

AMERICAN CONSTITUTIONALISM
VOLUME II: RIGHTS AND LIBERTIES
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Supplementary Material

Chapter 10: The Reagan Era – Democratic Rights/Free Speech/Public Property, Subsidies, Employees,
and Schools

Ward v. Rock Against Racism, 491 U.S. 781 (1989)

Rock Against Racism (RAR) regularly held concerts at the Naumberg Acoustic Bandshell in New York's Central Park. After repeated complaints from both neighbors about the volume and audiences about sound quality, New York City adopted a series of guidelines on March 21, 1986. The crucial provision provided for a city-employed sound technician who would control the volume and mix at all concerts held at the bandshell. RAR sought an injunction against Benjamin Ward, the Police Commission of New York City, claiming that this requirement violated their First and Fourteenth Amendment rights to determine the volume and mix of the music they played. A federal district court rejected their contention, but that decision was reversed by the Court of Appeals for the First Circuit. Ward appealed to the Supreme Court of the United States. Both the United States and the National League of Cities filed amicus briefs urging the justices to sustain New York City's policy. The brief for the United States asserted,

The events that take place annually in Capital-area parks run the gamut from Fourth of July celebrations on the Mall, to marches on Washington, to folk festivals, to hundreds of smaller demonstrations and assemblies. The Park Service must rely on a variety of techniques for regulating sound in all of these settings. The First Amendment does not and cannot require it to satisfy a court that it has selected the least restrictive of all possible alternative means of preventing excessive noise for each of the events that takes place in a national park.

The Supreme Court by a 6-3 vote sustained the noise control ordinance. Justice Kennedy's majority opinion held that the ordinance was a constitutional means for lowering the volume and providing for better sound quality. Kennedy also noted that a narrowly-tailored law need not be the least restrictive means for regulating speech. How did Justice Kennedy interpret "narrow tailoring?" How did Justice Marshall interpret that phrase? Whose interpretation best balances First Amendment and other interests? Justice Marshall claimed that the city could simply prohibit certain volume levels. Why did the majority reject that position?

JUSTICE KENNEDY delivered the opinion of the Court.

...

Music is one of the oldest forms of human expression. From Plato's discourse in the Republic to the totalitarian state in our own times, rulers have known its capacity to appeal to the intellect and to the emotions, and have censored musical compositions to serve the needs of the state. . . . The Constitution prohibits any like attempts in our own legal order. Music, as a form of expression and communication, is protected under the First Amendment. . . .

We need not here discuss whether a municipality which owns a bandstand or stage facility may exercise, in some circumstances, a proprietary right to select performances and control their quality. . . . Here the bandshell was open, apparently, to all performers; and we decide the case as one in which the bandshell is a public forum for performances in which the government's right to regulate expression is subject to the protections of the First Amendment. . . . Our cases make clear, however, that 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.” . . .

The principal inquiry in determining content neutrality, in speech cases generally and in time, place, or manner cases in particular, is whether the government has adopted a regulation of speech because of disagreement with the message it conveys. . . . A regulation that serves 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. . . .

The principal justification for the sound-amplification guideline is the city’s desire to control noise levels at bandshell events, in order to retain the character of the Sheep Meadow and its more sedate activities, and to avoid undue intrusion into residential areas and other areas of the park. This justification for the guideline “ha[s] nothing to do with content,” . . . and it satisfies the requirement that time, place, or manner regulations be content neutral.

. . .
[T]he city’s concern with sound quality extends only to the clearly content-neutral goals of ensuring adequate sound amplification and avoiding the volume problems associated with inadequate sound mix. Any governmental attempt to serve purely esthetic goals by imposing subjective standards of acceptable sound mix on performers would raise serious First Amendment concerns, but this case provides us with no opportunity to address those questions. [T]he District Court found that the city’s equipment and its sound technician could meet all of the standards requested by the performers, including [Rock Against Racism].

. . .
. . . [R]espondent contends only that the city, by exercising what is concededly its right to regulate amplified sound, could choose to provide inadequate sound for performers based on the content of their speech. Since respondent does not claim that city officials enjoy unguided discretion to deny the right to speak altogether, it is open to question whether respondent’s claim falls within the narrow class of permissible facial challenges to allegedly unconstrained grants of regulatory authority. . . .

. . . [R]espondent’s facial challenge [also] fails on its merits. The city’s guideline states that its goals are to “provide the best sound for all events” and to “insure appropriate sound quality balanced with respect for nearby residential neighbors and the mayorally decreed quiet zone of [the] Sheep Meadow.” . . . While these standards are undoubtedly flexible, and the officials implementing them will exercise considerable discretion, perfect clarity and precise guidance have never been required even of regulations that restrict expressive activity. . . . By its own terms the city’s sound-amplification guideline must be interpreted to forbid city officials purposely to select inadequate sound systems or to vary the sound quality or volume based on the message being delivered by performers. The guideline is not vulnerable to respondent’s facial challenge.¹

Even if the language of the guideline were not sufficient on its face to withstand challenge, our ultimate conclusion would be the same, for the city has interpreted the guideline in such a manner as to provide additional guidance to the officials charged with its enforcement. The District Court expressly found that the city’s policy is to defer to the sponsor’s desires concerning sound quality. . . .

The city’s regulation is also “narrowly tailored to serve a significant governmental interest.” . . . Despite respondent’s protestations to the contrary, it can no longer be doubted that government “ha[s] a substantial interest in protecting its citizens from unwelcome noise.” . . .

¹ The dissent’s suggestion that the guideline constitutes a prior restraint is not consistent with our cases. . . . The sound-amplification guideline . . . grants no authority to forbid speech, but merely permits the city to regulate volume to the extent necessary to avoid excessive noise. It is true that the city’s sound technician theoretically possesses the power to shut off the volume for any particular performer, but that hardly distinguishes this regulatory scheme from any other; government will always possess the raw power to suppress speech through force, and indeed it was in part to avoid the necessity of exercising its power to “pull the plug” on the volume that the city adopted the sound-amplification guideline. . . . [footnote by Justice Kennedy]

We think it also apparent that the city's interest in ensuring the sufficiency of sound amplification at bandshell events is a substantial one. The record indicates that inadequate sound amplification has had an adverse affect on the ability of some audiences to hear and enjoy performances at the bandshell. The city enjoys 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. . . .

The Court of Appeals erred in sifting through all the available or imagined alternative means of regulating sound volume in order to determine whether the city's solution was "the least intrusive means" of achieving the desired end. This "less-restrictive-alternative analysis . . . has never been a part of the inquiry into the validity of a time, place, and manner regulation." . . . Instead, our cases quite clearly hold that restrictions on the time, place, or manner of protected speech are not invalid "simply because there is some imaginable alternative that might be less burdensome on speech." . . .

. . . Lest any confusion on the 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 but that it need not be the least restrictive or least intrusive means of doing so. Rather, the requirement of narrow tailoring is satisfied "so long as the . . . regulation promotes a substantial government interest that would be achieved less effectively absent the regulation." . . . To be sure, this standard does not mean that a time, place, or manner regulation may burden substantially more speech than is necessary to further the government's legitimate interests. Government may not regulate expression in such a manner that a substantial portion of the burden on speech does not serve to advance its goals. . . . So long as the means chosen are not substantially broader than necessary to achieve the government's interest, however, the regulation will not be invalid simply because a court concludes that the government's interest could be adequately served by some less-speech-restrictive alternative. . . .

It is undeniable that the city's substantial interest in limiting sound volume is served in a direct and effective way by the requirement that the city's sound technician control the mixing board during performances. Absent this requirement, the city's interest would have been served less well, as is evidenced by the complaints about excessive volume generated by respondent's past concerts. The alternative regulatory methods hypothesized by the Court of Appeals reflect nothing more than a disagreement with the city over how much control of volume is appropriate or how that level of control is to be achieved. . . . The Court of Appeals erred in failing to defer to the city's reasonable determination that its interest in controlling volume would be best served by requiring bandshell performers to utilize the city's sound technician.

The city's second content-neutral justification for the guideline, that of ensuring "that the sound amplification [is] sufficient to reach all listeners within the defined concertground" . . . also supports the city's choice of regulatory methods. By providing competent sound technicians and adequate amplification equipment, the city eliminated the problems of inexperienced technicians and insufficient sound volume that had plagued some bandshell performers in the past. No doubt this concern is not applicable to respondent's concerts, which apparently were characterized by more-than-adequate sound amplification. But that fact is beside the point, for the validity of the regulation depends on the relation it bears to the overall problem the government seeks to correct, not on the extent to which it furthers the government's interests in an individual case. Here, the regulation's effectiveness must be judged by considering all the varied groups that use the bandshell, and it is valid so long as the city could reasonably have determined that its interests overall would be served less effectively without the sound-amplification guideline than with it. . . .

. . .
If the city's regulatory scheme had a substantial deleterious effect on the ability of bandshell performers to achieve the quality of sound they desired, respondent's concerns would have considerable force. The District Court found, however, that pursuant to city policy, the city's sound technician "give[s] the sponsor autonomy with respect to the sound mix . . . [and] does all that he can to accommodate the sponsor's desires in those regards." . . . In view of these findings, which were not disturbed by the Court of Appeals, we must conclude that the city's guideline has no material impact on any performer's ability to exercise complete artistic control over sound quality. . . .

. . .

The city's sound-amplification guideline is narrowly tailored to serve the substantial and content-neutral governmental interests of avoiding excessive sound volume and providing sufficient amplification within the bandshell concert ground, and the guideline leaves open ample channels of communication. Accordingly, it is valid under the First Amendment as a reasonable regulation of the place and manner of expression. . . .

JUSTICE BLACKMUN concurs in the result.

JUSTICE MARSHALL, with whom JUSTICE BRENNAN and JUSTICE STEVENS join, dissenting.

No one can doubt that government has a substantial interest in regulating the barrage of excessive sound that can plague urban life. Unfortunately, the majority plays to our shared impatience with loud noise to obscure the damage that it does to our First Amendment rights. Until today, a key safeguard of free speech has been government's obligation to adopt the least intrusive restriction necessary to achieve its goals. By abandoning the requirement that time, place, and manner regulations must be narrowly tailored, the majority replaces constitutional scrutiny with mandatory deference. . . .

The majority sets forth the appropriate standard for assessing the constitutionality of the Guidelines. A time, place, and manner regulation of expression must be content neutral, serve a significant government interest, be narrowly tailored to serve that interest, and leave open ample alternative channels of communication. . . . The Guidelines indisputably are content neutral as they apply to all bandshell users irrespective of the message of their music. . . . They also serve government's significant interest in limiting loud noise in public places. . . .

My complaint is with the majority's serious distortion of the narrow tailoring requirement. . . . While there is language in a few opinions which, taken out of context, supports the majority's position, in practice, the Court has interpreted the narrow tailoring requirement to mandate an examination of alternative methods of serving the asserted governmental interest and a determination whether the greater efficacy of the challenged regulation outweighs the increased burden it places on protected speech. . . . In *Schneider v. State* (1939), for example, the Court invalidated a ban on handbill distribution on public streets, notwithstanding that it was the most effective means of serving government's legitimate interest in minimizing litter, noise, and traffic congestion, and in preventing fraud. The Court concluded that punishing those who actually litter or perpetrate frauds was a much less intrusive, albeit not quite as effective, means to serve those significant interests. . . .

The Court's past concern for the extent to which a regulation burdens speech more than would a satisfactory alternative is noticeably absent from today's decision. The majority requires only that government show that its interest cannot be served as effectively without the challenged restriction. . . . It will be enough, therefore, 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. Despite its protestations to the contrary, the majority thus has abandoned the requirement that restrictions on speech be narrowly tailored in any ordinary use of the phrase. Indeed, 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 and fraud, or that a ban on loudspeakers and radios in a public park is the most effective means of avoiding loud noise. Logically extended, the majority's analysis would permit such far-reaching restrictions on speech.

. . . Had the majority not abandoned the narrow tailoring requirement, the Guidelines could not possibly survive constitutional scrutiny. Government's interest in avoiding loud sounds cannot justify giving government total control over sound equipment, any more than its interest in avoiding litter could justify a ban on handbill distribution. In both cases, government's legitimate goals can be effectively and less intrusively served by directly punishing the evil—the persons responsible for excessive sounds and the persons who litter. . . .

. . .

The majority's conclusion that the city's exclusive control of sound equipment is constitutional is deeply troubling for another reason. It places the Court's imprimatur on a quintessential prior restraint,

incompatible with fundamental First Amendment values. . . . Here, the city controls the volume and mix of sound through its monopoly on sound equipment. In both situations, government's exclusive control of the means of communication enables public officials to censor speech in advance of its expression. . . .

The majority's implication that government control of sound equipment is not a prior restraint because city officials do not "enjoy unguided discretion to deny the right to speak altogether" . . . is startling. In the majority's view, this case involves a question of "different and lesser" magnitude—the discretion to provide inadequate sound for performers. But whether the city denies a performer a bandshell permit or grants the permit and then silences or distorts the performer's music, the result is the same—the city censors speech. . . .

As a system of prior restraint, the Guidelines are presumptively invalid. . . . They may be constitutional only if accompanied by the procedural safeguards necessary "to obviate the dangers of a censorship system." . . . The city must establish neutral criteria embodied in "narrowly drawn, reasonable and definite standards," in order to ensure that discretion is not exercised based on the content of speech. . . . Moreover, there must be "an almost immediate judicial determination" that the restricted material was unprotected by the First Amendment. . . .

The Guidelines contain neither of these procedural safeguards. First, there are no "narrowly drawn, reasonable and definite standards" guiding the hands of the city's sound technician as he mixes the sound. The Guidelines state that the goals are "to provide the best sound for all events" and to "insure appropriate sound quality balanced with respect for nearby residential neighbors and the mayorally decreed quiet zone." . . . But the city never defines "best sound" or "appropriate sound quality." . . . Because judgments that sounds are too loud, noiselike, or discordant can mask disapproval of the music itself, government control of the sound-mixing equipment necessitates detailed and neutral standards.

. . . [T]he requirement that there be detailed standards is of value only so far as there is a judicial mechanism to enforce them. Here, that necessary safeguard is absent. 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. There is, of course, no time for appeal in the middle of a song. As a result, no court ever determines that a particular restraint on speech is necessary. . . .

Today's decision has significance far beyond the world of rock music. Government no longer need balance the effectiveness of regulation with the burdens on free speech. After today, government need only assert that it is most effective to control speech in advance of its expression. Because such a result eviscerates the First Amendment, I dissent.