Number 62
October 1994
© 1994
David M. Lawrence
Editor
Published by the
Institute of Government,
The University of
North Carolina at
Chapel Hill

Local Government Law Bulletin

The Constitutionality of Assessing Parade-Permit Fees

William S. McConnell

There is probably no more visible exercise of the right to free speech than citizens marching down the main streets of a town or city to make their views on a subject known. Unfortunately, from the point of view of local governments, this speech is *not* free: it can put a considerable and unexpected dent in local budgets. Expenses accumulate in administering a parade-permit system to regulate the use of the streets, in insuring against liability from accidents,[1] in rerouting traffic, in paying for police protection, and in cleaning up after the march. Some local governments have sought to make marchers and demonstrators pay for at least some of these costs, by requiring them to pay a fee for a parade permit.

Many North Carolina cities have ordinances that require marchers to obtain a permit before holding a parade, and some of these cities charge a fee for the permit.[2] Particularly in cases where the costs of police protection are likely to be significant, the attractiveness of charging marchers is plain. The general population may well not want to see tax dollars subsidizing a parade of Nazis, for example.[3] Charging for a parade or march, however, can create constitutional problems, especially in cases where fees for controversial speech are greater than fees for more popular speech. This *Local Government Law Bulletin* examines the constitutional limitations on charging fees to parade participants and organizers.

I. Fees for Parade Permits: The Basic Rules

It is unconstitutional to tax the exercise of First Amendment rights; that is, to use their exercise as an opportunity to gather general revenue.[4] Therefore any fee charged must be used solely to cover the costs directly associated with the activity being regulated. There is at present a dispute among the federal courts of appeal as to whether a charge may be larger than "nominal." Neither the Fourth Circuit nor any North Carolina district court has decided a case about a fee for a parade permit. In those jurisdictions where a larger-than-nominal fee is permitted, however, the assessed fee must still meet several criteria to pass constitutional muster. First, the fee must be directly related to the costs the government will incur and as low as possible to accomplish the goal of the government's permit system (usually, maintaining public order and safety). The second criterion limits the *kinds* of costs

---

William S. McConnell was a law clerk for David M. Lawrence at the Institute of Government during the summer of 1994.

1. Some ordinances require permittees to purchase liability insurance policies naming both the permittee and the municipality as the insured. *See, e.g.*, Carrboro, N.C., Code §7-21 (1985); Hillsborough, N.C., Code §7-21 (1986). Municipal liability stemming from a private parade has been described as "at best, far-fetched." Common law and statutory law do not usually make municipalities liable for the acts of their permittees, and municipal immunity for failure to enforce the law or to provide adequate police protection is generally available. *See* Eric Neisser, *Charging for Free Speech: User Fees and Insurance in the Marketplace of Ideas*, 74 Geo. L.J. 257, 300–321 (1985). *See also*, Long Beach Lesbian and Gay Pride v. Long Beach, 17 Cal. Rptr. 2d 861, 877 (Cal. Ct. App. 1993) (calling financial protection provided city by insurance "extremely limited").

2. Charlotte, for example, requires a flat $10.00 fee of permit applicants "to cover expenses incidental to processing the application." Charlotte, N.C., Code § 19-121 (1981). Carrboro may require the applicant to buy insurance coverage as well as pay a fee that covers the costs of providing notice to affected property owners and the costs of any "extraordinary services . . . provided." Carrboro, N.C., Code §§ 7-21, -22 (1985).

3. In Collin v. Smith, 447 F. Supp. 676 (N.D. Ill. 1978), *aff'd*, 378 F.2d 1197 (7th Cir. 1978), for example, the Nationalist Socialist Party of America wanted to march in the predominantly Jewish town of Skokie, Illinois, where many survivors of the Holocaust lived.

4. Murdock v. Pennsylvania, 319 U.S. 105 (1943).

a government may recover through a fee for a parade permit: the amount of the fee may not depend on the content of the speech—that is, the issue the marchers espouse. To ensure that content is not considered when the fee is set, the government must provide definite standards to guide the fee-setting authority, and all paraders must be subject to the same standards. Finally, some jurisdictions require governments to make exceptions for indigent permit applicants.[5]

II. Judicial History of Parade-Permit Fees

Modern judicial approaches to the issue of parade-permit fees grow out of two Supreme Court cases decided in the 1940s. The first of these, *Cox v. New Hampshire*,[6] established the constitutionality of parade-permit fees; the second, *Murdock v. Pennsylvania*,[7] has been read by some later courts to severely limit the permissible amount of such a fee.

Cox concerned a challenge to a New Hampshire statute that allowed a local government to assess fees ranging from "$300 to a nominal amount" for parade permits. A group of eighty-eight Jehovah's Witnesses was convicted of violating the law after they marched down the streets of Manchester, New Hampshire, carrying placards and distributing religious literature. They had neither applied for a permit nor paid a fee. Although the statute itself had been written rather vaguely—allowing a local board to "investigate and decide the question of granting licenses"—the United States Supreme Court adopted the narrowing construction of the New Hampshire Supreme Court. According to the New Hampshire court, all reasonable requests for permit fees had to be granted, and the amount of the fee itself had to be reasonable. There was no evidence that the statute had been administered in a discriminatory way. Given these factors, the Court held the fee requirement constitutional.

Murdock, decided three years later, concerned a flat fee assessed Seventh Day Adventists who distributed religious literature. The statute in question charged all "canvassers and solicitors" a fee to obtain a permit. The Seventh Day Adventists collected a small contribution from those able to pay for their materials and were therefore considered to fall within the scope of the statute. The Supreme Court held the statute unconstitutional, noting that the fees were not part of the administration of a valid licensing scheme but, in effect, a revenue-generating mechanism. The Court distinguished *Cox* as a case where the fees were "nominal one[s], imposed as a regulatory measure and calculated to defray the expense of protecting those on the streets against the abuses of solicitors."[8] Although *Murdock* is probably most plausibly read as an announcement of the unconstitutionality of a tax on speech, some courts have read it as allowing only a "nominal" fee for a parade permit.

III. Modern First Amendment Analysis

After *Cox* and *Murdock*, the Supreme Court did not address the constitutionality of a permit fee for parades for another fifty years, until *Forsyth County v. The Nationalist Movement*.[9] In the meantime, First Amendment doctrine evolved significantly. *Cox* was the first Supreme Court case to enunciate the talismanic "reasonable time, place and manner" restrictions with which many First Amendment analyses begin.[10] Simply charging a fee for a parade permit, however, really regulates none of those three,[11] although courts sometimes treat such fees as time, place, or manner restrictions.[12] The constitutionality of the fee is usually addressed through the doctrines of (1) the public forum, (2) prior restraint, and (3) overbreadth.

Parade-permit fees regulate speech in public forums and act as prior restraints.[13] Public forum doctrine declares certain areas particularly suitable to the exercise of free speech rights and requires governments to make these areas available for

5. One court has held that a statute that fails to provide for prompt judicial review of an assessed fee is unconstitutional. Central Florida Nuclear Freeze Campaign v. Walsh, 774 F.2d 1515, 1526, 1527 (11th Cir. 1985). None of the other cases in this *Bulletin* addresses either the lack or presence of a mechanism for judicial review. It is unlikely, however, that a municipality would have the power to dictate the promptness with which a judicial review is conducted. In addition, federal law provides mechanisms to challenge unconstitutional parade-fee ordinances, as the cases discussed in this *Bulletin* demonstrate. The fact that this concern has not come up in other cases, the inability of municipalities to require prompt review, and the existence of remedies under current law may indicate that providing for such review is not crucial to a statute's constitutionality. The requirement is more apt in censorship cases (where it is uniformly required), since in those cases the plaintiffs face being denied entirely the opportunity for expression. Indeed, the *Walsh* opinion recites a rule of law that "a licensing regulation which grants city officials the discretion to *deny* permits must provide for speedy review to ensure constitutional protection." 774 F.2d at 1526 (emphasis added). This *Bulletin* is limited to a treatment of the constitutionality of a government's assessing a permit fee, not of its denying a permit outright.

6. 312 U.S. 569 (1940).

7. 319 U.S. 105 (1943).

8. *Id.* at 116.

9. 112 S. Ct. 2395 (1992).

10. 112 U.S. at 576.

11. *See* Neisser, *supra* note 1, at 283, 284.

12. *See, e.g.*, Ku Klux Klan v. Mayor of Thurmont, 700 F. Supp. 281, 285 (D. Md. 1988).

13. *See* Forsyth County v. Nationalist Movement, 112 S. Ct. 2395, 2401 (1992).

free speech purposes. Public streets, sidewalks, and parks are particularly good examples of such public forums. They "have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions."[14]

A prior restraint is a regulation that may inhibit the exercise of free speech before it ever occurs. For instance, a requirement that paraders obtain liability insurance is a prior restraint because the insurance must be obtained before the march may be held. On the other hand, a court's requiring disorderly marchers to indemnify property owners is not a prior restraint, since the march has already taken place. In order for a prior restraint to be constitutional, it must be "narrowly tailored" to serve a "compelling government interest," and must leave open "ample alternatives for communication."[15]

Overbreadth doctrine allows groups to challenge laws as unconstitutional even when the laws as applied to the particular group have not have been used in an unconstitutional manner. In *Forsyth*, for example, a group that had been charged a $100 fee challenged the constitutionality of an ordinance on the ground that it allowed a fee of up to $1,000. Perhaps the overbreadth doctrine best explains why the Court gave much greater scrutiny to the ordinance in *Forsyth* than to the law in *Cox*.

In *Forsyth*, the Nationalist Movement wanted to stage a march in opposition to the Martin Luther King, Jr., holiday. The county administrator assessed a $100 permit fee, pursuant to a county ordinance, for ten hours of his time spent in issuing the permit. The ordinance required that the permit applicant pay "for the use of the County, a sum of not more than $1,000 for each day [a] parade, procession or open air public meeting shall take place."[16] It allowed the administrator to adjust the amount in order to meet the expenses of administering the ordinance and of keeping public order. The administrator testified, however, that no consideration of the cost of keeping order went into the determination of the fee.[17]

In striking down the ordinance as unconstitutional, the Court took an approach fundamentally different from the one it took in *Cox*. In *Cox*, the Court had relied heavily on the narrowing construction given the statute by the New Hampshire Supreme Court and held the statute constitutional. In *Forsyth*, the Court read the ordinance broadly, not limiting its scrutiny of the ordinance either to how the ordinance was applied in the particular case or to narrowing constructions the county suggested. The Court, however, did not overrule *Cox*, nor did it adopt the narrow reading based on *Murdock* given *Cox* by some courts.

IV. Modern Constitutional Analysis of Parade-Permit Fees

A. Fee Must Be Nominal

At least one court has held that no fees may be charged for issuing parade permits.[18] Other courts, when distinguishing *Cox*, read *Murdock* to limit *Cox*'s approval of fees to those that are nominal. The Eleventh Circuit in *Central Florida Nuclear Freeze Campaign v. Walsh*[19] first read *Murdock* in this way. The ordinance in question required marchers to pay for the costs of police protection, as determined by the chief of police. The town assessed antinuclear marchers a fee of over $1,000. The court held that *Cox* permitted only nominal fees, and that the fee assessed the marchers was not a nominal one.

The Sixth Circuit, however, in *Stonewall Union v. City of Columbus*,[20] has dismissed this reading of *Cox*. According to that court, *Cox* specifically allowed larger-than-nominal fees, since the fee at issue in that case could range "from $300 to a nominal amount." *Forsyth* came to the Supreme Court from the Eleventh Circuit, where that court had affirmed the interpretation it gave *Cox* in *Walsh* (fee must be nominal).[21] The Supreme Court took the *Forsyth* case in order to resolve the question of whether a greater than nominal fee could be charged.

The court did not in fact resolve that question in *Forsyth*, however, holding instead that *any* fee based on content is unconstitutional, regardless of its amount. The Court dismissed the notion that an otherwise unconstitutional fee could be constitutional if it were nominal. In addition, the Court addressed the Eleventh Circuit's interpretation of the sentence concerning nominal fees in *Murdock*, stating, "this sentence does not mean that an invalid fee can be saved if it is nominal, *or that only nominal charges are constitutionally permissible.*"[22] One case decided since *Forsyth* read this to

14. Hague v. CIO, 307 U.S. 496 (1939).
15. *Forsyth*, 112 S. Ct. at 2401.
16. *Id.* at 2399.
17. *Id.* at 2402.
18. Ku Klux Klan v. City of West Haven, 600 F. Supp. 1427 (D. Conn. 1985)("[S]ociety should bear the expense, however great, of guaranteeing that every idea, no matter how offensive, has an opportunity to present itself in the marketplace of ideas.").
19. 774 F.2d 1515 (11th Cir. 1985).
20. 931 F.2d 1130 (6th Cir. 1991).
21. Nationalist Movement v. City of Cumming, 934 F.2d 1482 (11th Cir. 1991).
22. Forsyth County v. Nationalist Movement, 112 S. Ct. 2395, 2405 (1992) (emphasis added).

dispense with the requirement that the fee be nominal.[23] The Supreme Court's failure to overrule *Cox* would appear to support this interpretation. As the dissent in *Forsyth* put it, however, the majority's approach to the question was "ambiguous and non-committal."[24]

Even if only nominal fees are permitted, no court has clearly set forth what constitutes a nominal amount. *Nominal* means *small* and generally refers to a charge "in name only." Yet the courts have been less concerned with the actual amount of the fee than with the expenses the fee is designed to cover. A $20.00 permit fee for the use of a park has been held to be nominal, where the fees were shown to be directly related to the costs of assigning a park attendant to the rally.[25] A $1,200 fee was too high for an adult entertainment license,[26] but when the fee was lowered to $400 and shown to be related to the costs of police protection, it was nominal.[27] Although there is no obvious reason that a nominal fee would need to be strictly correlated with the cost of the activity for which it is assessed (in fact, the term suggests the opposite), the courts in these examples weighed such correlation heavily in deciding whether a fee was nominal. Such correlation is required under *Cox* and prior restraint analysis in any case. The requirement of nominality, then, if it exists at all, may simply collapse into the requirement of traditional First Amendment analysis that is discussed next: the requirement that the fee system be "narrowly tailored" to serve its goals. What *Forsyth* makes clear is that any failure to comply with the constitutional dictates of the First Amendment will doom a statute, no matter how small the fee assessed.

B. Fee System Must Be "Narrowly Tailored"

Assuming that a larger-than-nominal fee may be charged, or that *nominal* means something other than merely *small*, there are still several hurdles any law requiring a fee for a parade must clear before it is constitutional. The first of these, in the language of prior restraint analysis, is that the fees be narrowly tailored to achieve a significant government interest. Courts have generally accepted that paying for the costs associated with parades is a significant government interest.[28] In practice the requirement that the fees be narrowly tailored to achieve this interest has meant that the fees must be assessed only for expenses actually incurred by the local government body, and that those expenses must not be greater than required to achieve the governmental objective. Unsurprisingly, different courts have construed this requirement more or less strictly.

Murdock v. Pennsylvania[29] perhaps first construed this requirement strictly. The Supreme Court held the ordinance in that case unconstitutional because it operated as a mechanism for producing general revenues, just as a sales tax does. The fees did not vary with the actual expenses incurred by the city. *Baldwin v. Redwood City*[30] went a step further. In *Baldwin* the city charged a $1.00 inspection fee for display of a political sign and required a $5.00 deposit per sign, refundable when the signs were taken down. Although the city demonstrated that its average expenses per sign were significantly *higher* than the fees collected, the court held the ordinance unconstitutional. In individual cases—for example, the inspection of 500 identical posters—the fees assessed would be significantly higher than the actual costs incurred by the city. In *Long Beach Lesbian and Gay Pride*,[31] the court held that a requirement that marchers buy insurance was not narrowly tailored, since it could mean thousands of dollars of premium payments even if there were never any claims against the city.

In *Baldwin*, the Ninth Circuit distinguished *Cox* as a case where costs were apportioned. Instead of a flat fee schedule, the town in *Cox* could vary the fee in accordance with the actual costs incurred in each case. In *Stonewall Union*,[32] however, the Sixth Circuit held both a flat fee and a variable one to be permissible. The flat fee at issue in that case covered the administrative costs of issuing the parade permit. The court imposed no requirement that fees be directly correlated with the expenses incurred in each case. It was sufficient, held the court, that all the fees collected went to cover the costs of administering the permit system.

In none of the cases surveyed for this article involving parade permits did an insurance requirement survive constitutional scrutiny. Although it is not clear, in most of the cases, exactly what insurance the towns in question already had, courts generally hold that there are less expensive ways of meeting a town's concerns about liability than requiring

23. Long Beach Lesbian & Gay Pride v. Long Beach, 17 Cal. Rptr. 2d 861, 873 (Cal. Ct. App. 1993) (holding that *Forsyth* "laid to rest" notion that *Cox* allowed only nominal fees).

24. *Forsyth*, 112 S. Ct. at 2405 (Rehnquist, J., dissenting). The majority writes that "not even [a] nominal cap could save the ordinance because *in this context* the level of the fee is irrelevant." *Id.* at 2405 (emphasis added). This may suggest to future courts that, in some contexts, fees still need to be nominal.

25. Milwaukee Mobilization for Survival v. Milwaukee County Park Comm'n, 477 F. Supp. 1210 (E.D. Wis. 1979).

26. Bayside Enterprises v. Ellwest Stereo Theaters, 450 F. Supp. 696 (M.D. Fla. 1978).

27. Bayside Enterprises v. Carson, 470 F. Supp. 1140 (M.D. Fla. 1978).

28. *See, e.g.*, Forsyth County v. The Nationalist Movement, 112 S. Ct. 2395, 2404 (1992); Stonewall Union v. City of Columbus, 931 F.2d 1130, 1134 (6th Cir. 1991).

29. 319 U.S. 870 (1943).

30. 540 F.2d 1360 (9th Cir. 1976).

31. 17 Cal. Rptr. 2d 861, 875–79 (Cal. Ct. App. 1993).

32. 931 F.2d 1130 (6th Cir. 1991).

paraders to purchase insurance. In *Collin v. Smith*,[33] the "rare and expensive" insurance the town required placed an excessive burden on the marchers' speech. In two other cases the government failed to demonstrate that insurance was necessary. In one of those instances, the town already had insurance,[34] and in the other, the court held it unlikely, based on past good behavior of the marchers, that claims would arise against the state.[35] In both cases the courts held that concerns about damage to private persons were best addressed through vigorous enforcement of the criminal and civil laws. The California Court of Appeals, in *Long Beach Lesbian and Gay Pride* noted that insurance payments were made not for "real costs incident to the activities . . . but rather for contingencies that may never eventuate."[36]

Not only must a fee be correlated with actual costs the government will incur because of a parade or demonstration, but a government needs to limit the costs it incurs to those necessary to achieve its objectives concerning the parade. Courts, however, give a government considerable leeway in deciding how to assign police protection or run a permit system. The goal that a government hopes to accomplish through a regulation of speech can frequently be accomplished in different ways. For instance, to prevent littering by people who are handed leaflets, the government could altogether prohibit the handing out of leaflets or it could strictly enforce laws against littering. A prohibition against handing out leaflets is clearly more restrictive of free speech rights than are fines against those who litter. While formerly some courts held that only the least restrictive regulation was permissible in order to satisfy the narrow-tailoring test, *Ward v. Rock Against Racism* held that a government need only show that it could not accomplish its goal *as well* with a less restrictive regulation.[37]

In *Central Florida Nuclear Freeze Campaign v. Walsh* (decided before *Ward*), the court had held the use of police officers on overtime pay unconstitutional because that use was not the "least restrictive means" of providing police protection: cheaper reserve officers could have been used.[38] Such scrutiny is probably no longer appropriate, given the Supreme Court's decision in *Ward*. The correct approach under *Ward* was taken by the Sixth Circuit in *Stonewall Union v. City of Columbus*, where the court refused to scrutinize the city's choice to pay overtime to police, holding it inappropriate for the court to determine whether regular-duty as opposed to special-duty police should have been used.[39]

In *U.S. Labor Party v. Codd*[40] the Second Circuit upheld a $5.00 fee for a permit to use a bullhorn. The lower court had held the fee unconstitutional because although the city had shown that its expenses *exceeded* the fee, the city could actually save money overall by charging no fee and distributing permits for free at local police stations. The circuit court held that since the costs were clearly related to the expenses of administering the licensing scheme, and localized distribution might limit the scheme's effectiveness, the fees were constitutional.

C. Fee System Must Be Administered in a Content-Neutral Manner

If all that were required of a parade-fee ordinance were that it be directly related to the costs incurred by the city, drafting a constitutional ordinance would be fairly easy. The added requirement that the fee not vary with the message of the marchers makes things considerably more difficult. Government officials are naturally concerned to protect their units of government from paying for particularly costly demonstrations. It is often the content of a parade, however—the viewpoint the paraders espouse—that causes a parade to be expensive. Prior to enacting its parade ordinance, Forsyth County paid $670,000 in police protection at two civil rights marches, costs attributable in part to the presence of one thousand counter-demonstrators.[41] Since the counter-demonstrators would not have been present but for the message of the marchers, charging the parade organizers for the entire cost of the police protection would have violated the principle of content neutrality.

To be content neutral, a fee must not be based on factors that are likely to vary with the content of the parade. In addition, the procedure for setting a fee must be guided by definite standards, giving the decision-maker relatively little discretion. Finally, the ordinance must be administered in a uniform, nondiscriminatory way, with all paraders being subject to the same procedures.

33. 447 F. Supp. 676, 685 (N.D. Ill. 1978), *aff'd*, 328 F.2d 1197 (7th Cir. 1978).

34. Invisible Empire of the Ku Klux Klan v. Mayor of Thurmont, 700 F. Supp. 281, 285 (D. Md. 1988).

35. Eastern Connecticut Citizens Action Group v. Powers, 723 F.2d 1050, 1056 (2d Cir. 1983). This case also held that the State was protected against liability by a hold-harmless agreement. In *Mayor of Thurmont*, however, the Court held a requirement that marchers sign hold harmless agreements unconstitutional. 700 F. Supp. at 286.

36. 17 Cal. Rptr. 2d 861, 876 (1993).

37. 491 U.S. 781, 798, 799 (1989).

38. 774 F.2d 1515, 1526 (11th Cir. 1985).

39. 931 F.2d 1130, 1137 (6th Cir. 1991).

40. 527 F.2d 118 (2d Cir. 1975).

41. *Forsyth*, 112 S. Ct. 2395 at 2399 (1992).

1. Factors Determining Fee Amounts

Guidelines for setting a fee may not take into account the likely public reaction to a parade: they must be based entirely on the physical characteristics of the parade itself. As the Supreme Court put it in *Forsyth*, "listeners' reaction to speech is not a content-neutral basis for regulation."[42] An administrator should determine, in setting a fee, what the costs to the city will be if no one besides the marchers shows up.

a. Police Protection and Traffic Control: Permissible Factors in Fee-Setting?

It is probably the cost of additional police protection, often on overtime, that most concerns local governments. Factoring the cost of police *protection* into a permit fee, however, is constitutionally troublesome. The need for protection of marchers and onlookers is likely to vary with the potential for violence or disorder at a parade, which is in turn likely to vary with the issue the marchers espouse: in other words, the content of their speech. Assessing higher fees to those with numerous opponents could provide a "hecklers' veto"; that is, opponents of the marchers' message could prevent a march from happening, simply by threatening to show up in numbers large enough, and to misbehave badly enough, to make police protection prohibitively expensive. *Forsyth* affirmed the unconstitutionality of changing marchers for the costs of police protection. Estimating costs necessary to protect persons participating in or observing parades inevitably requires examining the content of their speech. Charging the demonstrators a fee to cover those costs might force "those wishing to express views unpopular with bottle throwers, for example," to pay more.[43]

In *Central Florida Nuclear Freeze Campaign v. Walsh*,[44] the city did not dispute that it took into account the speech of protesters in determining the permit fee it assessed. The city felt that demonstrators for a nuclear freeze in a city where there was a defense manufacturing plant created the potential for hostile counter-demonstrators who would be concerned about losing their jobs in the event of a nuclear freeze. The court held that a perceived need for special police protection did not justify the city's charging those demonstrators a higher fee than they would charge less controversial ones.

In *Stonewall Union* the court approved the use of crowd size as a factor in setting the fee.[45] *Forsyth*, however, casts doubt on the constitutionality of this factor. Although *Forsyth* referred only to crowd *reaction*, not pure numbers, the likelihood that numbers would in some instances be correlated with content makes charging on that basis troublesome. In two cases courts have held fee-setting provisions related to crowd control unconstitutional, relying in part on testimony that the size of the crowd determined the number of police officers used.[46] The sponsoring group's lack of control over the number of onlookers means particularly popular or unpopular (but controversial) speech could be discouraged.[47] A high fee assessed because of a large expected turnout might lead the parade's sponsors to cancel. In a case where the sponsoring group actively encouraged spectators to attend, basing a fee on the number of spectators might be constitutional, since that fee would not be correlated with the message's *content* so much as the *manner* in which the marchers desired to convey the message and the size of the audience that the group desired to reach. This is a fine distinction, however, and the reaction of a particular court to such an argument is unpredictable.

A permit fee that covers costs for the use of police for motor traffic control is content neutral and constitutionally permissible, provided charges for crowd (pedestrian) control are not included. The best way to ensure such content neutrality may be to specifically prohibit charging for police protection of marchers. The court in *Long Beach Lesbian and Gay Pride* found evidence that fees in the case were only for motor traffic control and that they specifically excluded the costs of contingency plans for violence. Such evidence was sufficient to allow the ordinance to withstand constitutional attack.[48] Factors like the time and date of the parade, the length, the route taken, the number of participants (not onlookers) and vehicles, the general traffic conditions, the number of intersections, and so forth may be taken into account in assessing a fee.[49]

b. Other Costs: Which May Be Covered by a Fee?

Charging marchers for the cost of administering a permit scheme, of cleaning up after a parade, or of protecting a city against liability may appear to be content neutral. However, while courts have generally accepted that it is proper to

42. *Id.* at 2403.
43. *Id.*
44. 774 F.2d 1515 (11th Cir. 1985).
45. 931 F.2d 1130 (6th Cir. 1991).
46. Gay and Lesbian Services Network v. Bishop, 832 F. Supp. 270, 273, 275, *modified* 841 F. Supp. 295 (W.D. Mo. 1993); Ku Klux Klan v. City of West Haven, 600 F. Supp. 1427 (D. Conn. 1985). *See also* Long Beach Lesbian and Gay Pride v. Long Beach, 17 Cal. Rptr. 2d 861, 874 (Cal. Ct. App. 1993) (noting that fees in question "respond to the size of the parade and its impacts on normal traffic, not the size of the crowd in attendance").
47. *See Gay and Lesbian Services Network*, 832 F. Supp. at 275.
48. 17 Cal. Rptr. 2d at 874.
49. Stonewall Union v. City of Columbus, 931 F.2d 1130, 1135 (6th Cir. 1991); *Gay and Lesbian Services Network*, 841 F. Supp. at 296, 297, and 832 F. Supp. at 272, 273; *Long Beach Lesbian and Gay Pride*, 17 Cal. Rptr. 2d at 874.

charge a fee for the administration of a permit scheme,[50] clean-up and insurance costs do implicate content, and charging marchers for them may lead a court to strike down a statute as unconstitutional.

The content neutrality of assessing clean-up costs hinges on the degree to which the mess is attributable to the parade itself rather than to onlookers. *Forsyth* made clear by implication that charging parade organizers for the costs of cleaning up after bottle-throwing onlookers is unconstitutional. Less expressive forms of littering by onlookers probably cannot be charged for either.[51] Such charges are likely to be correlated with the number of onlookers and, as discussed above, may be unconstitutional. On the other hand, there is no reason why charging parade organizers for the costs of cleaning up confetti thrown by paraders themselves could not be constitutionally assessed. However, the difficulties of estimating with any precision the costs attributable to a parade that has yet to take place are formidable. A process involving so much guesswork may not be narrowly tailored, since it may in some cases overcharge parade organizers. Although one case did approve a requirement that a group post a $1,000 clean-up bond before holding a rock concert,[52] that case may be distinguishable because it did not involve a parade or demonstration. What *is* permissible is requiring marchers to agree to reimburse the city for clean-up costs *after* the parade, provided those costs are attributable to the marchers themselves, rather than the onlookers.[53]

Ordinances requiring that applicants for a parade permit take out liability insurance, as noted earlier, tend to be struck down on the ground that they are not narrowly tailored to the governmental objective. Courts have also held that such a requirement may discriminate against groups based on the content of the group's message. In *Long Beach Lesbian and Gay Pride*, the court noted that considerations of content could "slip in" to the determination of an insurance premium, both when the city determined the appropriate amount of coverage and when the market determined the cost of the insurance.[54] Insurance companies examine factors like the political beliefs of the applicants and possible adverse publicity for the company, and such examination may cause a speech's content to influence the price of premiums.[55] In sum, it seems unlikely that an insurance requirement could survive the level of scrutiny for content neutrality accorded permit fees in *Forsyth*.

2. Limited Discretion in Setting Fee

It is at least as important for an administrator to rely on a standardized list of factors in assessing a fee as it is that the factors themselves be content neutral. Placing the determination of a fee in the discretion of a local government official will likely render the ordinance unconstitutional. In *Forsyth*, the fact that the ordinance did not preclude the fee-setter from taking into account listeners' reaction to speech made the statute unconstitutional, despite testimony that the administrator setting the fee considered only the time it took to process the application. The court held that the administrator had excessive discretion since he could vary the fee between zero and $1,000 and there were no explicit guidelines in the ordinance to help him determine a figure.[56] In *Walsh*, the court ruled that latitude given the police chief to take into account the "size, location and nature" of the assembly gave him excessive discretion.[57] Statutory authority for a fee-setter to waive an insurance requirement, with no standards as to when it should be waived, has also rendered a statute unconstitutional.[58]

In the few recent cases where a local fee-setting official's discretion has been limited so as to fall within constitutional boundaries, extensive written guidelines have controlled the setting of the fee.[59] Written guidelines may not be required in all cases, however. In *Ku Klux Klan v. Mayor of Thurmont*, the court noted in dicta that a small town need not

50. Cox v. New Hampshire, 312 U.S. 577 (1941); *Stonewall Union*, 931 F.2d at 1130. *See also* Eastern Connecticut Citizens Action Group v. Powers, 723 F.2d 1050 (2d Cir. 1983) (requiring defendants, on remand, to demonstrate that fees are needed to offset "expenses associated with processing applications"). Recall, however, that fees used to offset administrative expenses must be narrowly tailored.

51. See Ku Klux Klan v. Mayor of Thurmont, 700 F. Supp. 281, 286 (D. Md. 1988) (holding fee for clean-up costs impermissible where onlookers' litter could be included in charge).

52. Rock Against Racism v. Ward, 658 F. Supp. 1346, 1355 (S.D.N.Y. 1987); *aff'd in relevant part, 848 F.2d 367 (2d Cir. 1988), rev'd in part, reinstating district court decision* in toto, 491 U.S. 781 (1989).

53. *See* Long Beach Lesbian and Gay Pride, 17 Cal. Rptr. 2d 861, 875 (1993) (ordinance requiring marchers to reimburse city for damage to property caused by groups' use of property constitutional where scope of ordinance did not extend to make marchers liable for damage of others).

54. *Id.* at 877.

55. Eastern Connecticut Citizens Action Group v. Powers, 723 F.2d 1051, 1056 (2d Cir. 1983).

56. Forsyth County v. The Nationalist Movement, 112 S. Ct. 2395, 2402, 2403.

57. Central Florida Nuclear Freeze Campaign v. Walsh, 774 F.2d 1515, 1525 (11th Cir. 1985). Note, however, that size and location were approved as content-neutral factors in *Stonewall*, 931 F.2d 1130, 1135 (6th Cir. 1991) and Gay and Lesbian Services v. Bishop, 841 F. Supp. 295, 296 (W.D. Mo. 1993) (modifying policy detailed in same case at 832 F. Supp. 270, 272, 273).

58. *Collin v. Smith*, 578 F.2d 1197 (7th Cir. 1978).

59. *See* cases cited in note 57.

have written guidelines: "A Town policy could be constitutional under appropriate circumstances, such as if the Town's explicit practice was . . . to impose uniform constitutional conditions on all applicants."[60] *Forsyth*, although adverting to the possibility that past practice could suffice to demonstrate appropriately limited discretion,[61] requires some affirmative restraint on official discretion.[62] It is not clear how a government could demonstrate that its policy had been uniformly applied if the first group to be charged a fee under a new ordinance were to challenge the ordinance.

3. Discriminatory Administration of Fee Ordinance Not Allowed

Standards or guidelines are required not just to ensure that officials do not vary fees with content of marchers' views, but to ensure that all marchers are treated equally. This requirement, too, can be difficult for local governments to meet. While town citizens may approve of charging an unpopular group a fee to march, their approval may dissolve when organizers of the Fourth of July parade are charged the same fee. Such appeared to be the case in *Forsyth*, where the Court cited the failure of the administrator to charge a fee for a Fourth of July parade as evidence that the fee was used only in cases where a need for police protection was anticipated.[63]

It is crucial, therefore, that all groups applying for permits be assessed the full fees. In *Stonewall*, where the court by and large found the ordinance constitutional, the court remanded the case for further review on the question of discriminatory enforcement. The plaintiffs in that case contended that a failure to charge organizers of a motor vehicle procession, a failure to cite marchers who paraded without a permit, and a failure to charge one sponsor until after the parade, indicated discrimination.[64]

Government sponsorship of parades is not necessarily precluded, provided the sponsorship is not used to discriminate against particular groups, but to promote legitimate government interests. In *Long Beach Lesbian and Gay Pride*, the court approved city funding of parades that the city felt would help boost its image.[65] The court in *Stonewall* did not rule out government sponsorship of a parade, although it would require the government to pay the same fees assessed sponsors of other parades. As long as the sponsoring department could show that the parade related to its government function, the sponsorship did not indicate discriminatory application of the fee ordinance.[66] *Collin v. Smith*, however, found that the town government used "co-sponsorship" of parades to allow favored groups to escape insurance requirements. That kind of favoritism, with "no principled standard" for determining which organizations are exempt from insurance requirements, held the court, was unconstitutional.[67] It is important, then, that government co-sponsorship of parades be the exception, not the rule, and that the government articulate legitimate reasons for its sponsorship.

D. Required Exception for Indigents?

Prior restraint analysis requires that there exist "ample alternatives for communication" when a government imposes a restriction on speech.[68] A few cases have held that these alternatives do not exist for indigents who are unable to pay the fees required by a parade-permit system. These cases have required that a permit system that charges a fee for parades must allow exceptions for indigents.[69] The rationale for this requirement is that the state may not deny its citizens the opportunity to exercise their constitutional rights. Charging someone who has no money a fee to march down the street effectively denies that person the right to march at all. For similar reasons, when West Haven, Connecticut, required the Ku Klux Klan to obtain liability insurance, the city's refusal to waive the requirement became unconstitutional when the Klan proved that no insurance company would sell it the required insurance. None of the cited cases involved an indigent group; nevertheless, the lack of an indigency exception in the ordinance has been held to be enough to invalidate the ordinance under the overbreadth doctrine.[70]

Other cases, however, have been significantly more permissive in dealing with the question of whether an exception

60. 700 F. Supp. 281, 285 (D. Md. 1988).

61. Forsyth County v. Nationalist Movement, 112 S. Ct. 2395, 2402 (1992).

62. *Id.* at 2403.

63. *Id.* at 2404.

64. Stonewall Union v. City of Columbus, 931 F.2d at 1130, 1138, 1139 (6th Cir. 1991). In Gay and Lesbian Services v. Bishop, 841 F. Supp. 295, 296 (W.D. Mo. 1993), the court approved an ordinance despite the fact that the city had provided free traffic-control services for professional sporting events and a March of Dimes walkathon. In an earlier opinion (which examines the policy at issue in detail) the court had indicated that the free provision of these services might be evidence of discriminatory enforcement. *Gay and Lesbian Services v. Bishop*, 832 F. Supp. at 273.

65. Long Beach Lesbian and Gay Pride v. Long Beach, 17 Cal. Rptr. 2d 861, 879 (1993).

66. Stonewall Union v. City of Columbus, 931 F.2d 1130, 1138 (6th Cir. 1991).

67. 447 F. Supp. 676, 685 (N.D. Ill. 1978), *aff'd* 578 F.2d 1197, 1208 (7th Cir. 1978).

68. Forsyth County v. Nationalist Movement, 112 S. Ct. 2395, 2401 (1992).

69. Central Florida Nuclear Freeze Campaign v. Walsh 774 F.2d at 515 (11th Cir. 1985); Ku Klux Klan v. Mayor of Thurmont 700 F. Supp. 281 (D. Md. 1988); Ku Klux Klan v. City of West Haven 600 F. Supp. 1427 (D. Conn. 1985). *See also,* Lubin v. Panish, 94 S. Ct. 1315 (1974).

70. *See* cases cited in note 69.

to fees is required for indigents. In *Rock Against Racism v. Ward*, the federal district court refused to hold the ordinance facially invalid for its failure to provide an indigency exception. The court instead placed the burden of proving indigence on the group challenging the ordinance.[71] In *Stonewall*, the court held that the presence of alternative means for indigents to express themselves meant the fee requirement was not unconstitutional. The ordinance at issue in that case applied only to street marches; therefore the indigents were free to march down the sidewalks without paying a fee.[72] Similarly, indigent marchers in *Long Beach Lesbian and Gay Pride* could march without obstructing traffic to avoid the fee requirements.[73]

The requirement that an alternative be provided for indigents grows out of the Supreme Court decision concerning First Amendment rights in *Lubin v. Panish*.[74] In that case, involving a requirement that candidates pay a fee to run for political office, the court held that alternatives to fees were required in order to allow indigent would-be candidates to run.[75] The courts that have required an indigency exception to parade-permit fees may take the view that indigents have a right to march in the streets, and therefore alternatives to fees, not alternative forums, must be available. When the problem is phrased like this, it is difficult to see any suitable alternative other than a fee waiver. The courts finding sidewalks or similar forums to be acceptable alternatives, on the other hand, take the approach that indigents have a right to express themselves publicly, but that their choice of forum may be limited by ability to pay. With the problem phrased like this, it is a rather easy matter to find alternatives, since most fee systems do not require fees for all uses of public forums for free speech purposes. Given these different approaches to the problem, until the Supreme Court speaks directly to the issue, the constitutionality of a parade fee permit without a fee waiver for indigents will vary from jurisdiction to jurisdiction.

Conclusion

Drafting and administering a fee system for the issuance of parade permits requires a great deal of constitutional hoop-jumping. Significantly, in none of the cases cited in this article did a fee system for parade permits survive constitutional scrutiny unscathed.[76] Nevertheless, drafting a constitutional ordinance ought not be an impossible task (at least in most jurisdictions). Beginning with *Cox*, courts have frequently recognized that local governments may have a strong interest in finding equitable ways to offset the costs of the use of public areas for free speech purposes.[77]

The limits of what can be accomplished by a constitutional fee ordinance must be recognized, however. Although a larger-than-nominal fee is probably constitutionally permissible, the requirement that an ordinance be content neutral means, most significantly, that a fee may not include charges for the costs of extraordinary police protection. These costs simply cannot be constitutionally assessed in the form of a fee that paraders must pay before they are allowed to march. On the other hand, a certain number of police will be needed to ensure order and control traffic at even the most peaceful parade, and that number will likely correspond at least in part to factors like the time and date of the parade, its location, and the number of participants. These are content-neutral factors[78] that can be evaluated uniformly to every parade for which a government issues a permit. Content neutrality alone is not enough, however. If it were, a government could charge an average of its expected expenses for parades, in effect requiring the cheaper parades to subsidize the more expensive ones. This practice, however, would mean that the charges for individual parades might not be narrowly tailored to the costs the local government expected to incur in providing a safe public forum for that parade. The two requirements of content neutrality and narrow tailoring together mean, then, that in a city where extra police are needed for controversial parades, fees may not be used to cover the cost.

The factors that affect the amount of the fee need to be clearly laid out. The overbreadth doctrine probably prevents a broadly worded ordinance like the one in *Cox* from surviving constitutional scrutiny today. Instead, the ordinance must be worded so that an appropriate fee could be determined by an administrator who knew neither the identity of the group applying for the permit nor the identity of the expected observers (nor, most likely, their expected number). When the

71. 658 F. Supp. at 1355 (S.D.N.Y. 1987), *aff'd in relevant part*, 848 F.2d 367 (2d Cir. 1988), *rev'd in part, reinstating trial court decision* in toto, 491 U.S. 781 (1989).

72. Stonewall Union v. City of Columbus, 931 F.2d 1130, 1137 (1991).

73. Long Beach Lesbian and Gay Pride v. Long Beach, 17 Cal. Rptr. 2d 861, 875 (1993).

74. 415 U.S. 709 (1974).

75. *Id.* at 1320, 1321.

76. *Stonewall* upheld an ordinance as facially valid, but remanded the case to address the issue of whether it had been unconstitutionally enforced. Stonewall Union v. City of Columbus, 931 F.2d 1130 (6th Cir. 1991).

77. Cox v. New Hampshire, 312 U.S. 569, 577 (1940); Forsyth County v. Nationalist Movement, 112 S. Ct. 2395, 2404 (1992).

78. These factors could still be used in constitutionally impermissible ways. It might not be constitutionally permissible, for example, to charge more for a parade held on March 17th in a predominantly Irish section of town. The fee may be based on location and date, but assumptions about that date and that location may implicate the parade's content.

administrator assesses the fee, selective ignorance can be constitutional bliss. In practice, of course, the administrator will probably know the marchers' identity. It is therefore important that the law affirmatively prohibit that administrator from basing the amount of the fee on impermissible factors.

The First Amendment does not require society to subsidize the speech of its noisiest members (although it may require society to do so for its poorest members). It does, however, require that speakers not be penalized by government because others disagree with their message. If a local government conscientiously distinguishes between expenses attributable to a group's use of a public forum and expenses attributable to others' reaction to that use, it may constitutionally assess fees.

The Institute of Government of The University of North Carolina at Chapel Hill has printed a total of 663 copies of this public document at a cost of $299.87, or $0.45 each. These figures include only the direct costs of reproduction. They do not include preparation, handling, or distribution costs.

⊖ This publication is printed on permanent, acid-free paper in compliance with the North Carolina General Statutes.