PAYING FOR FREE SPEECH: THE CONTINUING VALIDITY OF *COX v. NEW HAMPSHIRE*

In *Cox v. New Hampshire,*[1] the Supreme Court rejected a first amendment challenge to a licensing statute that imposed a fee on groups holding "parades or processions."[2] Since this landmark decision, local governments' power to require public demonstrators to procure permits and pay fees to offset the costs of their demonstrations has remained largely unchallenged.[3] Recently, however, the Eleventh Circuit Court of Appeals, in *Central Florida Nuclear Freeze Campaign v. Walsh,*[4] invalidated a "police protection ordinance"[5] that imposed permit fees based on the estimated costs of providing police protection during demonstrations. This holding substantially narrows the rule of *Cox v. New Hampshire* and threatens the validity of police protection ordinances.

This Note examines the continued validity and desirability of police protection ordinances. Part I discusses the fundamental role of free speech in American society. Part II explains the function of police protection in public demonstrations, the costs associated with that protection, and the positive effect of police protection on the exercise of free speech. Part III examines Supreme Court treatment of government restrictions on the exercise of free speech. Finally, Part IV rejects the *Central Florida* approach to police protection ordinances and concludes that police protection ordinances imposing a fee based on actual costs are constitutionally valid and socially desirable.

I. THE ROLE OF FREE SPEECH

The first amendment's guarantee of free speech serves as a cornerstone

1. 312 U.S. 569 (1941).

2. N.H. P.L. ch. 145, § 4 (current version at N.H. REV. STAT. ANN. § 286:4 (1977)). For the text of this statute, see *infra* note 39.

3. *See* Goldberger, *A Reconsideration of* Cox v. New Hampshire: *Can Demonstrators Be Required to Pay the Costs of Using America's Public Forums?, 62* TEX. L. REV. 403 (1983). Permit applicants have challenged other aspects of licensing ordinances. *See, e.g.,* Shuttleworth v. City of Burmingham, 394 U.S. 147 (1969) (prohibiting unbridled discretion to grant or deny permits); Miami Herald Publishing Co. v. City of Hallendale, 734 F.2d 666 (11th Cir. 1984) (ordinance must contain procedural safeguards to avoid abuse).

4. 774 F.2d 1515 (11th Cir. 1985), *cert. denied,* 106 S. Ct. 1637 (1986).

5. As used in this Note, "police protection ordinance" refers to a licensing ordinance that charges a fee based on the actual or estimated cost to the city of providing police protection.

of personal and political development in the United States.[6] The American political system operates on the premise that rational voters, permitted to choose among the widest possible range of competing ideas, will arrive at socially superior decisions. Democratic principles and free speech create a "marketplace" of competing political ideas.[7] Individuals cast ideas into the market where they compete with other ideas for voter consideration.[8] Voters choose between these competing ideas and express their choices through the ballot.

Ideas can only enter the marketplace if individuals gain access to public forums in order to express their political and social views. When a broad range of speakers has access to public forums, the market will reflect a wide range of views. However, all speakers cannot gain access to all forums. For example, many speakers cannot afford television or radio broadcasting time, and speakers espousing unconventional views may find the mass media unreceptive. For this reason, public streets and parks, which are accessible to speakers regardless of their financial resources or media appeal, are vitally important public forums.[9] Maintaining free access to public streets and parks helps insure a market composed of a wide range of competing ideas.[10]

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6. The first amendment states in part: "Congress shall make no law . . . abridging the freedom of speech . . . ." U.S. CONST. amend. I. *See* Eastern Conn. Citizens Action Group v. Powers, 723 F.2d 1050, 1051 (2d Cir. 1983) ("right to communicate freely . . . is a cornerstone of our American polity"); Leonard v. City of Columbus, 705 F.2d 1299, 1304 (11th Cir. 1983) ("speech goes to the heart of our democratic process"). *See also* Karst, *Equality as a Central Principle in the First Amendment*, 43 U. CHI. L. REV. 20, 23 (1975) (first amendment advances self-government, aids in the search for truth, and promotes the "sense of individual self-worth").

7. The marketplace of ideas theory tracks the theory of free market economics. Much like produced goods, ideas compete in the market for acceptance by buyers/voters seeking to satisfy personal interests. In Abrams v. United States, 250 U.S. 616 (1919), Justice Holmes stated that "the best test of truth is in the power of thought to get itself accepted in the competition of the market." *Id.* at 630 (Holmes, J., dissenting). Commentators recognize this statement as introducing the marketplace concept into first amendment legal thought. See Ingber, *The Marketplace of Ideas: A Legitimizing Myth*, 1984 DUKE L.J. 1, 3.

8. *See* Ingber, *supra* note 7, at 3 (marketplace theory "assumes that a process of robust debate, if uninhibited by government interference, will lead to the discovery of truth, or at least the best perspectives or solutions for societal problems").

9. The Supreme Court has characterized streets and parks as "quintessential public forums." Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983). Such forums 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." *Id.* (quoting Hague v. CIO, 307 U.S. 496, 515 (1939)).

10. *See* Ingber, *supra* note 7, at 42. Ingber noted that Vietnam war protestors used public forums to challenge the views of the "status quo," including the views of public officials possessing access to mass media. *Id.* at 42 n.208. Similarly, the civil rights movement gained national attention

II. FREE SPEECH AND POLICE PROTECTION

A. Public Order and Free Speech

Although vitally important to the effective functioning of the American political process, public demonstrations, unlike other forms of expression, present unique problems. Public demonstrators frequently rely on the intensity of personal encounters for effective communication,[11] but personal confrontation also creates a potential for violence.[12] Violence, in turn, threatens public order and safety. Moreover, violence may disrupt the flow of communication and garble the message that spectators receive. As a result, important ideas may fail to reach receptive listeners. In short, violence causes a breakdown in the proper functioning of the marketplace of ideas and lessens the ability of voters to make informed choices.[13]

The likelihood that violence will occur during a demonstration depends on two factors, the content of the speaker's message and the physical intrusion inherent in personal encounters. A public speaker cannot avoid the risk of violence that results from the content of his message. On the contrary, in *Terminiello v. Chicago*,[14] the Supreme Court noted that speech should be encouraged when it causes people to consider present conditions, "or even stirs people to anger."[15] Demonstrators can re-

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through effective use of public forums. Goldberger, *supra* note 3, at 403. *See also* Baker, *Unreasoned Reasonableness: Mandatory Parade Permits and Time, Place, and Manner Regulations,* 78 NW. U.L. REV. 937, 944 (1983) ("streets sometimes are the only 'media' available to poor groups").

11. Mass media speakers disseminate their views to a wide audience. Public demonstrators, however, can produce a greater effect in a smaller audience. "The audience's experience in a face-to-face encounter is more imposing . . . . The interchange is more flexible, more of the senses are engaged, and the audience's response . . . is likely to be more pronounced." Ingber, *supra* note 7, at 41. *See also* G. ABERNATHY, THE RIGHT OF ASSEMBLY AND ASSOCIATION 55 (2d ed. 1981) (demonstators "collar" their audience).

12. *See* Ingber, *supra* note 7, at 41. ("The emotional feedback generated by face-to-face contact designed to evoke or increase support also may build antagonism and lead to violence.").

13. *See* Terminiello v. Chicago, 337 U.S. 1 (1949). Justice Jackson, in a dissenting opinion, noted that freedom of speech holds no value if a hostile audience can silence the speaker. *Id.* at 31. The marketplace of ideas contains flaws similar to those found in economic markets. Speech consistent with the dominating ideology in the society gains ready market acceptance, while unconventional views are ignored. The market, therefore, contains a "skew" in favor of conventional views. Ingber, *supra* note 7, at 16-17. Violent spectators disrupt a speaker's message and thereby exacerbate this skew. *See generally* Barnum, *Freedom of Assembly and the Hostile Audience in Anglo-American Law,* 29 AM. J. COMP. L. 59 (1981) (discussing hostile audience and first amendment rights); Note, *Free Speech and the Hostile Audience,* 26 N.Y.U.L. REV. 489 (1951).

14. 337 U.S. 1 (1949).

15. *Id.* at 4.

duce the risk of violence caused by the physical intrusion of the demonstration if they travel less congested routes or split into smaller groups. These measures, however, reduce the size of the speaker's audience and diminish the persuasive effect of his message.[16]

Courts have stressed the vital relationship between public order and free speech. In *Cox v. New Hampshire*,[17] for example, the Supreme Court stated that civil liberties "imply the existence of an organized society maintaining public order without which liberty itself would be lost in the excesses of unrestrained abuses."[18] Justice Jackson, in a dissenting opinion in *Terminiello*, also noted that the maintenance of public order is necessary "if free speech is to be a practical reality."[19] Finally, in *Houston Peace Coalition v. Houston City Council*,[20] the District Court for the Southern District of Texas stressed the importance of "safeguarding [the] good order upon which . . . civil liberties ultimately depend."[21]

B. The Role of Police Protection

Police protection during demonstrations, unlike private measures to reduce the likelihood of violence, serves as an effective means of maintaining public order.[22] Law enforcement officials possess the authority and training to control spectators angered by the message content. Police control over vehicle and pedestrian flow also reduces the physically intrusive nature of demonstrations. Finally, the mere presence of police officers may deter spectators from interfering with controversial speakers.

Although effective and beneficial, police protection imposes costs upon the public. A city can hire additional police officers or reassign officers

16. In the absence of spectators, even the most exciting demonstration lacks force. In addition, by reducing the number of participants or spectators, a speaker forfeits other advantages of size. A mass demonstration "conveys an image of power to bystanders and participants alike, reinforces the group's commitment to its cause, . . . and appears to circumvent the elite's power to control mass communication." Ingber, *supra* note 7, at 41.

17. 312 U.S. 563 (1941).

18. *Id.* at 574.

19. 337 U.S. at 31 (Jackson, J., dissenting).

20. 310 F. Supp. 457 (S.D. Tex. 1970). The Houston ordinance required demonstrators to procure liability insurance prior to the issuance of a parade permit. See *infra* note 37 for a discussion of insurance permits.

21. 310 F. Supp. at 459.

22. *See* Terminiello v. Chicago, 337 U.S. 1, 31 (1949) (free speech "depends on local police . . . who, regardless of their own feelings, risk themselves to maintain supremacy of law") (Jackson, J., dissenting).

from its existing force to maintain public order during a demonstration. Employing additional officers imposes a significant pecuniary burden,[23] and drawing officers from existing duties necessarily diminishes police protection in other areas.[24] In order to fund adequate protection, municipalities may have to forego other important social objectives. Public demonstrations thus create a conflict between the need to protect free speech and allocate limited public resources.[25]

III. RESTRICTIONS ON FREE SPEECH

a. Supreme Court Protections

The marketplace of ideas theory tolerates only minor interference with the free flow of information into the market. Restrictions which deny speakers access to public forums or prevent the entry of ideas to the marketplace interfere with the voter's ability to make rational decisions.[26] Government regulation, therefore, must facilitate rather than impede the free flow of ideas by correcting malfunctions that may develop in the marketplace.[27]

In evaluating government regulation, the Supreme Court has traditionally distinguished "content-based" restrictions from "content-neutral"

23. *See* HOUSE COMM. ON APPROPRIATIONS, 1980 FISCAL YEAR SUPPLEMENTAL APPROPRIATIONS FOR THE DISTRICT OF COLUMBIA 623 (April 22, 1980) (District expended $86,800 to police the Iranian student demonstration during the peak to the "hostage crisis"). A city may employ off duty officers, usually at an overtime pay rate. Instead, a city may hire reserve officers at lower pay. *See* Central Fla. Nuclear Freeze Campaign v. Walsh, 774 F.2d 1515 (11th Cir. 1985). However, reserve officers, generally "doctors, lawyers and businessmen," *id.* at 1526 n.9, may lack the training and qualifications necessary for effective performance during a demonstration.

24. *See* Blasi, *Prior Restraints on Demonstrations*, 68 MICH. L. REV. 1481, 1527 (1980). Other serious social consequences may result from reassignment. Blasi notes that frequent assignment to a demonstration can cause resentment and vindictiveness in a police officer. *Id.* Moreover, demonstrators can hold a city's resources hostage until the city gives in to the demonstrator's demands. In effect, this amounts to a demand for "political ransom." *Id.* at 1528.

25. *See* Terminiello v. Chicago, 337 U.S. 1 (1949). Government's options are limited. It cannot punish or prohibit speech unless "shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest." *Id.* at 4. *But cf.* Feiner v. New York, 340 U.S. 315 (1951) (principle does not extend to inciting a riot).

26. *See supra* notes 6-10 and accompanying text.

27. *See* Cox v. New Hampshire, 312 U.S. 569, 577 (1941) (restriction found to "conserve rather than impair" free speech); United States v. Grace, 461 U.S. 171, 177 (1983) (government possesses only limited power to regulate free speech in the public forum). *See also* R. LADENSON, A PHILOSOPHY OF FREE EXPRESSION AND ITS CONSTITUTIONAL APPLICATIONS 34 (1983) ("Unregulated expression of attitudes and beliefs occasionally leads to serious trouble. Total regulation, by contrast, virtually guarantees it.").

restrictions.[28] Content-based restrictions focus on the subject matter of the speech in question and limit or prohibit speech about certain subjects.[29] The court closely scrutinizes such restrictions because they can effectively prevent all ideas about the restricted topic from reaching the marketplace.[30] Content-neutral restrictions control only the incidental aspects of speech—the "time, place and manner" in which the message reaches the market.[31]

The Supreme Court evaluates content-neutral restrictions under a level of scrutiny which varies with the nature of the forum. The Court applies a low scrutiny level to restrictions on access to nonpublic forums such as school mailboxes[32] and military bases.[33] The Court more closely scrutinizes access restrictions to semi-public forums such as state universities[34] and municipal theatres.[35] Finally, the Court strictly scrutinizes regulations limiting access to public forums. To survive strict scrutiny, such regulations must be "narrowly tailored to serve a significant government interest, and [must] leave open ample alternative channels of communication."[36]

28. *See* L. TRIBE, AMERICAN CONSTITUTIONAL LAW §§ 12-2 to -3 (1978). *See also* Stone, *Restrictions of Speech Because of its Content: The Peculiar Case of Subject-Matter Restrictions,* 46 U. CHI. L. REV. 81 (1978). *But see* Redish, *The Content Distinction in First Amendment Analysis,* 34 STAN. L. REV. 113 (1981) (arguing that the distinction between content-based and content-neutral restrictions is unworkable and should be abolished).

29. *See* L. TRIBE, *supra* note 28, at § 12-2 (such restrictions are "aimed at communicative impact"). *See, e.g.,* Miller v. California, 413 U.S. 85 (1973) (law prohibiting obscene speech); Dennis v. United States, 341 U.S. 494 (1951) (law prohibiting the advocacy of violent overthrow of the government).

30. To enforce a content-based restriction, the state must show "that its regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end." Perry Educators' Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1984).

31. *See* L. TRIBE, *supra* note 28, at § 12-2 (such restrictions are "aimed at noncommunicative impact" but may have adverse effects on "communicative opportunity"). Examples include laws restricting noisy speech near hospitals, limiting signs in residential areas, and requiring individuals distributing leaflets to disclose their names. Stone, *supra* note 28, at 81.

32. Perry Educators' Ass'n v. Perry Local Educators' Ass'n, 460 U.S 37 (1983).

33. *See* Greer v. Spock, 424 U.S. 828 (1976) (prohibition on political meetings and the distribution of literature upheld).

34. *See* Widmar v. Vincent, 454 U.S. 263 (1981) (state university could limit campus forum to student use only).

35. *See* Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546 (1975) (municipal theatre refused to allow a performance of a controversial musical).

36. Perry Educators' Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983).

B. Police Protection Ordinances

In order to defray the costs to the public of demonstrations, many municipalities impose access restrictions in the form of licensing requirements on persons intending to conduct public parades, processions or meetings. Such ordinances often require demonstrators to pay a fee based on the actual or anticipated costs of providing the necessary police protection.[37] In effect, police protection ordinances shift the burden of providing additional police protection to those responsible for creating the need.

In *Cox v. New Hampshire*,[38] the Supreme Court upheld a police protection statute in the face of first amendment challenge. The statute authorized a municipal licensing board to impose a license fee of "not more than three hundred dollars."[39] The Court found that the legislature authorized the fee to cover only the administrative expenses and costs of maintaining public order.[40] The Court noted that the flat fee proposed by the regulation's challengers "fail[ed] to take account of the difficulty of framing a fair schedule to meet all circumstances."[41] In addition, the Court observed that adjustable fees allow local governments "that flexibility . . . which in the light of varying conditions would tend to conserve rather than impair the liberty sought."[42]

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37. *See, e.g.*, SEASIDE, CAL., CODE § 9-108 which provides:

(b) Exceptions—Parades or civil demonstrations which obstruct the free use of the public streets and/or sidewalks may be permitted providing the following conditions are met: . . . (5) . . . In the even that the anticipated crowds . . . will reasonably require the use of extra police officers . . . the cost of hiring such persons shall be at the expense of the person or group applying for the permit.

(*cited in* Dillon v. Municipal Court, 4 Cal.3d 860, 863 n.2, 94 Cal. Rptr. 777, 778 n.2, 484 P.2d 945, 946 n.2 (1971)). *See also infra* notes 39 and 49.

Insurance ordinances allow a city to shift the burden of paying for damage to the permit applicant. *See, e.g.*, HOUSTON, TEX., CODE art. 8, § 48-208 (applicant required to deliver a "comprehensive general liability insurance policy" prior to issuance of a license). This ordinance was invalidated in Houston Peace Coalition v. Houston City Council, 310 F. Supp. 457 (S.D. Tex. 1970). Such ordinances are remedial and do not aid in the mainstream of public order. *See generally* Note, *Conditioning Access to the Public Forum on the Purchase of Insurance*, 17 GA. L. REV. 815 (1983).

38. 312 U.S. 569 (1941).

39. *Id.* at 571-72 n.1. The New Hampshire statute authorized a municipality to establish a licensing board. The statute further provided:

"Licenses: Fees: . . . Every licensee shall pay in advance for such license, for the use of the city or town, a sum note more than three hundred dollars for each day . . . such parade, procession or open-air meeting shall take place . . . ." *Id.* (citing N.H. P.L. ch. 145 § 4).

40. 312 U.S. at 577.

41. *Id.*

42. *Id.*

Despite the Court's holding in *Cox*, critics argue that police protection ordinances force demonstrators to pay for the public benefits resulting from free speech activity[43] and erect economic barriers which discourage speakers from entering the market.[44] Such critics, however, fail to recognize offsetting factors which justify imposing demonstration costs on those creating the need.

Free speech benefits society,[45] but society should not bear the total cost of free speech activity.[46] Police protection ordinances may discourage demonstrators from provoking excesses, such as violence, which provide no corresponding social benefit.[47] Additional cost, for example, deters demonstrators from unnecessarily increasing the size of the demonstration. Although police protection ordinances may force speakers to restructure their methods of presentation, such ordinances do not foreclose access to public forums. In addition, police protection ordinances recognize that speakers should pay for the benefits that they derive from their activity, such as the opportunity to cultivate and express personal ideas.[48]

IV. CENTRAL FLORIDA NUCLEAR FREEZE CAMPAIGN V. WALSH

In *Central Florida Nuclear Freeze Campaign v. Walsh*,[49] the Eleventh Circuit Court of Appeals held that an Orlando police protection ordinance violated the first amendment. The ordinance required the chief of police to anticipate the cost of additional police protection based on the "size, location and nature of the assembly."[50] The ordinance further re-

43. *See* Goldberger, *supra* note 3, at 411. Goldberger notes that cities provide police protection and city maintenance services to others at no charge. He argues that charging speakers devalues speech activity and places an inequitable burden on speakers. *Id. See also* Baker, *supra* note 10, at 1001.

44. *See* Goldberger, *supra* note 3, at 412.

45. *See supra* notes 6-10 and accompanying text.

46. *See* Blasi, *supra* note 24, at 1529 ("it cannot be said that society has a positive stake in the maximum assertion of the right to demonstrate").

47. *See supra* notes 11-13 and accompanying text.

48. Free speech serves the "libertarian" value of allowing an individual to "develop ideas and to express himself." Farber & Nowack, *The Misleading Nature of Public Forum Analysis: Content and Context in First Amendment Adjudication*, 70 VA. L. REV. 1219, 1224 n. 30 (1984). *See also* Karst, *supra* note 6, at 23 (free speech promotes "sense of individual self-worth"). *See generally* L. TRIBE, *supra* note 28, at § 12-1 (discussing the purposes of freedom of speech).

49. 774 F.2d 1515 (11th Cir. 1985), *cert. denied*, 106 S. Ct. 1637 (1986).

50. The ordinance prohibited any "outdoor public assembly unless an outdoor public assembly permit shall first have been obtained by the Chief of Police." *Id.* at 1516 n.1 (citing ORLANDO, FLA., CODE § 18A.10(1)). The ordinance further provided:

quired the applicant to prepay this anticipated expense. An anti-nuclear organization challenged the fee as an "insurmountable burden" on freedom of speech.[51]

The *Central Florida* court interpreted *Cox* as allowing a municipality to charge only "nominal" permit fees.[52] The court ruled that Orlando's ordinance, which placed the fee amount within the police chief's discretion, violated this requirement.[53] The court noted that those persons unable to afford the anticipated costs would be denied an opportunity to be heard.[54] Finally, the court labeled the Orlando ordinance content-based and held it invalid under the first amendment because the ordinance permitted differential cost assessment based on the possibility of a hostile response to the speaker's message.[55]

In a concurring opinion, Judge Henderson chastised the majority for improperly narrowing the *Cox* holding.[56] According to Judge Henderson, *Cox* held that reasonable fees are constitutional if they are incidental to maintaining public order.[57] Judge Henderson found the Orlando ordinance invalid, however, because it failed to provide an adequate constitutional standard to prevent abuse of discretion.[58]

The *Central Florida* court's narrow reading of *Cox* threatens to lead to several undesirable consequences. First, *Central Florida* requires courts to second-guess a city's determination of the means necessary to ensure adequate police protection.[59] License applicants can challenge the city's

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> "[The Chief of Police] shall determine whether and to what extent additional police protection reasonably will be required for the assembly for purposes of traffic and crowd control. In making this determination, the chief of police shall consider such factors as the size, location and nature of the assembly. . . . The applicant then shall have the duty to secure police protection reasonably acceptable to the chief of police at the sole expense of the applicant and shall prepay the expenses of such protection."

Id. at 1516 n.2 (citing ORLANDO, FLA., CODE § 18A.12).

51. *Id.* at 1518.

52. *Id.* at 1523.

53. *Id.* The court found that the ordinance's grant of discretion to the chief of police did not require him to consider the purpose of the speech or the ability of the applicant to pay.

54. *Id.*

55. *Id.* at 1524.

56. *Id.* at 1527 ("The majority misreads *Cox v. New Hampshire* . . . as permitting only nominal charges for policing a demonstration in a public area.") (Henderson, J., concurring).

57. *Id.*

58. *Id.* Judge Henderson concluded that the discretionary authority vested in the chief of police to determine the amount of police protection "reasonably required, failed to provide a constitutionally adequate guarantee against an abuse of discretion.

59. In another context the Supreme Court has rejected such second-guessing. *See* Clark v. Community for Creative Non-Violence, 468 U.S. 288 (1984). The Court upheld a National Park

choice of means on the basis that they impose more than a nominal charge. Presumably, local authorities possess greater capacity than courts to determine the quantity and quality of police protection necessary. In addition, local governments may choose to provide inadequate police protection, thus sacrificing public order and effective communication in order to avoid court battles.[60]

Second, the *Central Florida* approach forces municipalities to subsidize the cost of demonstrations that impose costs in excess of amounts considered nominal.[61] Society will be forced to forego other positive goals in order to subsidize free speech.

In addition, the *Central Florida* decision completely prohibits a city from considering speech content when setting an appropriate fee.[62] The court incorrectly labeled the police protection ordinance a content-based restriction.[63] This characterization ignores the fact that cities enact such ordinances in order to recoup the actual costs of demonstrations not to prohibit speech on certain topics.[64] Although police protection ordinances may impose greater costs on speakers espousing controversial views, they only do so because such speakers need more police protection.[65] Increased police protection increases the actual cost of the demonstration. Police protection ordinances merely allow authorities to consider speech content as one factor affecting actual cost; they do not impermissibly discriminate on the basis of content.

Finally, as Judge Henderson correctly noted in his concurring opinion, content-based restrictions, although subject to close judicial scrutiny, are not invalid per se.[66] Therefore, even if the majority correctly classified the ordinance as content-based, this labeling should not have resulted in immediate invalidation. The Supreme Court requires content-based re-

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Service regulation prohibiting camping in certain parks in the face of a first amendment challenge. The Court stated that its prior decisions concerning content-neutral restrictions do not "assign to the judiciary the authority . . . or endow the judiciary with competence to judge how much protection of park lands is wise and how that level of conservation is to be attained." *Id.* at 299.

60. *See supra* notes 11-21 and accompanying text.

61. *See supra* notes 22-25 and accompanying text. *See also* Goldberger, *supra* note 3, at 415-16 n.65 (nominal charges are insufficient to cover the costs of a mass demonstration).

62. *See supra* note 55 and accompanying text.

63. *See supra* notes 28-36 and accompanying text. *See also* Central Fla. Nuclear Freeze Campaign v. Walsh, 774 F.2d 1515, 1528 (11th Cir. 1985) (Henderson, J., concurring).

64. *See supra* notes 37-42 and accompanying text.

65. *See supra* notes 11-16, 22 and accompanying text.

66. *Central Fla.*, 774 F.2d at 1528 (Henderson, J., concurring).

strictions to be justified by a compelling state interest,[67] and police protection ordinances, which ensure the funds necessary to maintain public order and permit effective communication, certainly promote compelling state interests.

V. CONCLUSION

Adequate police protection during demonstrations ensures the public order necessary for public safety and effective communication. Police protection ordinances enable local governments to defray the costs of policing public demonstrations and discourage excesses that increase the costs of public speech without a corresponding public benefit. In addition, such ordinances allow cities to fund equally important social projects rather than subsidize free speech activity. The *Central Florida* court's narrow reading of *Cox v. New Hampshire* threatens the continued viability of police protection ordinances and thereby hampers the exercise of free speech.

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67. *Central Fla.*, 774 F.2d at 1528 (Henderson, J., concurring). *See supra* note 30.