at 679. The Court held that whether or not the base constituted a public forum, the exclusion of the defendant did not violate the first amendment. *Id.* at 687.

74. 472 U.S. at 689. Moreover, Kennedy argued in *Rock Against Racism* that prior cases clearly held time, place or manner restrictions not to be invalid "simply because there is some imaginable alternative that might be less burdensome on speech." 109 S.Ct. at 2757 (quoting *Albertini*, 472 U.S. at 689).

75. 109 S.Ct. at 2761 n. 2.

76. 472 U.S. at 687. Later in the *Albertini* opinion, however, O'Connor explicitly stated that time, place and manner regulations are not invalid simply because there is some imaginable alternative that might be less burdensome on speech. *Id.* at 688-89.

77. 109 S.Ct. at 2758. *See also* Frisby v. Schultz, 108 S.Ct. 2495 (1988). In *Frisby*, abortion protesters brought suit to enjoin enforcement of a municipal ordinance prohibiting picketing before the dwelling of an individual. The Court held that the ordinance did not ban all picketing, only that in front of a particular resident. Therefore, the ordinance was a valid time, place and manner restriction. *Id.* at 2502.

78. 108 S.Ct. at 2502 (1988).

lines focused primarily on the target by imposing the city's technician upon Bandshell users. Furthermore, it is entirely plausible that the city's interest in protecting citizens from unwelcome noise and insuring the quality of sound heard by the listener would be achieved less effectively absent the regulation. The danger here lies in the precedent *Rock Against Racism* sets and the implications it has for the future.

Rock Against Racism's as yet unproven legacy amounts to what Justice Marshall referred to as a sacrifice of free speech. While the majority argued that content-neutral restrictions do not merit the strict scrutiny traditionally associated with first amendment freedoms,[79] the question arises whether time, place or manner restrictions that only incidentally burden speech warrant minimal scrutiny. Apparently, Justice Kennedy and the majority think it does.[80] Their position defies the historical bases of the public forum doctrine,[81] as well as certain recognized norms in constitutional legal theory.[82] The cause for alarm may be premature, but the case invites observers to ask — at what price regulation?

III. *ROCK AGAINST RACISM'S* IMPACT ON YESTERDAY: A LOOK AT *SCHNEIDER v. STATE* THROUGH TODAY'S SPECTACLES

Few would argue here that the result the Court reached is incorrect. RAR's behavior (evident in the record) virtually forced the city to police their concerts from backstage. At numerous intervals, a different response by RAR might have avoided the need for this case ever to be adjudicated, much less to be the subject of a Supreme Court decision.[83] Moreover, the more drastic measure of shutting

79. Marshall, in dissent, admits this much in *Community for Creative Non-Violence*, but there he challenged the practice of giving content-neutral regulations only minimal scrutiny. 468 U.S. at 313. In *Rock Against Racism*, Marshall takes a more affirmative stance arguing that the "least restrictive means" test is, in fact, part of the time, place and manner inquiry. 109 S.Ct. at 2760.

80. *But see Martin*, 319 U.S. at 147-48 (invalidating a ban on handbill distribution, notwithstanding that it was the most effective means of serving the government interest); *see also Schneider*, 308 U.S at 162.

81. *See supra* notes 6-11.

82. The terms "significant" or "substantial" interests usually are associated with an intermediate standard of scrutiny. *See, e.g.*, Craig v. Boren, 429 U.S. 190 (1976) (Oklahoma statute prohibiting sale of beer to males under age of 21 held invalid). Further, common sense dictates that the narrowly tailored requirement should consist of something more than minimal scrutiny (rational basis test). *See, e.g.*, City of New Orleans v. Dukes, 427 U.S. 297 (1976)(City ordinance exempting certain vendors from a pushcart prohibition held valid as rationally related to a legitimate state interest).

83. RAR could have lowered the volume when city officials first requested them to do so. Again, lowering the volume would have solved the problem when the city issued citations during the concert. Finally, given that RAR freely used the Band-

off the power left city officials facing a riot.[84] In addition, no other group performing at the Bandshell complained about the guidelines' restrictions.[85]

The majority in *Rock Against Racism* dismissed the dissent's analogy comparing the sound-amplification guideline to a total ban on distribution of handbills. In doing so, they ignored the case's potential ramifications, thereby sounding the death knell of the less-restrictive-alternative analysis. Its demise takes on significance when the majority's test is applied to the facts of a prior case. As discussed in *Schneider v. State* involved a New Jersey city ordinance proscribing the distribution of literature by the Jehovah's Witnesses.[86] The Court there found the ordinance invalid because it struck at "the very heart of constitutional guarantees."[87]

But suppose Justice Kennedy wrote that opinion in Justice Roberts' stead. Since *Schneider* concerned distribution in the streets, assume for present purposes that a traditional public forum exists. Justice Kennedy would begin by enunciating the familiar test: restrictions of this kind are valid provided they are justified without reference to the content of the regulated speech, they are narrowly tailored to serve a significant government interest and they leave open ample alternative channels for communication of the information.

Following *Rock Against Racism*, this ordinance appears content-neutral because the city of Irvington only sought to regulate the manner in which the literature was distributed. In fact, the content of the message never received consideration because the ordinance was "aimed at protecting occupants and others from disturbance and annoyance and preventing unknown strangers from visiting houses by day and night."[88]

The next stage in the analysis requires that the ordinance be narrowly tailored to serve a significant government interest. In accord

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shell in 1986 due to the injunction prohibiting enforcement of the city's use guidelines, a prudent course would have been discreet monitoring of the volume controls by RAR during their concerts. 109 S.Ct. at 2750-52.

84. *Id.* at 2750.

85. *Id.* at 2752. *See* Rock Against Racism v. Ward, 658 F.Supp. 1346, 1352 (S.D.N.Y. 1987).

86. The ordinance in part stated:

"No person except as in this ordinance provided shall canvass, solicit, distribute circulars, or other matter, or call from house to house in the Town of Irvington without first having reported to and received a written permit from the Chief of Police or the officer in charge of Police Headquarters . . ." *Schneider*, 308 U.S. at 157-58.

The ordinance is more complex than the part reproduced here, making it strongly resemble a prior restraint, but for the purposes of the hypothetical offered it suffices.

87. 308 U.S. at 164.

88. *Id.* at 159. In other words, the city sought to prevent fraudulent solicitation.

with his analysis in *Rock Against Racism*, Justice Kennedy would first consider the government interest at stake. Although either a legitimate or substantial interest might apply, the majority would hold that Irvington's interest must be substantial. Here, Irvington satisfies the requirement because it has a substantial interest in promoting the public safety, health, and welfare. The restriction therefore serves this interest because homeowners will only deal with canvassers previously licensed by city police. This insures the homeowner against random strangers soliciting door to door and increases the safety of the neighborhoods.

Of critical importance is the next stage of the analysis — the narrow tailoring requirement. Justice Kennedy, to be consistent with *Rock Against Racism*, would argue that this ordinance is not invalid simply because there is some imaginable alternative less burdensome on speech.[89] Further, narrow tailoring would be satisfied "so long as the regulation promotes a substantial government interest that would be achieved less effectively absent the regulation."[90] The Court would issue a final warning — the regulation may not burden substantially more speech than is necessary to further the governmental interest.[91]

The court in *Schneider* held that frauds and trespasses may be punished by law. "If it is said that these means are less efficient and convenient than [the regulation at issue], the answer is that considerations of this sort do not empower a municipality to abridge freedom of speech and press."[92] Justice Kennedy, however, would hold differently.

Under *Rock Against Racism's* test, the ordinance in *Schneider*

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89. 109 S.Ct. at 2757.

90. *Id.* at 2758 (citing U.S. v. Albertini, 472 U.S. 675, 689 (1985)).

91. *Id.*

92. 308 U.S. at 164. It is true that the Court in *Schneider* focused on the power of the Irvington police to censor handbills, yet the ordinance did not empower police to censor on the basis of the pamphlet's content. Rather, a canvasser was required to:

> make an application giving his name, address, age, height, weight, place of birth, whether or not previously arrested or convicted of crime, by whom employed, address of employer, clothing worn, and description of project for which he is canvassing; that each applicant shall be fingerprinted and photographed; that the Chief of Police shall refuse a permit in all cases where the application . . . shows that the canvasser is not of good character or is canvassing for a project not free from fraud; that canvassing may only be done between 9 a.m. and 5 p.m.; that the canvasser must furnish a photograph of himself which is to be attached to the permit; that the permittee must exhibit the permit to any [police officer] upon request, must be courteous to all persons in canvassing, must not importune or annoy the town's inhabitants or conduct himself in an unlawful manner and must, at the expiration of the permit, surrender it at police headquarters. *Id.* at 157-58.

would survive challenge even though a less burdensome alternative exists (remedy at law). Moreover, it is enough that the city demonstrates that their interest would be served less effectively absent the regulation. The city would merely point to the fact that their substantial interest in preventing fraudulent solicitation cannot be achieved as effectively absent the licensing procedure at the police station. The remedy at law against offenders, while less burdensome on speech, would defeat the interest to be served — protection against fraudulent solicitation — because the offense already will have occurred. Finally, the ordinance only requires canvassers to obtain a permit at police headquarters. Since they retain the right to distribute their literature, the ordinance would not substantially burden more speech than is necessary to protect the homeowner from fraudulent solicitation.

The final prong of the analysis requires that the ordinance leave open ample alternative channels of communication. Here, *Rock Against Racism's* majority would find that the ordinance continues to permit expressive activity and has no effect on the content of expression beyond regulating when canvassing may occur and the manner in which it will be done.[93] Furthermore, canvassers cannot contend that a barrier would exist to delivering their religious message to the media, or to the public by other means.[94] In truth, they still can resort to distribution in the streets or other forms of communication to convey their message.

While the comparison between *Schneider* and *Rock Against Racism* may not land on all fours, both situations involve a city ordinance that places content-neutral discretion over expression in the hands of municipal officials. In each case, the ordinance serves a significant governmental interest; the former protects against fraudulent solicitation while the latter seeks to reduce noise and insure the sound quality of the Bandshell concerts. Furthermore, both cases leave the desired form of expression intact, albeit subject to regulation. *Schneider's* canvassers may still solicit door-to-door and *Rock Against Racism's* performers retain their right to utilize the Bandshell. The only meaningful distinction concerns how narrowly the ordinance at issue is tailored.

In *Schneider*, the Court sacrificed efficiency for free speech, whereas *Rock Against Racism's* Court did the exact opposite. The tacit nod the majority gave to music's expressive value in *Rock Against Racism* underscores the Court's nascent disregard for the lessons of history. Why pay homage to the historical role of music as expression and decry the totalitarian fear of free speech, if the Court only proceeds to slowly emasculate constitutional safe-

93. *See Rock Against Racism*, 109 S.Ct. at 2760.

94. *See Community for Creative Non-Violence*, 468 U.S. at 295; Heffron v. International Soc'y for Krishna Consciousness, Inc., 452 U.S. 640, 654-55 (1981).

guards?[95] Dissenting, Justice Marshall sounded the alarm,[96] doggedly defending the viability of the "less-restrictive-alternative" analysis. His argument persuaded only two out of nine, leaving the majority comfortably positioned to install their version of the time place or manner analysis.

CONCLUSION

The Supreme Court sits at the crossroads of the public forum. On its present course, *Rock Against Racism* represents a sword in government's hands poised to strike deftly at first amendment freedoms.[97] The Court, however, may anticipate the coming blow and disarm government.[98]

The majority in *Rock Against Racism* need not have refuted the less-restrictive-alternative analysis. For content-neutral cases, this analysis is "relevant to deciding whether government has in fact left too little opportunity for communicative activity."[99] A key to making a determination is whether the government's goals can be effectively and less intrusively served.[100] To be effective, an alternative must first be available; that is, it must exist. Second, it must be a

95. 109 S.Ct. at 2753.

96. *Id.* at 2760-63.

97. Arguably, the quartering already has begun. *See* United States v. Kokinda, 110 S.Ct. 3115 (1990). Here, the Court, in a plurality opinion by Justice O'Connor, recently upheld a regulation prohibiting exercise of first amendment freedoms on a post office sidewalk.

98. Some may query whether *Rock Against Racism's* new standard indeed foreshadows future governmental infringement of speech; especially given the Court's decision in Texas v. Johnson, 109 S.Ct. 2533 (1989), the flag-burning case. There, the Court (in an opinion by Justice Brennan, joined by Justices Marshall, Blackmun, and Scalia, and concurred in by Justice Kennedy) struck down a Texas statute which prohibited desecration of the American flag. While the *Johnson* case indicates the Court's regard for free speech, it does little to allay the anxiety generated by *Rock Against Racism*, primarily because the cases were decided under different analyses.

The *Johnson* case is a classic example of Tribe's track-one analysis — regulation based upon the content of speech. As such, the regulation is subjected to strict scrutiny. In contrast, *Rock Against Racism* was decided on track-two — content-neutral restrictions. Once a restriction is deemed content-neutral, it must be narrowly tailored to serve a significant government interest that leaves open ample alternatives to communicate. *See* Tribe at 977-86.

Justification for each track turns on the burdens placed on speech. Track one employs strict scrutiny because content-based regulations threaten the speaker's right to speak at all. Time, place or manner restrictions, however, only regulate the way in which speakers express their message. Consequently, speech subject to such restrictions, while still under the first amendment analytical rubric, receive less protection than other types of speech. *Id.* Therefore, removal of the "less restrictive alternative" prong of the test further dilutes an already watered down constitutional standard.

99. Tribe at 985.

100. 109 S.Ct. at 2762.

viable option; the alternative must have utility for whomever considers its use. Although Justice Marshall, in dissent, identified a number of alternatives as less intrusive,[101] most, if not all, are impracticable.[102] Therefore, the least restrictive alternative available to the city was the one it employed.[103]

Aside from this, the Court must resolve the standard of scrutiny to be applied to content-neutral time, place or manner restrictions. As constitutional theory has evolved over time, the courts have developed three standards of scrutiny to be applied in specific situations.[104] Since each standard has two components, nine combinations exist.[105] Based on the many Court cases within and

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101. In an amicus brief, the National Park Service set forth the methods it uses to control volume, which, according to Marshall, were rejected by the city. *Id.* at 2762 n. 5. In fact, the city tried each one with no success. The recalcitrance RAR demonstrated removes sound monitoring on the event's perimeter and communication with event sponsors from the schedule of alternatives. Similarly, turning the power off resulted in a potential riot and is therefore not a feasible option. *See supra* notes 46-51.

102. The only alternative not fully explored by the city concerned an anti-noise ordinance which it has chosen not to enforce. The threshold problem with the ordinance is that the violation must occur prior to enforcement. Thus, the city's residents will be subjected to the noise before any relief is provided. The solution, therefore, defeats the purpose. Furthermore, RAR did not act accordingly even after it received two citations during the concert. Their actions indicated that enforcement of the ordinance may have little or no impact on RAR's behavior in the future. 109 S.Ct. at 2750.

103. This author does not argue that *Rock Against Racism* was decided incorrectly, merely that the majority need not have thrown out the "less restrictive altertative" requirement. For discussion of the former, *see* Note, *Flag Burning Yes, Loud Music No: What's the Catch?*, 44 U. Miami L. Rev. 1033, 1053-73 (1990); Note, *Ward v. Rock Against Racism: Reasonable Regulations and State Sponsored Sound*, 10 Pace L. Rev. 633 (1990).

104. The equal protection/discrimination cases, where the court identified the characteristics of a suspect class, contributed a great deal to the development of the three-tier scrutiny analysis. The three standards provide that the governmental ordinance, activity or classification must:

(1) for strict scrutiny, be necessary to accomplish a compelling governmental interest, *see, e.g.*, Palmore v. Sidoti, 104 S.Ct. 1879 (1984);

(2) for intermediate scrutiny, bear a substantial relationship to an important government interest, *see, e.g.*, Craig v. Boren, 429 U.S. 190 (1976);

(3) for minimal scrutiny, be rationally related to a legitimate state interest, *see, e.g.*, City of New Orleans v. Dukes, 427 U.S. 297 (1976) (per curiam).

105. Possible combinations:

(1) Necessary for compelling state interest.
(2) Necessary for important state interest.
(3) Necessary for legitimate state interest.
(4) Substantial relationship to compelling state interest.
(5) Substantial relationship to important state interest.
(6) Substantial relationship to legitimate state interest.
(7) Rational relationship to compelling state interest.
(8) Rational relationship to important state interest.
(9) Rational relationship to legitimate state interest.

without the public forum doctrine that employ a scrutiny standard, choosing the correct one nearly amounts to throwing the dice or flipping a coin.

Apart from indecision concerning the requisite governmental interest, the majority in *Rock Against Racism* appeared to rely on a test which combined a strict scrutiny component with that of the intermediate variety.[106] Although narrow tailoring is arguably a strict scrutiny standard, the version that emerged from this case is equivalent to minimal scrutiny.[107] The Court seems to be correct in holding that content-neutral time, place or manner restrictions were never intended to be strictly scrutinized.[108] However, neither should they only receive minimal scrutiny. The simple answer to this dilemma is to adopt the intermediate standard.

By holding that regulations ought to bear a substantial relationship to an important government interest, the Court avoids strict scrutiny, but simultaneously safeguards free speech to the extent that a regulation must be more than merely rationally related. It is quite apparent from the cases that the distinction between a compelling state interest and a legitimate state interest is a red herring. If the Court chooses to apply strict scrutiny, the state interest, more than likely, will be found compelling. Similarly, minimal scrutiny, in all probability, will result in a determination that the state interest is legitimate. Therefore, of paramount importance is the gloss given the first component.

Assuming that narrow tailoring is tantamount to a substantial relationship, *Rock Against Racism's* potential erosion of first amendment freedoms need not occur. It permits the Court here to reach the same conclusion, yet prevents facile manipulation of the language by government. No longer would the Court be inclined to state that a time, place or manner restriction is valid if, absent the regulation, the government interest is achieved less effectively.

Applied to the facts of *Rock Against Racism*, the Court still could hold that the regulation is valid because it exhibits a substantial re-

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106. "[N]arrowly tailored to serve a substantial government interest. . . ." 109 S.Ct. at 2752 (citing Rock Against Racism v. Ward, 848 F.2d 367, 370 (2d Cir. 1988) (cite omitted). Common sense dictates that a substantial interest is more akin to an important state interest than a legitimate state interest. *See* Tribe at 984.

107. "It will be enough . . . that the challenged regulation advances the government's interest only in the slightest, for any differential burden on speech that results does not enter the calculus." 109 S.Ct. at 2762 (Marshall, J., dissenting).

108. *See* Tribe at 981-82. " '[P]ublic forums' represent areas within which tolerance for inhibitions on speech, petition, and assembly is at a minimum, and government's burden of justification [is] at its highest . . . [However] , [u]nless the inhibition resulting from . . . a content-neutral abridgement is significant, government need show no more than a rational justification for its choice. . . . " *Id.*

The inherent tension between these two statements is obvious, but they perfectly frame the dilemma in which the Court presently finds itself cornered.

lationship to an important government interest. In other words, the city's interest in noise control and insuring the sound quality would be furthered substantially by the sound-amplification guidelines.[109] Nevertheless, the city's burden would involve more than satisfaction of the rationality test.[110]

It is true that the Court, as yet, has not developed consistent terms defining intermediate scrutiny, much less what constitutes a substantial relationship. At the very least, the government's burden should be more than minimal because first amendment freedoms, even incidentally burdened, merit greater protection than those afforded by a rationally related regulation. Here, the Court may find articulation of a concise standard onerous, but the alternative is a gradually taciturn marketplace of ideas. Even the most conservative on the Court today acknowledge the danger of a less vital marketplace. By further restricting the open exchange of ideas, we fetter the essence of freedom and lose an opportunity for expression in an already finite galaxy of forums. How much speech will be lost before the Court is forced to ask itself — at what price regulation?

*Michael R. Manley**

109. While the Court at times questioned the wisdom of further dividing the levels of scrutiny into three-tiers, the case law adopting that approach has lead to the three tiers becoming relatively entrenched. *See* Craig v. Boren, 429 U.S. 190 (1976).

110. The rationality test, traditionally applied to economic regulations in violation of the Equal Protection Clause, employs disturbingly permissive language. Generally, the legislature "may . . . adopt[] regulations that only partially ameliorate a perceived evil and defer[] complete elimination of the evil to future regulations." City of New Orleans v. Dukes, 427 U.S. 297, 303 (1976)(per curiam). An older case is still cited with approval by the Supreme Court as articulating the elements of a rational basis test. For present purposes they may be stated in the following form:

(1) A regulation is valid unless "it is without any reasonable basis and therefore is purely arbitrary";

(2) A regulation "having some reasonable basis does not offend . . . merely because it is not made with mathematical nicety or because in practice it results in some inequality";

(3) When a regulation is called into question, "if any state of facts reasonably can be conceived that would sustain it, the existence of that state of facts at the time the law was enacted must be assumed . . . ".

See generally, Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61 (1911).

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