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Time, Place, and Manner Regulations of Expressive Activities in the Public Forum: *Heffron v. International Society for Krishna Consciousness, Inc.*, 101 S. Ct. 2559 (1981)

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Note

Time, Place, and Manner Regulations of Expressive Activities in the Public Forum

Heffron v. International Society for Krishna Consciousness, Inc., 101 S. Ct. 2559 (1981).

I. INTRODUCTION

Almost a half-century has passed since the United States Supreme Court initially recognized that the first amendment[1] operates as a shield protecting speech activities in public places.[2] Prodded by religious and political groups[3] who sought to promote

1. U.S. CONST. amend. I. The first amendment provides: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." *Id.*
2. The earliest Supreme Court cases which extended first amendment protection to speech activities in public places were: Schneider v. New Jersey, 308 U.S. 147 (1939); Hague v. Committee for Indus. Org., 307 U.S. 496 (1939); Lovell v. City of Griffin, 303 U.S. 444 (1938). For a discussion of *Hague* and *Schneider*, see notes 27-31, 73 & accompanying text *infra*.
3. Members of the Jehovah's Witnesses were almost solely responsible for the influx of first amendment cases in the Supreme Court during the 1930's and 1940's. Because of the religious nature of this organization, these cases included both free speech and free exercise first amendment claims. *See* Marsh v. Alabama, 326 U.S. 501 (1946) (use of the streets of a company-owned town to distribute literature); West Virginia Bd. of Educ. v. Barnette, 319 U.S. 624 (1943) (flag salute); Murdock v. Pennsylvania, 319 U.S. 105 (1943) (handbilling); Jamison v. Texas, 318 U.S. 413 (1943) (handbilling); Chaplinsky v. New Hampshire, 315 U.S. 568 (1942) (handbilling and denouncing other religions); Cox v. New Hamphsire, 312 U.S. 569 (1941) (parades); Cantwell v. Connecticut, 310 U.S. 296 (1940) (solicitation of contributions); Schneider v. New Jersey, 308 U.S. 147 (1939) (leafletting); Lovell v. City of Griffin, 303 U.S. 444 (1938) (handbilling). *See generally* Niemotko v. Maryland, 340 U.S. 268, 273-89 (1951), a decision reversing the conviction of two Jehovah's Witnesses on disorderly conduct charges after they conducted bible readings in a public park without first obtaining a permit, in which Justice Frankfurter analyzed the first amendment principles established by the Court in the Witnesses' cases.

   Since the mid-1970's, the International Society for Krishna Consciousness,

their causes by communicating their views in public places to whomever would listen, the Court has taken up the task of defining what publicly owned facilities are to remain open to expressive activities and what government regulation of speech activities in those facilities is constitutionally permissible.

Publicly owned facilities which are to remain open to expressive activities are known as public forums.[4] This classification

> serves as constitutional shorthand for the proposition that, in addition to its usual obligation of content-neutrality (an obligation that exists whether or not a public forum is involved), government cannot regulate speech-related conduct in such places except in narrow ways shown to be necessary to serve significant governmental interests.[5]

In *Heffron v. International Society for Krishna Consciousness, Inc.*,[6] the Court confronted the issue of whether a state fair regulation which confined the distribution of literature and solicitation of contributions by members of the International Society for Krishna Consciousness (ISKCON)[7] to leased booths on the fairgrounds was a constitutionally permissible restriction on speech activity in a public forum. The Court's conclusion that the booth rule was a reasonable time, place, and manner regulation, promoting the alleged government interest in crowd control and public safety,[8] in-

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Inc., has assumed the role of chief advocate of first amendment protection for speech activities in public places. For a discussion of the most significant of the Krishna cases, see notes 58-61 & accompanying text *infra*. In addressing the controversial beliefs and practices of members of the International Society for Krishna Consciousness, Inc., Judge Pell of the Court of Appeals for the Seventh Circuit observed: "Distaste for what is being expressed, and often absolute revulsion, appear to be the hallmarks of the exercise of First Amendment rights and probably are the necessary contexts in which the preservation of those rights can be firmly assured." International Soc'y for Krishna Consciousness, Inc. v. Bowen, 600 F.2d 667, 670 (7th Cir.), *cert. denied*, 444 U.S. 963 (1979).

4. L. TRIBE, AMERICAN CONSTITUTIONAL LAW 689 (1978) (footnote omitted).
5. *Id.* (footnote omitted).
6. 101 S. Ct. 2559 (1981).
7. The International Society for Krishna Consciousness, a non-profit New York corporation, was organized in the late 1960's to promote the Indian and Hindu religion of Vaisnavism. Amicae Curie Brief for the Indian Cultural Society at 1, Heffron v. International Soc'y for Krishna Consciousness, Inc., 101 S. Ct. 2559 (1981). An essential element of Vaisnavism is the practice of sankirtan, a ritual which emphasizes the distribution of religious tracts and the solicitation of contributions to support ISKCON's temples and educational activities. *Id.* at 3. The booth rule, as interpreted by the Minnesota Agricultural Society, would allow ISKCON members to proselytize in any of the open areas of the fairgrounds but confine their practice of sankirtan to fixed leased locations. 101 S. Ct. at 2561-62. ISKCON claimed that the ritual of sankirtan is peripatetic in nature and that its proper practice required that the devotee move around. International Soc'y for Krishna Consciousness, Inc. v. Heffron, 299 N.W.2d 79, 83 n.7 (Minn. 1980).
8. 101 S. Ct. at 2567.

dicates a need to reexamine the Court's previous decisions involving such traditional modes of constitutionally protected speech as the distribution of literature and solicitation of contributions in a public forum.[9] This Note presents such an examination and a critical analysis of the *Heffron* decision.

II. THE *HEFFRON* FACTS

In August 1977, ISKCON brought suit in the district court of Ramsey County, Minnesota against the Secretary of the Minnesota Agricultural Society, Michael Heffron, seeking an injunction against the enforcement at the upcoming state fair of the Society's booth rule.[10] That rule provided, in relevant part, that the " '[s]ale or distribution of any merchandise, including printed or written material except under license issued [by] the Society and/or from a duly-licensed location shall be a misdemeanor.' "[11] The Agricultural Society interpreted the rule as requiring that all distributions of literature and solicitations of contributions on the fairgrounds be conducted from fixed, leased locations.[12] Claiming that the rule violated its members' first amendment rights under the free exercise and freedom of speech clauses, ISKCON was granted its request for a temporary restraining order.[13] However, in August 1978, the trial court granted the defendant's motion for summary

9. A reexamination is in order because of the *Heffron* Court's departure from the analysis pertinent to public forum cases established in Grayned v. City of Rockford, 408 U.S. 104 (1972), and its predecessors. For a discussion of that departure, see notes 100-11 & accompanying text *infra*.

10. International Soc'y for Krishna Consciousness, Inc. v. Heffron, 299 N.W.2d 79, 82 (Minn. 1980).

11. Minnesota State Fair Rule 6.05, *quoted in* Heffron v. International Soc'y for Krishna Consciousness, Inc., 101 S. Ct. 2559, 2561 (1981). The Rule was promulgated pursuant to MINN. STAT. ANN. § 37.16 (West 1981) which authorized the Society to make "bylaws, ordinances and rules, not inconsistent with law, which it may deem necessary or proper for the government of the fair grounds."

12. 101 S. Ct. at 2561-62.

13. International Soc'y for Krishna Consciousness, Inc. v. Heffron, 299 N.W.2d 79, 82 (Minn. 1980), *rev'd*, 101 S. Ct. 2559 (1981). While the Minnesota Supreme Court ultimately held in favor of ISKCON, it was reversed on appeal to the United States Supreme Court. It is possible that counsel for ISKCON made a tactical error in not including a claim of a violation of the Minnesota Constitution. Article 1, section 3 of the Minnesota Constitution provides: "The liberty of the press shall forever remain inviolate, and all persons may freely speak, write and publish their sentiments on all subjects, being responsible for the abuse of such right." MINN. CONST. art. 1, § 3. If the Minnesota Supreme Court had been given the opportunity to decide ISKCON's claim under a state constitutional provision, the decision may have been unreviewable by the United States Supreme Court. The doctrine of independent and adequate state grounds denies the Supreme Court jurisdiction to review state court decisions based upon state law adequate to support the judgment, even

judgment.[14] The court addressed only ISKCON's free speech claims and found the booth rule to be a reasonable regulation of the manner and place of ISKCON's proselytizing and soliciting activities; thus, it enjoined ISKCON from violating the rule.[15]

On appeal to the Minnesota Supreme Court,[16] ISKCON's dual claims under the free exercise and freedom of speech clauses received blurred treatment.[17] While the court questioned whether the booth rule was a reasonable manner and place regulation of expressive activity,[18] it placed a burden upon the state fair officials

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if a federal question exists. Fox Film Corp. v. Mueller, 296 U.S. 207 (1935); Murdock v. City of Memphis, 87 U.S. (20 Wall.) 590 (1875).

Justice Brennan, recognizing the growing importance of state constitutional civil rights provisions, has stated:

> The essential point I am making, of course, is not that the United States Supreme Court is necessarily wrong in its interpretation of the federal Constitution, or that ultimate constitutional truths invariably come prepackaged in the dissents, including my own, from decisions of the Court. It is simply that the decisions of the Court are not, and should not be, dispositive of questions regarding rights guaranteed by counterpart provisions of state law. Accordingly, such decisions are not mechanically applicable to state law issues, and state court judges and the members of the bar seriously err if they so treat them. Rather, state court judges, and also practitioners, do well to scrutinize constitutional decisions by federal courts, for only if they are found to be logically persuasive and well-reasoned, paying due regard to precedent and the policies underlying specific constitutional guarantees, may they properly claim persuasive weight as guideposts when interpreting counterpart state guarantees. I suggest to the bar that, although in the past it might have been safe for counsel to raise only federal constitutional issues in state courts, plainly it would be most unwise these days not also to raise the state constitutional questions.

Brennan, *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 502 (1977) (footnote omitted).

14. 299 N.W.2d at 82.
15. *See id.* at 82 n.4. The trial court rejected ISKCON's free exercise claims.
16. International Soc'y for Krishna Consciousness, Inc. v. Heffron, 299 N.W.2d 79 (Minn. 1980).
17. Claims under the free exercise clause are treated in a much different manner than those under the freedom of speech clause. In a free exercise case, when a state regulation interferes with a religious practice, the state must show a compelling state interest which justifies the application of that regulation against the practitioners of the religion. Wisconsin v. Yoder, 406 U.S. 205, 214 (1972); Sherbert v. Verner, 374 U.S. 398, 406 (1963). The remedy for a free exercise clause violation is to exempt the individual whose belief is being infringed by a state regulation from that regulation. The remedy in a successful freedom of speech attack upon a state regulation is the invalidation of the regulation. *See* Village of Schaumburg v. Citizens for Better Environment, 444 U.S. 620 (1980); Schneider v. New Jersey, 308 U.S. 147 (1939).
18. 299 N.W.2d at 83. Under the normal formulation of the test for the constitutional validity of a regulation of speech activity in a public place, regulation of the time, place, and manner of speaking is permissible within certain guidelines. Grayned v. City of Rockford, 408 U.S. 104, 116 (1972). *See* notes 40-44 &

to show that exempting ISKCON from the rule would significantly impair the state's concededly significant interest in conducting an orderly, safe state fair.[19] The state failed to make the requisite showing and as a result, the Minnesota Supreme Court exempted ISKCON from the booth rule's operation. The court's merging of two distinct first amendment tests and granting of a free exercise clause remedy rendered the case ripe for the United States Supreme Court's granting of the state official's petition for a writ of certiorari.[20]

In the United States Supreme Court, the free exercise issue was ignored; the Court framed the issue so as to question whether the booth rule was a reasonable time, place, and manner regulation of speech activity in the public areas of the fairgrounds.[21] Under this freedom of speech formulation of the issue, the Court rejected the Minnesota Supreme Court's free exercise clause remedy.[22] Finding the rule to be a reasonable one serving the state's interest in conducting an orderly fair, the Court, in a 5-4 decision, reversed the Minnesota Supreme Court.[23] A proper analysis of the Court's decision necessarily involves an examination of the Court's previous treatment of public forum cases.

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accompanying text *infra* for the applicable guidelines. Since no regulation of time was involved in the booth rule, the Minnesota court shortened the formula, dropping out the time consideration.

19. 299 N.W.2d at 83. This burden is akin to that imposed upon the state when it seeks to justify a regulation under a free exercise attack. *See* note 17 *supra*.

20. Heffron v. International Soc'y for Krishna Consciousness, Inc., 299 N.W.2d 79 (Minn. 1980), *cert. granted*, 101 S. Ct. 917 (1981). The Court had previously denied certiorari in a case involving almost identical facts, International Soc'y for Krishna Consciousness, Inc. v. Bowen, 600 F.2d 667 (7th Cir.), *cert. denied*, 444 U.S. 963 (1979). ISKCON prevailed in this case in which the court found that the state's significant interest in crowd control and safety on the fairgrounds could be adequately served by a less restrictive regulation on ISKCON's solicitation activities than confinement to a booth. *Id.* at 669. Two other circuit courts have ruled on the same issue, both in ISKCON's favor. International Soc'y for Krishna Consciousness, Inc. v. Barber, 650 F.2d 430 (2d Cir. 1981) (ISKCON exempted from a booth rule on free exercise grounds); Edwards v. Maryland State Fair & Agricultural Soc'y, 628 F.2d 282 (4th Cir. 1980) (state officials enjoined from enforcing a booth rule against all solicitors of contributions and distributors of literature on free speech grounds).

21. 101 S. Ct. at 2564.

22. *Id.* at 2566.

23. *Id.* at 2568. Justice White authored the majority opinion. There were two partially dissenting opinions. Justice Brennan's dissent was joined by Justices Marshall and Stevens. *Id.* at 2658. Justice Blackmun dissented on his own. *Id.* at 2572. All four dissenters concurred with the portion of the majority opinion which upheld the constitutionality of the rule as applied to the sale of literature and the solicitation of funds. They dissented with respect to the application of the rule to the distribution of literature.

III. PUBLIC FORUM BACKGROUND

A. Origin of Public Forum Constitutional Protection

First amendment protection for speech activity in public places is of relatively recent constitutional vintage.[24] Until the mid-1930's, the Court was seemingly committed to the notion that the Constitution offered persons no protection from arbitrary government prohibitions of speech activities on the streets and in other public places. For example, in *Davis v. Massachusetts*,[25] a public forum case decided near the turn of the century, the Court affirmed a minister's conviction of the violation of a Boston ordinance which prohibited making a public address without a permit from the Mayor. The minister had claimed that the ordinance, which vested arbitrary authority in the Mayor to issue a permit, violated his first and fourteenth amendment rights of freedom of speech and due process of law. In rejecting his claims, the Court stated in dictum: "The right to absolutely exclude all right to use [publicly owned property], necessarily includes the authority to determine under what circumstances such use may be availed of, as the greater power contains the lesser."[26]

The property rights orientation inherent in the *Davis* dictum, indicating that the state, as owner of publicly held property, has vast discretion in how that property may be used, was argued again forty years later in *Hague v. Committee for Industrial Organization*.[27] In *Hague*, the Court addressed the claims of labor organizers that the enforcement of two city ordinances which prohibited the distribution of literature on the public streets and required a permit from the Mayor prior to the leasing of any hall for a public meeting was incompatible with the first amendment.[28] The union obtained an injunction in a federal district court restraining the city officials from enforcing the ordinances.[29] In a plurality opinion[30] upholding the issuance of the injunction, the Supreme Court scorned the *Davis* dictum by stating: "Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind,

24. For an excellent discussion of the first amendment and speech activities in public places, see Kalven, *The Concept of the Public Forum*, 1965 SUP. CT. REV. 1; Stone, *Fora Americana: Speech in Public Places*, 1974 SUP. CT. REV. 233.
25. 167 U.S. 43 (1897).
26. *Id.* at 48.
27. 307 U.S. 496 (1939).
28. *Id.* at 501-02.
29. Committee for Indus. Org. v. Hague, 25 F. Supp. 127 (D.N.J. 1938).
30. Hague v. Committee for Indus. Org., 307 U.S. 496 (1939). Mr. Justice Roberts' plurality opinion was joined only by Mr. Justice Black. The rest of the Court split on a jurisdictional issue.

have been used for purposes of assembly, communicating thought between citizens, and discussing public questions."[31]

The *Davis* notion was again confronted in *Jamison v. Texas*,[32] a case involving the conviction of a member of the Jehovahs' Witnesses for the violation of a city ordinance which prohibited the distribution of handbills in public places. Responding to the city's *Davis*-based property rights arguments, Justice Black left no doubt that those arguments were no longer persuasive:

> [O]ne who is rightfully on a street which the state has left open to the public carries with him there as elsewhere the constitutional right to express his views in an orderly fashion. This right extends to the communication of ideas by handbills and literature as well as by the spoken word.[33]

After *Hague* and *Jamison*, it was clear that speech activities in public places were entitled to constitutional protection. Defining the extent of that protection became the next task for the Court in its efforts to develop a coherent theory of the public forum.

B. Scope of the Public Forum Theory

The Supreme Court's development of a public forum theory and a test for determining the validity of government regulation of speech activity in a public forum has been a complex process involving many decisions which analyze distinct types of expressive conduct. In discussing that process, this section of the Note will begin with a case which illustrates the public forum theory seemingly accepted by the Court prior to *Heffron* and will trace the essential elements of that theory back to the key cases which spawned it.

In *Grayned v. City of Rockford*,[34] a Negro student who was convicted under two city ordinances as a result of his involvement in a demonstration next to a public school attacked the ordinances on first amendment free speech grounds. The first ordinance forbade picketing and demonstrating within 150 feet of any school building, excluding a school involved in a labor dispute.[35] The second ordinance prohibited persons adjacent to any school building from willfully making noise or creating a diversion which tended to disturb the peace and good order of a school in session.[36]

The Court struck down the first ordinance on equal protection

31. *Id.* at 515 (dictum).
32. 318 U.S. 413 (1943).
33. *Id.* at 416.
34. 408 U.S. 104 (1972).
35. *Id.* at 107.
36. *Id.* at 107-08.

grounds[37] and established a key precept of the public forum theory: regulations based upon the content of speech are not permissible to control speech activity in public places.[38] The ordinance exempting labor picketers from its operation was such a content-based regulation.

The anti-noise ordinance was upheld as a reasonable time, place, and manner regulation of expressive activity.[39] The Court applied a three-step analysis to reach this result.[40] This analysis may be summarized as follows: First, the nature of the publicly owned place[41] must be considered in light of the type of speech activity that is being regulated.[42] If the speech activity is found to be appropriate, that is, compatible with the activity to which the place is dedicated, the second step is to determine what government interest is promoted by the regulation and whether it is legitimate.[43] If the expressive activity is appropriate and the government interest legitimate, the third step requires a determination of whether the regulation is narrowly tailored to further the

37. *Id.* at 107. Police Dep't of Chicago v. Mosley, 408 U.S. 92 (1972), was decided the same day as *Grayned* and involved virtually the same anti-picketing ordinance. The Court invalidated the ordinance on equal protection grounds and the opinion contains the Court's full equal protection analysis which was abbreviated in *Grayned*. *Mosley* established that the equal protection clause requires that statutes affecting first amendment interests be narrowly tailored. The state interest promoted by the anti-picketing ordinance—the prevention of school disruption—was not served by the regulation, which discriminated among pickets based upon the content of the speech activity. *Id.* at 101-02.

38. 408 U.S. at 107.

39. *Id.* at 117.

40. The language in the *Grayned* opinion from which this three-step analysis is drawn reads as follows:

> The crucial question is whether the manner of expression is basically incompatible with the normal activity of a particular place at a particular time. Our cases make clear that in assessing the reasonableness of a regulation, we must weigh heavily the fact that communication is involved; the regulation must be narrowly tailored to further the State's legitimate interest.

Id. at 116-17 (footnotes omitted).

41. Extension of the public forum concept to include private property has had a checkered history. For example, in Marsh v. Alabama, 326 U.S. 501 (1946), the Court held that the streets of a company-owned town were part of the public forum and that speech activities conducted therein were entitled to first amendment protection. In Lloyd Corp. v. Tanner, 407 U.S. 551 (1972), the Court rejected an attempt to include the hallways of a privately owned shopping center in the public forum. But in Pruneyard Shopping Center v. Robbins, 447 U.S. 74 (1980), the Court affirmed a California Supreme Court decision which held that the California Constitution required the owners of shopping centers to allow peaceful use of their premises for expressive activities.

42. *See* Grayned v. City of Rockford, 408 U.S. 104, 116 (1972).

43. *See id.*

government interest so that there is a minimal restriction of speech activities.[44]

In *Grayned*, the Court finally developed a coherent test embodying the key elements of its previous public forum decisions. A short review of some of those decisions will illustrate the proper application of the test.

1. The Nature of the Place and the Type of Speech Activity Regulated

Almost all human activity is in some sense expressive conduct.[45] A person can express similar ideas by a wide variety of activities. For example, dissatisfaction with a political candidate may be expressed by delivering a speech denouncing that candidate, by writing and distributing a leaflet attacking the views of that candidate, or by drawing a pistol and assassinating that candidate. It is safe to say that while the first two activities may be appropriate in many public places, the latter is never appropriate in any place and is thus outside the range of first amendment protection.

The initial inquiry under *Grayned* is whether the expressive activity being regulated is appropriate for the place used as a forum. *Brown v. Louisiana*[46] provides an illustration of this prong of the *Grayned* analysis. In *Brown*, five Negro men who silently stood in the reading room of a segregated public library to protest racial discrimination were convicted under a breach of the peace statute. The Court held that the statute unconstitutionally violated the men's first amendment rights of speech and assembly.[47] The Court stated: "[T]he circumstances here were such that no claim can be made that use of the library by others was disturbed by the demonstration. . . . Were it otherwise, a factor not present in this case would have to be considered."[48] Thus, the mode of protest the men had chosen was appropriate to the public place involved.

Two closely related cases further illustrate the initial *Grayned* inquiry. In *Saia v. New York*,[49] plaintiff challenged a city ordinance which prohibited the use of sound amplification equipment

44. *See id.* at 116-17.
45. For a short, interesting discussion of the "speech pure" (generally oral or written communication) and "speech plus" (picketing, parading, and other symbolic speech) dichotomy, see Kalven, *supra* note 24, at 23-25.
46. 383 U.S. 131 (1966).
47. *Id.* at 142.
48. *Id.* The Court seemed to be hinting that had the protest been a boisterous one, disturbing other library patrons in their use of the facility, the first amendment would offer no protection for the plaintiffs' activities.
49. 334 U.S. 558 (1948).

in public places without first obtaining a permit from the police chief. The Court struck down the ordinance as an arbitrary grant of power because it contained no guidelines for the police chief to follow in exercising his permit-granting authority.[50] However, in dictum, the Court suggested that the use of loudspeakers might be appropriate in some public places.[51] One year later, in *Kovacs v. Cooper*,[52] the Court was forced to directly confront the issue and determine if the use of sound trucks on the public streets to blare out messages could be constitutionally prohibited. In upholding the city ordinance which forbade the use of trucks mounted with loudspeakers that emitted "loud and raucous noises,"[53] the Court recognized that voice amplication was not always an appropriate type of expressive activity.[54] The Court found that since the message being transmitted was not confined to the streets, a traditional public forum, but carried over into private homes and businesses bordering the forum, the use of the sound trucks was inappropriate for the forum involved and thus outside the sphere of first amendment protection.[55]

Distributing handbills and soliciting contributions for charitable, religious, or political causes have consistently been found to be appropriate speech activities in all public places.[56] The Supreme Court and the lower federal courts have rejected total bans on these activities in such diverse places as a performing arts center,[57] publicly owned office buildings,[58] airports,[59] national

50. *Id.* at 560.
51. The Court stated: "Loud-speakers are today indispensable instruments of effective public speech. . . . It is the way people are reached." *Id.* at 561.
52. 336 U.S. 77 (1949).
53. *Id.* at 78.
54. *Id.* at 87.
55. *Id.*
56. Handbilling cases include: Talley v. California, 362 U.S. 60 (1960); Murdock v. Pennsylvania, 319 U.S. 105 (1943); Jamison v. Texas, 318 U.S. 413 (1943); Schneider v. New Jersey, 308 U.S. 147 (1939); Lovell v. City of Griffin, 303 U.S. 444 (1938). The seminal case which established that the solicitation of contributions for religious and political causes is entitled to first amendment protection was Cantwell v. Connecticut, 310 U.S. 296 (1940). *See* Village of Schaumburg v. Citizens for Better Environment, 444 U.S. 620 (1980); Largent v. Texas, 318 U.S. 418 (1943). The rationale for first amendment protection for the solicitation of funds for religious and charitable purposes has been explained by the Court as follows: "[S]olicitation is characteristically intertwined with informative and perhaps persuasive speech seeking support for particular causes or for particular views on economic, political, or social issues . . . ." Village of Schaumburg, 444 U.S. at 632. *See also* Jones, *Solicitations—Charitable and Religious*, 31 BAYLOR L. REV. 53 (1979).
57. United States v. Boesewetter, 463 F. Supp. 370 (D.D.C. 1978).
58. International Soc'y for Krishna Consciousness, Inc. v. McAvey, 450 F. Supp. 1265 (S.D.N.Y. 1978).
59. Chicago Area Military Project v. City of Chicago, 508 F.2d 921 (7th Cir. 1975).

parks,[60] rest areas along the interstate highway system,[61] and the streets and parks.[62]

2. *Legitimate Government Interests Justifying Regulation of Speech in Public Forums*

Along with the government interest in assuring that the primary purposes of the public place being used as a forum are preserved,[63] the Court has found that other government interests can justify regulations of speech activities in a public forum. The second prong of the *Grayned* analysis involves a determination of the government interest being served by such a regulation and whether it is legitimate.

The state interest in assuring the orderly flow of traffic upon the streets and passageways of publicly owned buildings has consistently been held to justify restrictions on expressive activities. *Cox v. New Hampshire*[64] established the legitimacy of such an interest.

In this case, persons wished to distribute a military publication in the O'Hare airport. After being threatened with prosecution for trespass, the distributors successfully sued for an injunction which the Seventh Circuit affirmed. *See* International Soc'y for Krishna Consciousness, Inc. v. Eaves, 601 F.2d 809 (5th Cir. 1979) which provides an exhaustive discussion of permissible airport regulations of speech activities. In the Fifth Circuit's view, permissible regulations can include registration schemes, confining distributors of literature and solicitors of donations to certain areas in the airport, and requiring that transfers of money occur only in designated solicitation booths. *Id.* at 834-40. *See also* International Soc'y for Krishna Consciousness, Inc. v. Rochford, 585 F.2d 263 (7th Cir. 1978) (O'Hare airport, registration scheme for solicitors and handbillers void for vagueness).

The Lincoln, Nebraska municipal airport regulations forbid the distribution of literature or solicitation of funds without first obtaining the permission of the executive director of the airport. LINCOLN, NEB., MUNICIPAL AIRPORT REGULATIONS §§ J-5 to -7 (Nov. 1, 1972). These regulations could most likely be successfully attacked as a discretionary licensing scheme similar to the one rejected in Saia v. New York, 334 U.S. 558 (1948). See notes 49-51 & accompanying text *supra*. The Omaha, Nebraska airport regulations which govern solicitation of contributions and distribution of literature were attacked by ISKCON as an arbitrary licensing scheme. The regulations were modified after ISKCON filed suit and ISKCON was awarded attorneys' fees. International Soc'y for Krishna Consciousness, Inc, v. Andersen, 569 F.2d 1027, 1028-29 (8th Cir. 1978).

60. International Soc'y for Krishna Consciousness, Inc. v. Kleppe, 592 F.2d 529 (9th Cir. 1979).
61. International Soc'y for Krishna Consciousness, Inc. v. Hays, 438 F. Supp. 1077 (S.D. Fla. 1977).
62. *See* cases cited in notes 32, 56 & accompanying text *supra*.
63. The Court has sanctioned complete bans on some expressive activities in certain publicly owned places in order to prevent interference with the primary use of the place. Most notable are military installations, Greer v. Spock, 424 U.S. 828 (1976), and jails, Adderly v. Florida, 385 U.S. 39 (1966).
64. 312 U.S. 569 (1941).

In *Cox*, five Jehovahs' Witnesses appealed their arrests and convictions, along with sixty-three others, for violating a city ordinance which prohibited parades without a permit. The parade permit ordinance was not open to a *Saia*-type attack as an arbitrary licensing scheme since it contained criteria related to public safety and convenience for the officials to follow in granting permits.[65] The Court, citing *Hague v. Committee for Industrial Organization*,[66] recognized that the streets were a proper and traditional forum for the Witnesses' activity, which involved a single-file march down the sidewalk, distributing leaflets, and carrying signs.[67] Nevertheless, the Court approved the licensing scheme as one that promoted the city's interest in assuring a safe and orderly flow of traffic.[68]

As illustrated in *Kovacs v. Cooper*,[69] the protection of the privacy interests of those outside the public forum has likewise been found a government interest sufficient to justify restrictions on speech activities. A closely related interest was upheld in *Lehman v. Shaker Heights*.[70] The City of Shaker Heights had contracted with a private advertising company for the operation of interior signboards on the city's publicly owned bus system. One of the contract provisions prohibited the acceptance of political ads. A political candidate whose ad had been rejected by the advertising company brought suit, claiming that the signboards were a public forum and that the city's refusal to allow political advertising was impermissible content regulation. Rejecting his claim, the Court asserted that the privacy interests of those using the city transit system by necessity warranted the restriction.[71] This captive audience protection interest is probably of limited applicability and has been rejected in other contexts.[72]

65. *Id.* at 576.
66. 307 U.S. 496 (1939).
67. 312 U.S. at 574.
68. *Id.* at 576.
69. 336 U.S. 77 (1949). *See* notes 52-55 & accompanying text *supra*.
70. 418 U.S. 298 (1974).
71. *Id.* at 302.
72. *See, e.g.*, Cohen v. California, 403 U.S. 15 (1971), in which the Court overturned the conviction under a breach of the peace statute of a young man wearing a jacket emblazoned with profanity. Rejecting the state's captive audience argument, the Court stated: "The ability of government, consonant with the Constitution, to shut off discourse solely to protect others from hearing it is . . . dependent upon a showing that substantial privacy interests are being invaded in an essentially intolerable manner." *Id.* at 21. *See also* Public Utils. Comm'n v. Pollak, 343 U.S. 451 (1952) (Court rejected first and fifth amendment attacks upon a Washington, D.C. transit company's practice of channelling radio broadcasts into its buses and streetcars); Stone, *supra* note 24 (written in response to the Court's decision in *Lehman*).

Two other government interests asserted by state officials to justify regulations of speech activities in public places have been rejected by the Court as insufficient. In *Schneider v. New Jersey*,[73] the Court invalidated three municipal ordinances which prohibited the distribution of handbills, finding insufficient the municipalities' assertions that the ordinances assured cleaner municipal streets. And in *Village of Schaumburg v. Citizens for Better Environment*,[74] the Court invalidated a municipal ordinance which prohibited the solicitation of contributions by charitable organizations that did not dedicate seventy-five percent of their receipts to charitable purposes. The Court found that the state interest in preventing fraudulent misrepresentation did not warrant such a restriction on first amendment activity.[75]

It would be incorrect to say that the interests asserted by the states in *Schneider* and *Schaumburg* were not legitimate. However, the interests could be served by less drastic means than the total bans on the particular types of expressive activities which the ordinances in the two cases effected. This leads into the third part of the *Grayned* analysis.

3. Narrowly Tailored Regulations of Speech Activities in Public Forums

The final step in the *Grayned* analysis requires that a regulation of speech activity be narrow in scope.[76] In *Schneider*, the Court found that the interest in clean streets could adequately be assured by punishing those who littered.[77] In *Schaumburg*, the Court held that fraudulently procured charitable contributions could be prevented by punishing those who engaged in such activity.[78] Broad, prophylactic restrictions on speech activities such as handbilling have consistently been struck down.[79] While the Court has upheld regulations of speech activities, such as in *Grayned*, which prohibited the making of noise or the creation of a disturbance,[80] it has rejected regulations which prohibited certain types of traditional means of expression.[81] The Court has consist-

73. 308 U.S. 147 (1939).
74. 444 U.S. 620 (1980).
75. *Id.* at 639.
76. *See* notes 40-44 & accompanying text *supra*.
77. 308 U.S. at 162.
78. 444 U.S. at 639.
79. *See* notes 56-62 & accompanying text *supra*.
80. *See, e.g.*, Kovacs v. Cooper, 336 U.S. 77 (1949) (voice amplification equipment).
81. *See, e.g.*, Cantwell v. Connecticut, 310 U.S. 296 (1940) (solicitation of contributions); Schneider v. New Jersey, 308 U.S. 147 (1939) (handbilling). *See* notes 56-62 & accompanying text *supra*.

ently required that the aim of regulations be narrowed to include only those persons who frustrate the achievement of a legitimate state interest[82] and to allow those who express themselves in an orderly manner to do so.[83]

A corollary to the requirement that regulations of speech activity be narrowly tailored is that state schemes for licensing expressive activity contain objective criteria to guide the state official responsible for issuing permits. Schemes which grant unbridled discretion to such officials have consistently been struck down, as illustrated in *Saia v. New York*[84] and *Hague v. Committee for Industrial Organization*.[85]

Cox v. Louisiana[86] represents a further extension of this principle. In *Cox*, a civil rights activist was convicted of violating a state statute which prohibited the obstruction of public passageways. Cox had organized and participated in a civil rights demonstration which included a march from a Baton Rouge courthouse to a segregated diner. While the statute on its face precluded all street assemblies and parades,[87] the city officials had allowed other groups to parade on the streets without arrest and conviction.[88] The Court overturned the conviction on first amendment and due process grounds, explaining: "The situation is thus the same as if the statute itself expressly provided that there could only be peaceful parades or demonstrations in the unbridled discretion of the local officials."[89] The Court expressly left open the

82. Village of Schaumburg v. Citizens for Better Environment, 444 U.S. 620 (1980) (prevention of fraudulently induced contributions can be achieved by punishing those who engage in fraudulent misrepresentations instead of forbidding charitable solicitations generally); Schneider v. New Jersey, 308 U.S. 147 (1939) (assuring that the streets are clean can be achieved by punishing those who litter instead of prohibiting all distribution of handbills).

83. Brown v. Louisiana, 383 U.S. 131 (1966) (silent protest).

84. 334 U.S. 558 (1948).

85. 307 U.S. 496 (1939).

86. 379 U.S. 536 (1965).

87. *Id.* at 555-56. The statute provided:

> No person shall wilfully obstruct the free, convenient and normal use of any public sidewalk, street, highway, bridge, alley, road, or other passageway, or the entrance, corridor or passage of any public building, structure, watercraft or ferry, by impeding, hindering, stifling, retarding or restraining traffic or passage thereon or therein.
>
> Providing however nothing herein contained shall apply to a bona fide legitimate labor organization or to any of its legal activities such as picketing, lawful assembly or concerted activity in the interest of its members for the purpose of accomplishing or securing more favorable wage standards, hours of employment and working conditions.

Id. at 553 (quoting LA. REV. STAT. § 14:100.1 (Cum. Supp. 1962)).

88. 379 U.S. at 556-57.

89. *Id.* at 557-58.

question of whether a total ban on public gatherings on the streets and in other public facilities would be constitutionally permissible.[90]

Heffron v. International Society for Krishna Consciousness, Inc.[91] represents the Court's first approval of a ban on handbilling and solicitation of contributions in a public forum suitable for such activity. Its sanction of the Minnesota Agricultural Society's booth rule indicates a need to examine the process the Court used to reach its decision and to determine if the *Grayned* approach to the public forum theory is still embraced by a majority of the Court.

IV. ANALYSIS OF *HEFFRON*

In *Heffron*, the Court departed from the three-step analysis of *Grayned*[92] which had assembled the diverse principles found in the Court's previous public forum cases. This section of the Note will apply the *Grayned* analysis to the facts of *Heffron* and indicate where the Court departed from that analysis.

In *Heffron*, the Court was presented with an unusual situation in that the expressive activity being regulated was the activity to which the public place was dedicated. A state "fair is almost by definition a congeries of hawkers, vendors of wares and services, and purveyors of ideas, commercial, esthetic and intellectual."[93] The state fairgrounds is a classic, almost pure example of a public forum. It is a place dedicated to the transfer of information. ISKCON members' distribution of literature and solicitation of donations, activities both banned from the open areas of the fairgrounds and confined to fixed leased locations by the booth rule, was expressive conduct appropriate to the forum. Thus the first prong of the *Grayned* analysis was met in an almost tautological manner.

The second prong of the *Grayned* analysis requires a determination of the legitimacy of the state interest being promoted by the booth rule. State fair officials presented three interests which the rule allegedly promoted.[94] The first interest asserted was the prevention of fraudulent misrepresentations by roving solicitors.[95] State fair officials felt that by confining ISKCON devotees and others who solicited contributions to fixed locations, they could more easily police the solicitation activities to prevent fraudulently

90. *Id.* at 555.
91. 101 S. Ct. 2559 (1981).
92. *See* notes 40-44 & accompanying text *supra*.
93. International Soc'y for Krishna Consciousness v. State Fair of Texas, 461 F. Supp. 719, 721 (N.D. Tex. 1978).
94. 101 S. Ct. at 2565.
95. *Id.*

induced donations.[96] The second interest asserted by the state officials was the protection of the privacy interests of all fair patrons by preventing them from being approached by roving handbillers and solicitors.[97] The last interest asserted by the state officials, and the one solely relied upon by the Court, was the promotion of an orderly and safe state fair.[98]

The state's interest in assuring orderly traffic on the state fairgrounds was a type of interest which had long been accepted as legitimate.[99] Thus, in relying on that interest as sufficient justification for the booth rule, the Court was on solid *Grayned* ground.

However, when the third step of the *Grayned* analysis is applied, the Court's decision becomes subject to attack. In *Heffron*, Justice White's majority opinion dismissed in a single paragraph the possibility that the state's interest could be served by a less broad, more closely tailored rule than one effecting a total ban on the distribution and solicitation activities of ISKCON members and other persons from the open areas of the state fairgrounds.[100] By failing to carefully consider whether a more narrowly drafted rule could adequately promote the state's interest in crowd control, the Court in effect dropped the first amendment out of its analysis, for it is the third step of the *Grayned* formulation that reflects a sensitivity to the freedom of speech protection embodied in that amendment.[101]

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96. *Id.* at 2565 n.13.

97. *Id.*

98. *Id.* The Court viewed the interest of assuring an orderly movement of persons on the fairgrounds as sufficient to justify the booth rule and thus felt it unnecessary to discuss the other asserted interests. *Id.* For a discussion of cases addressing state interests in protecting privacy and preventing fraud, see notes 52-55, 74-75 & accompanying text *supra*.

99. Cox v. New Hampshire, 312 U.S. 569 (1941). *See* Cox v. Louisiana, 379 U.S. 536 (1965); Edwards v. South Carolina, 372 U.S. 229 (1963); Paulos v. New Hampshire, 345 U.S. 395 (1953); notes 64-68 & accompanying text *supra*.

100. 101 S. Ct. at 2567. Justice White stated:

> [W]e cannot agree with the Minnesota Supreme Court that Rule 6.05 is an unnecessary regulation because the State could avoid the threat to its interest posed by ISKCON by less restrictive means, such as penalizing disorder or disruption, limiting the number of solicitors, or putting more narrowly drawn restrictions on the location and movement of ISKCON's representatives. As we have indicated, the inquiry must involve not only ISKCON, but also all other organizations that would be entitled to distribute, sell or solicit if the booth rule may not be enforced with respect to ISKCON. Looked at in this way, it is quite improbable that the alternative means suggested by the Minnesota Supreme Court would deal adequately with the problems posed by the much larger number of distributors and solicitors that would be present on the fairgrounds if the judgment below were affirmed.

Id.

101. *See* Kalven, *supra* note 24, at 28, where the author stated that when balancing

To determine whether a narrower rule than the booth rule would serve the state's interest in crowd control, the types of activities which were regulated by the rule must be distinguished. The rule most importantly served to confine sellers and exhibitors of merchandise, whether farm equipment or kitchen utensils, to fixed locations, allowing the crowds of people to come to them and thus preventing the havoc that would result if no such scheme existed.

The other type of activity controlled by the rule was the distribution of literature and solicitation of contributions. The rule did not prohibit persons from approaching others and proselytizing their causes.[102] Nor did the rule prohibit a person from stationing himself in the fairgrounds and drawing a huge throng of persons by making a speech. What the rule did prohibit was the transfer of anything besides orally expressed ideas. Yet the Court failed to discuss how the state's interest in crowd control was further damaged by the transfer of a handbill or a dollar bill once a person had already stopped and engaged another in conversation. As Justice Blackmun noted in his dissent:

> The distribution of literature does not require that the recipient stop in order to receive the message the speaker wishes to convey; instead, the recipient is free to read the message at a later time. For this reason, literature distribution may present even fewer crowd control problems than the oral proselytizing that the State already allows upon the fairgrounds.[103]

The Court's failure to distinguish between the types of activities regulated by the booth rule resulted in an assertion that in the absence of the rule, the fair could not be presented in an orderly fashion.[104] This is undoubtedly true. However, the Court should have focused on whether a narrower rule could have served the state's interest rather than dwelling upon the effect of the absence of the rule. The Court did not adequately consider the possibility that a rule limiting the number of distributors of literature or keeping them away from highly traveled entrances and exits could adequately serve the state's interest.[105] This failure reflects little

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the state's interest in enforcing speech regulation with the first amendment interest in free speech, the scale is loaded in favor of free speech. To use Kalven's metaphor, the thumb of the Court should be on the speech side of the scales. *Id.* It can be said that thumb of the Court slipped in *Heffron*.

102. 101 S. Ct. at 2567. *See* note 7 *supra*.

103. 101 S. Ct. at 2572-73 (Blackmun, J., dissenting).

104. *Id.* at 2566. The Court raised the spectre that if it overturned the booth rule with respect to the distribution of literature and solicitation of contributions, it might be forced to invalidate the rule as applied to commercial vendors and distributors as well. *Id.* The Court also concluded that if the distribution of literature and the solicitation of contributions were exempted from confinement, there would necessarily be a large number of handbillers and solicitors in the open areas of the fairgrounds. *Id.* at 2567.

105. For example, the Nebraska State Fair regulations provide, in relevant part:

sympathy for the proposition that information should be exchanged freely with minimal government regulation.[106]

Not only is *Heffron* notable for the Court's departure from the *Grayned* model, but it is also the first case involving a regulation of speech activity in a public forum which introduces the existence of ample "alternative forums"[107] as a decisive criterion. Justice White and four other members of the Court felt the rule was further justified because it did not prevent ISKCON devotees from engaging in their proselytizing ritual outside the fairgrounds and because ISKCON's activities could be conducted from fixed leased

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FAIRBOARD: SOLICITATION RULE

Bonafide religious organizations may be permitted to distribute their literature and/or solicit donations on the Fairgrounds during the term of the Nebraska State Fair, subject to the following:

(a) Any group desiring to distribute literature or solicit donations pursuant to this rule must make an application to the fair manager for permission to do so at least sixty days in advance of the opening of the Nebraska State Fair.

(b) Said distribution of literature or solicitation of donations shall not be permitted within any building on the Fairgrounds, including, but not limited to, the Entertainment Complex and the Grandstand.

(c) Said distribution of literature or solicitation of donations shall not be permitted so close to any exit or entrance to the Fair or to any building so as to obstruct said entrance or exit.

(d) No more than ten individuals representing any one organization or 30 individuals representing all organizations will be permitted to distribute literature or solicit donations pursuant to this rule at any one time. If necessary the fair manager will further limit the number of individuals soliciting donations or distributing literature on behalf of any one organization in order to permit all organizations equal access to the fairgrounds.

(e) Any individual who wishes to distribute literature or solicit donations pursuant to this rule must register his or her name and organization with the manager of the fair. An identification card will be prepared for each individual by the manager authorizing him or her to engage in said activity on the date or dates shown on the identification card. The identification card must be worn in a prominent place by every individual engaged in the distribution of literature or solicitation of donations pursuant to this rule.

(f) No individual shall be permitted to distribute literature or solicit funds except pursuant to this rule.

(g) With the exception that individuals distributing literature or soliciting donations pursuant to this rule shall not be required to lease a booth, such individuals are subject to all other rules and regulations applicable to exhibitors and concessionaires generally.

The Nebraska State Fair Premium List 7 (1981) (available at the office of the Nebraska State Fair Manager, Lincoln, Neb.). The regulation on its face classifies speech by its content and only religious speech is permitted outside booths. The regulation may be open to a content-based regulation attack. *See* notes 37-38 & accompanying text *supra*.

106. *See* Lovell v. City of Griffin, 303 U.S. 444, 451 (1938).

107. 101 S. Ct. at 2567.

locations on the fairgrounds.[108] The ample alternative forum factor was drawn from dictum in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*,[109] a decision involving the validity of a state regulation prohibiting price advertising of prescription drugs.

The Court's adoption of the ample alternative forum inquiry is contrary to the thrust of previous public forum cases and if followed in future cases will introduce a new factor heretofore not considered. The previous inquiry was always "is the speech activity appropriate to this place"? This inquiry does not involve a consideration of the availability of other possible forums. The possibility that one could speak in places other than the one chosen has never previously justified regulations of the public forum. As the Court stated in *Schneider v. New Jersey*:[110] "[O]ne is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place."[111]

V. CONCLUSION

It is unclear if ISKCON's controversial reputation, which stemmed from allegations that its members had engaged in fraudulent solicitation tactics,[112] was an unstated influence upon the *Heffron* Court in its short-circuiting of the *Grayned* approach. If so, the Court has perhaps only damaged its integrity. However, if *Heffron* signals a change from the narrowly tailored regulation re-

108. *Id.*

109. 425 U.S. 748 (1976). The *Heffron* Court stated: " 'We have often approved restrictions of that kind provided that they are justified without reference to the content of the regulated speech, that they serve a significant governmental interest, and that in doing so they leave open ample alternative channels for communication of the information.' " 101 S. Ct. at 2564 (quoting Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 771 (1976). *See* Lloyd Corp. v. Tanner, 407 U.S. 551 (1972), where the Court used an "alternative avenues of communication analysis." *Id.* at 567. *Lloyd* involved a claim by distributors of anti-war leafletters that the hallways of a privately owned shopping center were part of the public forum, and thus their leafletting activity there was subject to first amendment protection. The Court rejected this claim, and the alternative avenues of communication seemed to play some role in the Court's decision. However, there is an added consideration involved when the Court is asked to extend the public forum onto private property: the owner of the property is being deprived of property in the 5th and 14th amendment sense. *Id.* at 570. There is no such consideration when the use of publicly owned property as a forum is involved.

110. 308 U.S. 147 (1939).

111. *Id.* at 163.

112. *See* Amicus Brief for the County of Los Angeles at 9-17; Amicus Brief for the State of New York at 16-25, Heffron v. International Society for Krishna Consciousness, Inc., 101 S. Ct. 2559 (1981).

quirement embodied in *Grayned* to an ample alternative forum inquiry, the first amendment rights of ISKCON devotees and of all who wish to use the public forum to receive and communicate ideas have been diluted.

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