CONSTITUTIONAL LAW—An Ordinance Permitting a Government Administrator to Vary the Fee for Assembling or Parading to Reflect the Estimated Cost of Maintaining Public Order Is Unconstitutional in Violation of the First and Fourteenth Amendments—*Forsyth County v. Nationalist Movement*, 112 S. Ct. 2395 (1992).

I. INTRODUCTION

In January 1989, the Nationalist Movement[1] planned to conduct a rally on the courthouse steps in Forsyth County, Georgia, expressing opposition to the federal holiday commemorating Martin Luther King Jr.'s birthday.[2] The Movement applied for a permit to hold the demonstration, and Forsyth County granted the permit and imposed a $100 fee pursuant to Forsyth County Ordinance 34 (Ordinance 34).[3] Ordinance 34 provided for "the issuance of permits for parades, assemblies, demonstrations, road closings, and other uses of public property and roads by private organizations and groups of private persons for private purposes."[4] The ordinance also required permit applicants to pay a permit fee of "a sum not more than $1000.00 for each day such parade, procession, or open air public meeting shall take place."[5] The permit fee was used to defray the cost of "necessary and reasonable protection of persons participating in or observing said parades [or] demonstrations."[6] Because the costs of providing security at parades and demonstrations usually exceeded the normal costs of law enforcement, the county believed permit applicants should bear the extra cost.[7] The $100 fee included the administrative costs associated with processing the permit application, but not a calculation for expenses expected to be incurred by law enforcement authorities.[8] The Nationalist Movement did not pay the fee and did not hold the planned demonstration.[9]

On January 19, 1989, the Movement filed for a temporary restraining order and permanent injunction to prevent Forsyth County from interfering with the proposed demonstration.[10] The United States District Court for the Northern District of Georgia denied the temporary restraining order and injunction.[11] The court found Ordinance 34 vested discretion in the county administrator to set the fee; however, the fee was based solely on content-neutral criteria, which included the actual costs of processing the application.[12] The court also found Ordinance

1. The Nationalist Movement is affiliated with the Klu Klux Klan. Forsyth County v. Nationalist Movement, 112 S. Ct. 2395, 2398 (1992).
2. *Id.* at 2399.
3. *Id.*
4. *Id.*
5. *Id.*
6. *Id.*
7. *Id.*
8. *Id.*
9. *Id.* at 2400.
10. *Id.*
11. *Id.*
12. *Id.*

34 constitutional as applied to the respondent.[13] The United States Court of Appeals for the Eleventh Circuit reversed.[14] The court relied on *Central Florida Nuclear Freeze Campaign v. Walsh*[15] and held "'[a]n ordinance which charges more than a nominal fee for using public forums for public issue speech, violates the First Amendment.'"[16] The Eleventh Circuit Court of Appeals found the ordinance unconstitutional because the $1000 a day permit fee exceeded the constitutional threshold of a "nominal" fee.[17] The court voted to vacate the Eleventh Circuit's panel opinion and to rehear the case en banc.[18] Following further briefing, the court issued a per curiam opinion reinstating the Eleventh Circuit's panel opinion in its entirety.[19]

The United States Supreme Court granted certiorari to resolve a conflict among the courts of appeals concerning the constitutionality of charging a fee for the exercise of First Amendment freedoms in a public forum.[20] The Supreme Court *held*, affirmed.[21] An ordinance permitting a government administrator to vary the fee for assembling or parading to reflect the estimated cost of maintaining public order is unconstitutional in violation of the First and Fourteenth Amendments. *Forsyth County v. Nationalist Movement*, 112 S. Ct. 2395 (1992).

II. THE HISTORY OF THE ENACTMENT OF ORDINANCE 34

The Forsyth County Board of Commissioners enacted Ordinance 34 as a direct result of two large civil rights demonstrations held in Forsyth County in early 1987.[22] Forsyth County is primarily a rural county with a troubled racial history.[23] In 1912, the county systematically purged itself of its entire African-American population in the wake of the lynching of a black man accused of raping and murdering a white woman.[24] Even in 1987, the county's population remained ninety-nine percent white.[25]

---

13. *Id.*

14. *Id.* (citing Nationalist Movement v. City of Cumming, 913 F.2d 885 (11th Cir. 1990)).

15. Central Florida Nuclear Freeze Campaign v. Walsh, 774 F.2d 1515 (11th Cir. 1985), *cert. denied*, 475 U.S. 1120 (1986) (holding municipalities may only constitutionally impose fees for the use of public forums when the fees are nominal and related to expenses incidental to the policing of the event).

16. Forsyth County v. Nationalist Movement, 112 S. Ct. 2395, 2400 (1992) (quoting Nationalist Movement v. City of Cumming, 913 F.2d 885 at 891).

17. *Id.*

18. *Id.* (citing Nationalist Movement v. City of Cumming, 921 F.2d 1125 (11th Cir. 1990)).

19. *Id.* (citing Nationalist Movement v. City of Cumming, 934 F.2d 1482, 1483 (11th Cir. 1991)).

20. *Id.* The Court cited cases from the Sixth, Second, and Fifth Circuit Courts of Appeal whose holdings varied as to the constitutionality of charging fees for the use of public forums to exercise First Amendment freedoms. *Id.* at 2400 n.8.

21. *Id.* at 2405.

22. *Id.* at 2399.

23. *Id.* at 2398.

24. *Id.*

25. *Id.*

In January 1987, Hosea Williams, a civil rights activist, found Forsyth County an ideal site, given its racial history, for a "March Against Fear and Intimidation."[26] When ninety civil rights demonstrators attempted to parade in the county seat, they were met by members of an independent affiliate of the Nationalist Movement.[27] An overwhelming number of counter-demonstrators lined the parade route throwing rocks, beer bottles, and shouting racial slurs, thus bringing the parade to a premature halt.[28] Police officers providing security during the parade were dramatically outnumbered and could not maintain control of the crowd.[29]

Following this curtailed demonstration, Williams planned another march for the next weekend.[30] This march developed into the largest civil rights demonstration in the South since the 1960s.[31] Approximately twenty thousand marchers joined civil rights leaders, politicians, and candidates for public office in a parade and rally in the city of Cumming, Georgia.[32] Three thousand state and local police and National Guardsmen were posted to maintain order during the parade and rally.[33] This enabled the parade to continue uninterrupted despite the presence of approximately one thousand counter-demonstrators.[34] Although the county paid only a small portion of the police protection costs, the total cost of maintaining order exceeded $670,000.[35]

The Forsyth County Board of Commissioners enacted Ordinance 34 on the heels of this demonstration.[36] The ordinance provided for the issuance of a permit, and the payment of a permit fee, in advance of any parades or assemblies in the public forums of Forsyth County.[37] The Commissioners explained "'the cost of necessary and reasonable protection of persons participating in or observing said parades, assemblies, demonstrations, road closings and other related activities exceeds the usual and normal cost of law enforcement for which those participating should be held accountable and responsible.'"[38] The ordinance originally required the permit applicant to defray the costs by paying a fee in an amount "fixed 'from time to time' by the Board."[39] The ordinance was later amended to require every permit applicant to pay a fee not to exceed $1000 for each day of the event.[40] Additionally, the county administrator could adjust the amount of the fee "to meet the expense incident to the administration of the

26. *Id.*
27. *Id.*
28. *Id.* at 2398-99.
29. *Id.*
30. *Id.* at 2399.
31. *Id.*
32. *Id.*
33. *Id.*
34. *Id.*
35. *Id.*
36. *Id.*
37. *Id.*
38. *Id.*
39. *Id.*
40. *Id.*

Ordinance and to the maintenance of public order in the matter licensed."[41] The Nationalist Movement asserted the ordinance was unconstitutional on its face.[42]

III. THE MAJORITY OPINION

Justice Blackmun, writing for the majority of the Court,[43] first addressed the Nationalist Movement's standing to mount a facial challenge to Ordinance 34 and held it had standing to challenge the ordinance.[44] As a general exception to the standing rules, when an overbroad regulation has the potential to limit freedom of expression it may be subject to facial review and invalidation, even though its application in the present case is not constitutionally objectionable.[45] The rationale underlying the exception is recognition that the very existence of a broadly written law "has the potential to chill the expressive activity of others not before the court."[46]

The Court found the Forsyth County ordinance requiring a permit and fee to exercise public speech in traditional public forums constituted a prior restraint on speech.[47] Although a heavy presumption exists against the constitutional validity of prior restraints, the Court, in *Cox v. New Hampshire,*[48] recognized that the government can regulate competing uses of public forums by requiring a permit and fee for their use.[49] *Cox* recognized the validity of regulatory schemes imposing time, place, and manner restrictions on speech.[50] In order for such regulatory schemes to be valid, they must: (1) be narrowly tailored to serve a significant governmental interest; (2) not be based on the content of the message; and (3) leave open ample alternatives for communication.[51] This constitutional standard provided the foundation for the Court's analysis in *Forsyth County.*

Generally, the Nationalist Movement contended the ordinance failed to meet this constitutional standard because: (1) the ordinance failed to set narrowly drawn, reasonably definite standards for setting the fee; (2) the ordinance by necessity required the fee be based on the content of the speech; and (3) the provision of the ordinance setting a maximum allowable fee did not make an otherwise unconstitutional ordinance constitutional.[52]

---

41. *Id.*
42. *Id.* at 2400.
43. Justices Blackmun, Stevens, O'Connor, Kennedy, and Souter comprised the majority.
44. *Id.* at 2400-01.
45. *Id.*
46. *Id.*
47. *Id.*
48. Cox v. New Hampshire, 312 U.S. 569 (1941).
49. Forsyth County v. Nationalist Movement, 112 S. Ct. 2395, 2401 (1992) (citing Cox v. New Hampshire, 312 U.S. at 574-76).
50. *Id.*
51. *Id.* (citing United States v. Grace, 461 U.S. 171 (1983)).
52. *Id.* at 2401-04.

A. *Failure to Set Reasonably Definite Standards*

The Court addressed the Nationalist Movement's contention that the county ordinance was invalid because it did not prescribe adequate standards for the county administrator to apply in setting the fee.[53] They argued the lack of adequate standards to guide the administrator may result in arbitrary application of the fee and may potentially allow suppression of a particular point of view.[54] The Court examined how the county interpreted and implemented the ordinance to evaluate the legitimacy of the respondent's facial attack.[55] It determined Forsyth County had interpreted the ordinance to give broad discretion to the administrator not only as to the amount of the fee imposed, but also whether a fee would be imposed at all.[56] Specifically, the fee was to reflect the county's administrative and police costs.[57] The administrator had the discretion, however, to include all, part, or none of these costs in the fee, or even to refuse imposing a fee.[58]

In *Forsyth County*, the county administrator testified in the district court that the fee reflected only the administrative costs associated with processing the permit application.[59] Not only did the fee not reflect any expected security costs, but the administrator deliberately undervalued the cost of the time he had spent processing the application in order to keep the fee low.[60] The Court concluded, based on the county's prior "implementation and construction of the ordinance, it simply cannot be said that there are any 'narrowly drawn, reasonable and definite standards,' guiding the hand of the Forsyth County administrator."[61] The Court found no articulated objective standards in Ordinance 34 or in its actual implementation.[62] Rather, decisions as to the amount of the fee, or whether a fee would be imposed at all, were left to the whim of the county administrator.[63] The Court concluded the vesting of such "unbridled discretion in a government official" constituted a violation of the First Amendment.[64]

---

53. *Id.* at 2401.
54. *Id.*
55. *Id.* at 2402.
56. *Id.*
57. *Id.*
58. *Id.*
59. *Id.*
60. *Id.*
61. *Id.* at 2402-03 (quoting Niemotko v. Maryland, 340 U.S. 268, 271 (1951)). In reaching this conclusion, the Court considered the administrator's testimony at trial regarding prior instances when Ordinance 34 was applied to impose a fee on the applicant. *Id.* The administrator imposed a fee in three other instances: a $100 fee was imposed on the Nationalist Movement in a prior year; a $25 fee was imposed on bike race organizers for holding a bike race on county roads; and a $5 fee was imposed on the Girl Scouts for an activity on county property. *Id.* at 2402. Other testimony also indicated in other instances the county had imposed neither a permit requirement nor charged a fee for activities and events held on county property. *Id.* The administrator neither explained the basis for the differential application of the ordinance, nor the basis for the differences in the amount of the fee when a fee was imposed for the use of county property. *Id.*
62. *Id.* at 2403.
63. *Id.*
64. *Id.*

B. *Ordinance Necessarily Requires the Fee to Be Based on the Content of the Speech*

The Court considered whether Ordinance 34 unconstitutionally required the fee to be based on the content of the message and concluded the ordinance, as construed by the county, unconstitutionally required the fee to be content-based.[65] To accurately calculate the law enforcement costs incurred by any particular assembly, the Court found the estimation must take into account the potential public reaction.[66] This would require the administrator to "'necessarily examine the content of the message that is conveyed.'" [67] Under this analysis, the fee would depend on the administrator's estimation of the hostility likely to be created by the speech.[68] Taken to its logical conclusion, this would encourage a heckler's veto because the more unpopular the content of the speech, the higher the costs of maintaining public order, and thus, the higher the fee imposed on the activity.[69] The Court stated it had always held "[r]egulations which permit the Government to discriminate on the basis of the content of the message cannot be tolerated under the First Amendment" absent a showing of a compelling governmental interest.[70] In this instance, the Court found the petitioner's justification for the ordinance, raising revenue for police services, did not constitute a compelling governmental interest.[71]

The Court quickly dismissed the county's argument that the ordinance was content-neutral and paralleled the language of the statute in *Cox*.[72] The Court distinguished *Cox* on the basis that no fee was actually assessed in *Cox*.[73] The Court recognized *Cox* authorized the municipality to charge a permit fee for the maintenance of public order, but stated simply "[n]othing in this Court's opinion suggests that the statute, as interpreted by the New Hampshire Supreme Court, called for charging a premium in the case of a controversial political message delivered before a hostile audience."[74]

The language of the statute upheld in *Cox* was similar to the language of the Forsyth County ordinance.[75] The purpose of the statute in *Cox*, like

---

65. *Id.*

66. *Id.*

67. *Id.* (quoting FCC v. League of Women Voters, 468 U.S. 364, 383 (1984)).

68. *Id.*

69. *Id.*

70. *Id.* at 2404 (citing Regan v. Time, Inc., 468 U.S. 641, 648-49 (1984); *see* Simon & Schuster, Inc. v. Members of the New York State Crime Victims Bd., 502 U.S. 105, 116 (1991); Arkansas Writers' Project, Inc. v. Ragland, 481 U.S. 221, 230 (1987)).

71. *Id.*

72. *Id.* (citing Cox v. New Hampshire, 312 U.S. 569 (1941)).

73. *Id.*

74. *Id.*

75. The statute in *Cox* provided in pertinent part: "'No . . . parade or procession [shall be performed or exhibited] upon any public street or way, and no open-air public meeting upon any ground abutting thereon, shall be permitted, unless a special license therefor shall first be obtained from the selectmen of the town, or from a licensing committee.'" Cox v. New Hampshire, 312 U.S. at 571. Section 4 of the statute addressed permit fees, providing "'[e]very licensee shall pay in advance for such license, for the use of the city or town, a sum not more than three hundred dol-

Ordinance 34, was to meet the expense incident to administration and the maintenance of public order in the matter licensed.[76] Using the Court's reasoning in *Forsyth County*, the determination of the amount of the fee in *Cox* would necessarily have required the fee to be based on the content of the speech. The Court in *Cox*, however, implied the content of the message was not important in determining the amount needed to defray law enforcement costs, but rather the size of the crowd the assembly would draw.[77] Quoting the New Hampshire Supreme Court, the United States Supreme Court gave an example of this principle:

> [T]he charge . . . for a circus parade or a celebration procession of length, each drawing crowds of observers, would take into account the greater public expense of policing the spectacle, compared with the slight expense of a less expansive and attractive parade or procession, to which the charge would be adjusted.[78]

Thus, there was validity to Forsyth County's argument that the ordinance was content-neutral and aimed only at the secondary effect of the costs of maintaining order, even though the cost of policing related to content.[79] The fee, which reflected the cost of policing the event, required an inquiry into the size of the crowd attracted to such an event rather than the content of the speech. Considering the circus parade example from *Cox*, it is not fear of a hostile response, but rather the attraction of a large, excited crowd that is the determining factor of the cost of maintaining order. The majority's attempt to distinguish *Cox* based on the fact a fee was not assessed because the demonstrating organization never sought a permit is ineffective and unconvincing. The majority's analysis in *Forsyth County* is simply inconsistent with *Cox*.

C. *Maximum Allowable Fee is Not the Touchstone of Constitutionality*

Finally, the Court addressed the constitutionality of charging speakers a fee for use of a public forum.[80] The court of appeals held an ordinance charging more than a nominal fee for individuals using public forums violated the First Amendment.[81] As a result, the court of appeals believed the county's permit fee of up to $1000 per day exceeded this constitutional standard.[82] The Supreme Court disagreed, however, stating the amount of the permit fee was irrelevant to a determination of the constitutional validity of the ordinance.[83] This conclusion was predicated on the Court's belief that the fee was based on the content of the

---

lars for each day such licensee shall perform or exhibit, or such parade, procession or open-air public meeting shall take place.'" *Id.* at 572 n.1.

76. *Id.* at 577.
77. *Id.* at 576-77.
78. *Id.*
79. Forsyth County v. Nationalist Movement, 112 S. Ct. 2395, 2403 (1992).
80. The Court granted certiorari to resolve this particular question. *Id.* at 2400.
81. *Id.* at 2400.
82. *Id.*
83. *Id.* at 2405.

speech, and such a "tax based on the content of speech does not become more constitutional because it is a small tax."[84]

The Court found the lower courts based the nominal fee requirement on a mistaken interpretation of a sentence in the Supreme Court's decision in *Murdock v. Pennsylvania*.[85] In *Murdock*, the Court invalidated a flat license fee levied on distributors of religious literature.[86] The sentence describing the fee in *Cox* as "nominal" merely reflected a distinction between the fees charged in *Cox* and *Murdock*.[87] The Court's language was not meant to indicate an invalid fee can be made constitutional if it is nominal.[88] The Court stated the fee in *Murdock* was unconstitutional because it was unrelated to any legitimate state interest, not because it was of a particular amount.[89] Similarly, the Court held Ordinance 34 was unconstitutional—not because the fee charged was more than nominal, but because the amount of the fee was tied to the content of the speech and lacked adequate procedural safeguards.[90]

IV. THE DISSENT

Four justices joined the dissent written by Chief Justice Rehnquist,[91] which severely criticized the majority's failure to address the question certified for review, as well as its willingness to draw its own conclusions when factual findings in the lower court did not support those conclusions.[92] The dissent asserted the Court granted certiorari to consider the following question:

> Whether the provisions of the First Amendment to the United States Constitution limit the amount of a license fee assessed pursuant to the provisions of a county parade ordinance to a nominal sum or whether the amount of the license fee may take into account the actual expense incident to the administration of the ordinance and the maintenance of public order in the matter licensed, up to the sum of $1,000.00 per day of the activity.[93]

The dissent criticized the majority not only for failing to pass authoritatively on this question, but for basing its decision on other perceived constitutional defects in Ordinance 34.[94]

---

84. *Id.*

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

86. Forsyth County v. Nationalist Movement, 112 S. Ct. 2395, 2405 (1992). The Court in *Murdock*, in distinguishing this fee from the fee upheld in *Cox*, stated "the fee is not a nominal one, imposed as a regulatory measure and calculated to defray the expense of protecting those on the streets and at home against the abuses of solicitors." Murdock v. Pennsylvania, 319 U.S. at 116.

87. Forsyth County v. Nationalist Movement, 112 S. Ct. at 2405.

88. *Id.*

89. *Id.*

90. *Id.*

91. Justices White, Scalia, and Thomas joined in the dissent written by Chief Justice Rehnquist. *Id.* (Rehnquist, C. J., dissenting).

92. *Id.* (Rehnquist, C. J., dissenting).

93. *Id.* (Rehnquist, C. J., dissenting).

94. *Id.* (Rehnquist, C. J., dissenting).

The dissent found the answer to the question posed by the petition for certiorari quite simple because it was already decided by the Court over fifty years ago in *Cox*.[95] The dissent emphasized a unanimous Court upheld the statute in *Cox*, finding:

> [t]here is nothing contrary to the Constitution in the charge of a fee limited to the purpose stated [to meet the cost incident to the administration of the Act and the maintenance of public order] . . . . [W]e perceive no constitutional ground for denying to local governments that flexibility of adjustment of fees which in the light of varying conditions would tend to conserve rather than impair the liberty sought.[96]

The dissent also addressed the appellate court's mistake in finding a city could not charge more than a nominal fee for a parade permit.[97] The dissent agreed with the majority's statement that neither *Murdock* nor *Cox* required that any fee charged for the use of public forums be nominal in order to be constitutional.[98] The dissent stated it was the language in *Murdock* suggesting the fee charged in *Cox* was nominal that led the Eleventh Circuit to conclude Forsyth County was prohibited from charging any more than a nominal permit fee.[99] The dissent explained the holding of *Cox* was to the contrary because the fee upheld in *Cox* "'had a permissible range *from $300 to a nominal amount.*'"[100] The dissent noted the fact that the *Murdock* court misread the facts of *Cox* and commented on them, does not bind a later court to the misreading of *Cox* as it appears in *Murdock*.[101] The dissent stated *Cox* squarely controlled the question presented in *Forsyth County*, and it would hold explicitly the Constitution does not limit a public forum license fee to a nominal amount.[102]

The dissent, however, did not stop at this determination. It also criticized the majority's conclusion that the ordinance was unconstitutional because it did not provide narrowly drawn, reasonably definite standards to guide the administrator in determining the amount of the fee.[103] The dissent indicated the lower courts in *Forsyth County* did not pass on this question and, therefore, the majority relied on its own interpretation of the ordinance in making its determinations.[104] Additionally, the dissent found the ordinance clearly paralleled the language of the statute upheld in *Cox* even though the language for setting the fee was

---

95. *Id.* (Rehnquist, C. J., dissenting).
96. *Id.* (Rehnquist, C. J., dissenting).
97. *Id.* at 2406 (Rehnquist, C. J., dissenting); *see supra* text accompanying notes 74-77.
98. Forsyth County v. Nationalist Movement, 112 S. Ct. 2395, 2406 (1992) (Rehnquist, C. J., dissenting).
99. *Id.* (Rehnquist, C. J., dissenting).
100. *Id.* (Rehnquist, C. J., dissenting) (quoting Cox v. New Hampshire, 312 U.S. 569, 576 (1941)) (emphasis added).
101. *Id.* at 2406 (Rehnquist, C. J., dissenting).
102. *Id.* (Rehnquist, C. J., dissenting).
103. *Id.* (Rehnquist, C. J., dissenting); *see supra* text accompanying notes 47-56.
104. Forsyth County v. Nationalist Movement, 112 S. Ct. 2395, 2407 (1992) (Rehnquist, C. J., dissenting).

broad.[105] The majority's concern focused on the administrator's unbridled discretion under the ordinance to set fees based upon approval of the content of the message.[106] The dissent, however, emphasized the county had neither rendered any "authoritative construction" indicating the administrator actually possessed such unbridled discretion, nor had the lower courts made findings to that effect.[107] Although the majority based its conclusion regarding the ordinance's grant of unbridled discretion to set the permit fee on four separate instances when the fee imposed differed, the dissent disregarded the difference.[108] Instead, it claimed differences in permit fee amounts did not invalidate the ordinance because *Cox* clearly allowed government entities to adopt a flexible permit scheme.[109] The dissent did not clearly state the majority reached the wrong conclusion.[110] It did emphasize that no factual findings from the lower court supported the conclusion reached by the majority regarding the discretion of the administrator.[111] The dissent strongly advocated for a remand to the district court for factual determinations on the issue of the constitutionality of the administrator's discretion in setting permit fees.[112]

The dissent briefly addressed the majority's second reason for invalidating the ordinance: the fee would be based in part on the cost of security, necessarily requiring an inquiry into the content of the message.[113] The majority was concerned with the possibility the county would charge the maximum amount in order to control hostile crowds, resulting in a "hecklers veto" repeatedly condemned by the Court.[114] The dissent was critical of the majority's concerns, particularly as they related to the facts in *Forsyth County*, because the lower courts did not find that Forsyth County applied the ordinance in such a discriminatory manner.[115] In fact, the fee imposed on the Nationalist Movement indicated the opposite conclusion.[116] The dissent correctly assessed the majority's analysis on this issue rested on an assumption the county interpreted the phrase "maintenance of public order" to support the imposition of fees based on hostile crowds.[117] Nothing in the record supported this assumption.[118] As a result, the dissent called for a remand for a hearing addressing this question.[119]

---

105. *Id.* (Rehnquist, C. J., dissenting). Ordinance 34 stated the administrator "'shall adjust the amount to be paid in order to meet the expense incident to the administration of the Ordinance and to the maintenance of public order in the matter licensed.'" *Id.* (Rehnquist, C. J., dissenting).

106. *Id.* (Rehnquist, C. J., dissenting).

107. *Id.* (Rehnquist, C. J., dissenting).

108. *Id.* (Rehnquist, C. J., dissenting).

109. *Id.* (Rehnquist, C. J., dissenting).

110. *See id.* (Rehnquist, C. J., dissenting).

111. *Id.* (Rehnquist, C. J., dissenting).

112. *Id.* (Rehnquist, C. J., dissenting).

113. *Id.* (Rehnquist, C. J., dissenting); *see supra* text accompanying notes 57-63.

114. Forsyth County v. Nationalist Movement, 112 S. Ct. 2395, 2407-08 (1992) (Rehnquist, C. J., dissenting).

115. *Id.* at 2408 (Rehnquist, C.J., dissenting).

116. *Id.* (Rehnquist, C. J., dissenting).

117. *Id.* (Rehnquist, C. J., dissenting).

118. *Id.* (Rehnquist, C. J., dissenting).

119. *Id.* (Rehnquist, C. J., dissenting).

V. CONCLUSION

Over fifty years ago, the Supreme Court in *Cox v. New Hampshire* upheld the right of a government to impose a variable fee on individuals seeking to use public forums for speech activities, to meet the costs of administration and maintaining public order.[120] The Court now seems to move away from such a position. The Forsyth County ordinance mirrored the language of the statute upheld in *Cox*, yet the Court declared this ordinance unconstitutional. The decision, however, does not stand for the proposition that a government may not charge a fee to speakers wishing to use public forums to communicate their message. The holding simply means states or municipalities drafting such ordinances imposing fee requirements will have to be more diligent in drafting their ordinances and statutes. Thus, the Court's decision has its strongest impact on legislatures drafting such licensing statutes.

The impact of the Court's holding in this case is threefold. First, future statutes authorizing the charging of a fee for the use of a public forum to meet administrative and police costs will need to be drafted with care to include more definite guidelines for determining the amount of the fee and when such a fee will be imposed. Legislatures drafting such statutes will have to balance the need for flexibility in fee setting and the dangers inherent in giving administrators unfettered discretion to set the fee. Additionally, the individuals imposing such fees must be cautious to assure even-handed application of the fee requirements to all speakers, and to provide justification for the fees imposed.

Second, drafters will be required to draft statutes assuring the fee imposed is not based on the content of the message. This may prove to be a formidable obstacle. It may be difficult to draft a statute providing flexibility for varying the fee to meet police costs and still avoid being subject to the kind of analysis the Court applied in this case invalidating the ordinance. One possibility is to base the amount of the fee on the number of expected spectators at the assembly. Although the fee amount would relate to content, assuming more controversial speech draws larger crowds, it would be difficult for a court to apply the analysis in *Forsyth County* and declare the statute unconstitutional because the fee was based on the content of the message. Courts find this statutory scheme less constitutionally objectionable than Ordinance 34. Because no factual findings in this case might distinguish it from future cases, or even from the statute in *Cox*, there seems to be a direct conflict between *Forsyth County* and *Cox* that will need to be resolved in future cases.

Third, the Court left no doubt that there is no constitutional requirement the fee imposed be "nominal." This ruling had the practical, if not the explicit effect of overruling more than a nominal amount of case law on the issue.

Overall, questions remain about the constitutionality of charging speakers a fee to use public forums to meet the costs of administration and maintaining public order. *Forsyth County* may be seen as the first step toward forbidding such statutory schemes unless the arguments regarding content-neutral criteria are met.

Stacie A. Sirovatka

120. Cox v. New Hampshire, 312 U.S. 569, 577-78 (1941).