University of Miami Law Review

Volume 39 | Number 5 Article 9

9-1-1985

Clark v. Community for Creative Non-Violence: First Amendment Safeguards-Their Sum is Less Than Their Parts

James B. Putney

Clark v. Community for Creative Non-Violence: First Amendment Safeguards—Their Sum is Less Than Their Parts

I. INTRODUCTION

In 1982, the Community for Creative Non-Violence ("CCNV") applied for and received from the National Park Service ("Park Service") a renewable seven day permit to establish symbolic tent cities on the Mall and in Lafayette Park in Washington, D.C. Volunteers planned to construct and man the tent cities during the winter to publicize the plight of the homeless. The Park Service allowed CCNV to erect tents and maintain day and night vigils during which the demonstrators might sit, stand, or lay down in the tents. Park regulations, however, forbade sleeping in the park for more than four hours.[1]

Although the Park Service permitted limited sleeping, it denied CCNV's request to allow the demonstrators to sleep in the tents overnight. The Park Service explained that sleeping in the tents would constitute impermissible camping, as defined by its regulations.[2] Park Service regulations permitted camping in the national parks in designated campgrounds; however, the Mall and Lafayette Park were not designated campgrounds.[3]

CCNV sought to enjoin the Park Service from applying the

---

1. Community for Creative Non-Violence v. Watt, 703 F.2d 586, 587 (D.C. Cir. 1983).

2. The regulations defined "camping" as:

> [T]he use of park land for living accommodation purposes such as sleeping activities, or making preparations to sleep (including the laying down of bedding for the purpose of sleeping), or storing personal belongings, or making any fire, or using any tents or . . . other structure . . . for sleeping or doing any digging or earth breaking or carrying on cooking activities.

36 C.F.R. § 50.27(a) (1982).

3. Clark v. Community for Creative Non-Violence, 104 S. Ct. 3065, 3067 (1984) ("CCNV").

camping regulation to the CCNV demonstration. They claimed that application of the regulation to the demonstration would violate their first amendment free speech rights.[4] A federal district court denied the injunction and granted summary judgment in favor of the Park Service.[5] The District of Columbia Circuit Court of Appeals reversed,[6] holding that the Park Service's application of the camping regulation to deny CCNV the right to sleep overnight as part of their demonstration violated CCNV's first amendment free speech rights. On appeal, the Supreme Court of the United States reversed and held that the Park Service's refusal to grant permission for the demonstrators to sleep overnight in the symbolic tent cities, as mandated by the Park Service regulations, did not violate the demonstrators' rights to freedom of speech under the first amendment.[7]

Historically, the courts have used two tests to scrutinize governmental regulations which restrict expressive conduct (also known as symbolic speech). The first test, the time, place, and manner test, applies to all modes of expression, whether written, oral, or symbolic. The test permits regulation of expression if the regulations are "justified without reference to the content of the regulated speech, . . . are narrowly tailored to serve a significant governmental interest, and . . . leave open ample alternative channels for communication of the information."[8]

The Supreme Court articulated the second test in *United States v. O'Brien*.[9] The *O'Brien*[10] test applies to situations where the conduct itself contains an expressive element. The *O'Brien* test permits regulation of expression if the regulation:

> is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.[11]

Before applying either test, the court usually determines

4. 703 F.2d at 587.
5. Community for Creative Non-Violence v. Watt, No. 82-02501 (D.C. 1982).
6. 703 F.2d at 599-600.
7. 104 S. Ct. at 3072.
8. *Id.* at 3069.
9. 391 U.S. 367, 377 (1968).
10. *Id.*
11. *Id.*

whether the disputed behavior is the type protected by the first amendment. In *Community for Creative Non-Violence v. Watt*, the court of appeals focused much of its attention on whether the act of sleeping in the tents during the demonstration was an expression protected by the first amendment.[12] On appeal to the Supreme Court of the United States, Justice White, writing for the Court, mooted the issue. He assumed, without deciding, that sleeping in the park, under the facts of this case, was a form of speech for first amendment purposes.[13]

The Court then applied both tests to the facts.[14] The tests, when combined, prescribe five requirements. The regulation must: 1) be within the constitutional power of the government; 2) leave alternative channels open for communicating the message; 3) be content-neutral; 4) be narrowly drawn, or no "greater" than necessary to serve its purpose; and 5) serve a "significant," "substantial," or "important" governmental interest.

Not all five of the factors were pertinent to the Supreme Court's disposition of *CCNV*. CCNV did not challenge the regulation's content-neutrality.[15] They did not argue that protection of

---

12. 703 F.2d at 591-94, 601-03, 605-08, 610-13, 622-27. For a proposed test for distinguishing expressive (protected) and nonexpressive (unprotected) conduct, see Note, *First Amendment Protection of Ambiguous Conduct*, 84 COLUM. L. REV. 467 (1984).

13. 104 S. Ct. at 3068-69. Justice White avoided the question of whether the conduct (sleeping in tents) was within the scope of first amendment protection by stating that the regulation was constitutional even if first amendment rights were implicated. *Id.* Chief Justice Warren applied identical reasoning in *O'Brien*, to avoid the same issue many years earlier. 391 U.S. at 376-77.

The Court then has consistently refused to demarcate a line where the first amendment content of expressive conduct ceases to be significant. As Justices Harlan and Brennan pointed out in Cowgill v. California, "The Court has, as yet, not established a test for determining at what point conduct becomes so intertwined with expression that it becomes necessary to weigh the State's interest in proscribing conduct against the constitutionally protected interest in freedom of expression." 396 U.S. 371, 372 (1970). Chief Justice Burger, in his concurrence in *CCNV*, would have held that sleeping "simply [was] not speech." 104 S. Ct. at 3072. Given the ease and utility of the "fails anyway" technique, the Court may never find it necessary to resolve the scope issue.

14. 104 S. Ct. at 3071.

15. *Id.* at 3071-72. Justice Marshall agreed that the regulation was content-neutral, but he objected that "[b]y narrowly limiting its concern to whether a given regulation creates a content-based distinction, the Court has seemingly overlooked the fact that content-neutral restrictions are also capable of unnecessarily restricting protected expressive activity." *Id.* at 3079. Justice Marshall pointed out that such restrictions bear more heavily on those who lack the resources to communicate in conventional ways. *Id.* at n.14. In Justice Marshall's view, the Court transformed the requirement of content-neutrality from "a floor that offers all persons at least equal liberty under the First Amendment into a ceiling that restricts persons to the protection of First Amendment equality - but nothing more." *Id.* at 3079.

A regulation can be facially neutral, although the government may have promulgated it

the parks was not within the power of the government, nor that CCNV could not deliver its message to the media or the public in any other way.[16] The Court focused on two issues: 1) whether the regulation furthered a substantial governmental interest, and 2) whether the Court should require the Park Service to protect the parks through less restrictive means. This casenote explores the Court's treatment of these last two factors.

II. FURTHERING A SUBSTANTIAL GOVERNMENTAL INTEREST

Under the time, place, and manner test, if a regulation "serves a significant governmental interest," a court will uphold the regulation, even though it incidentally infringes first amendment rights.[17] Similarly, under the *O'Brien* test, a court will uphold a regulation if it "furthers an important or substantial governmental interest."[18] The qualifiers "significant," "important," and "substantial" suggest that there may be situations in which a governmental interest will not be "important" enough to validate the infringing regulation.[19]

How does a court measure the importance of a governmental interest? Under the accepted dogma, the court "balances" the governmental interest against the first amendment right.[20] This bal-

---

for nonneutral reasons. Governmental agencies issued several of the regulations discussed in this casenote specifically to curtail the expressive activities of those (or their brethren in spirit) who later challenged them. The Park Service promulgated the anticamping regulation in *CCNV* after a court ruled, based on the previous regulation, that the Park Service could not constitutionally bar *CCNV* from camping in the park during its demonstration. *See* 703 F.2d at 587-88. It may be true, as Justice White points out, that "the regulation 'responds precisely to the substantive problems which legitimately concern the [Government].'" *CCNV*, 104 S. Ct. at 3071 (quoting City Council v. Taxpayers for Vincent, 104 S. Ct. 2118 (1984)). Yet because the judiciary will not, when faced with a content-neutral regulation, inquire into an allegedly illicit legislative or executive motive, a legislature or an executive agency may be free to curtail expressive conduct by enacting content-neutral laws or promulgating content-neutral regulations.

16. 104 S. Ct. at 3072.

17. *See supra* text accompanying note 8.

18. *See supra* text accompanying note 11.

19. In *O'Brien*, the Court described "the quality of the governmental interest which must appear . . . [as] compelling; substantial; subordinating; paramount; cogent; strong." 391 U.S. at 376-77.

20. In Schneider v. State, the Court stated that its task, when confronted with a regulation that incidentally limits rights of free expression, was "to weigh the circumstances and to appraise the substantiality of the reasons advanced in support of the regulation of the free enjoyment of the rights." 308 U.S. 147, 161 (1939). For further discussions of balancing, see Bogen, *Balancing Freedom of Speech*, 38 MD. L. REV. 387 (1979); Frantz, *The First Amendment in the Balance*, 71 YALE L.J. 1424, 1425 (1962); Meiklejohn, *First Amendment is an Absolute*, 1961 SUP. CT. REV. 245, 251.

ancing process has received perfunctory homage in the past.[21] The Court in *CCNV*, however, never mentioned balancing, and with good reason.

First amendment cases rarely pit a governmental interest directly against the first amendment.[22] Rather, the cases tend to focus on the degree to which a regulation effectively furthers a governmental interest.[23] It is the "furtherance of the interest," rather than the interest itself, that must stand or fall in the face of the first amendment.[24] The court of appeals took this approach in upholding CCNV's claims.

The court of appeals said the Park Service's denial of overnight sleeping was of "minimal consequence" in furthering the government's interest in protecting the parks. Indeed, the court suggested that the parks might positively benefit if the demonstrators were asleep at night.[25] When the case reached the Supreme Court, however, the Court did not limit its "furtherance" analysis to the particular demonstration at hand. The Court cited *Heffron v. International Society for Krishna Consciousness*[26] as authority for the proposition that "this regulation need not be judged solely

---

21. In Konigsberg v. State, for example, the Court affirmed the propriety of "general regulatory statutes, not intended to control the content of speech but incidentally limiting its unfettered exercise. . . ." 366 U.S. 36, 50 (1961). The Court stated that its analysis of conflicting first amendment and governmental interests in such cases "has necessarily involved a weighing of the governmental interest involved." *Id.* at 51.

22. *Konigsberg* provides a rare example of true balancing. 366 U.S. 36 (1961).

23. "Flag cases" and aesthetic regulation cases are two areas in which there has been noticeable evolution in the Court's perception of the legitimacy of the stated governmental interest. The Court has backed away from the notion that the state can enforce school flag salute rules against people whose principles constrain them not to salute. *See infra* text accompanying notes 80-81. The Court has not resolved the question of whether a state has an enforceable interest in the physical integrity of the flag. *See* Spence v. Washington, 418 U.S. 405 (1974); Smith v. Goguen, 415 U.S. 566 (1973).

24. The dissent in *CCNV* suggested that the Court should require that regulations *substantially* further governmental interests before the need for the regulations could outweigh the right to freedom of speech. 104 S. Ct. at 3076-77.

25. 703 F.2d at 598. Judge Mikva suggested that the parks might benefit if the Park Service allowed the protesters to sleep at night (as opposed to staying awake all night):

> Indeed, allowing an all-night presence by wakeful protestors would seem to tax sanitation facilities, law enforcement personnel, and the park resource itself to a greater extent than would allowing those same protestors simply to sleep.
>
> . . . .
>
> . . . If anything, the nighttime enjoyment of Lafayette Park and the Mall by nondemonstrators would probably be enhanced if the 150 CCNV demonstrators were asleep.

Id. at 596-97.

26. 452 U.S. 640 (1981).

by reference to the demonstration at hand."[27]

In *Heffron*, the Court examined a Minnesota State Fair rule that required all merchandise, including written material, to be distributed from booths. The International Society for Krishna Consciousness (ISKCON) challenged the rule as an unlawful infringement of its first amendment free speech right to distribute literature and solicit donations on foot, as commanded by their faith.[28]

The Fair's organizers claimed that the rule was necessary to prevent congestion of fair thoroughfares. The Supreme Court of Minnesota held that the rule violated ISKCON's first amendment right to freedom of speech. The decision turned on the significance of the state's interest in avoiding whatever disorder would likely result from granting members of ISKCON an exemption from the rule. The court concluded that the anticipated disruption was insufficient to justify infringement of ISKCON's first amendment rights, and thus, the rule was unconstitutional as applied to ISKCON.[29]

The Supreme Court of the United States reversed and upheld the booth rule as a valid time, place, and manner restriction.[30] The Court said the exemption could not be "meaningfully limited" to ISKCON; all "similarly situated groups" would have to be exempted.[31] The Court said ISKCON's practices did not merit greater first amendment protection than those of any other group that espoused religious, social, political, or ideological messages.[32] Although the rule might have no appreciable effect on crowd control when applied only to ISKCON, the Court said, when applied to all, it would achieve its intended effect.[33]

---

27. 104 S. Ct. at 3070.

28. 452 U.S. at 643-45.

29. *Id.* at 646.

30. *Id.* at 654.

31. *Id.*

32. ISKCON did not attempt to argue that it could make any special claim to first amendment protection. *Id.* at 652 n.15.

33. As Justice Brennan said in partial dissent, "If fairgoers can make speeches, engage in face-to-face proselytizing, and buttonhole prospective supporters, they can surely distribute literature to members of their audience without significantly adding to the State's asserted crowd control problem." *Id.* at 661.

He was quick to point out that the Court had reached the opposite conclusion in Tinker v. Des Moines School Dist., 393 U.S. 503 (1969). To protest the Vietnam War, Tinker wore a black armband to public school in violation of a school board regulation forbidding armbands. Although the Court recognized the prerogative of school boards to control students' conduct, it was unwilling to allow "undifferentiated fear or apprehension of disturbance [to] justify a total ban on purely expressive activity." *Id.* at 508. To Justice Brennan, the *Hef-*

In the court of appeals, both the majority and the dissents recognized the applicability of *Heffron* to *CCNV*; yet they reached different conclusions. According to the majority, the phrase "similarly situated groups" meant "all those who wish to engage in sleeping as part of their demonstration and have been granted renewable permits to demonstrate on a twenty-four hour basis on sites at which they have also been allowed to erect temporary symbolic structures."[34] The dissenters took a much broader view of "similarly situated" and said, "[W]e must look to the interest in preventing camping by all classes of persons, whatever their motive."[35]

On appeal, the Supreme Court of the United States agreed with the dissenters:

> Absent the prohibition on sleeping, there would be other groups who would demand permission to deliver an asserted message by camping in Lafayette Park. Some of them would surely have as credible a claim in this regard as does CCNV, and the denial of permits to still others would present difficult problems for the Park Service.[36]

The Court adopted an all-or-nothing approach: either everybody could camp, or nobody could. It was unwilling to allow the Park Service to judge which applicants had valid first amendment reasons for sleeping in the parks, and which did not.

Justice Marshall, in dissent, referred to the apprehension of a deluge of campers as the "imposter problem."[37] The "imposter problem" arises due to the interaction of two first amendment principles—overbreadth and content neutrality. The overbreadth doctrine is an exception to traditional rules of standing. Under the overbreadth doctrine, the Court may allow one party to challenge regulations or statutes where the Court predicts or assumes that the existence of the regulation or statute may cause others, not before the Court, to refrain from constitutionally protected speech or expression.[38] Under the content-neutrality doctrine, the government is forbidden from considering the nature of a message when

---

fron Court's expectation that increased disruption would result from numerous first amendment claimants on the Minnesota fairgrounds was just this sort of undifferentiated fear. 452 U.S. at 662.

34. 703 F.2d 586, 596 (D.C. Cir. 1983).

35. *Id.* at 616.

36. 104 S. Ct. at 3071.

37. *Id.* at 3075.

38. Broadrick v. Oklahoma, 413 U.S. 601, 612-13 (1973).

formulating regulations that curtail expression of the message.[39]

These two doctrines fit into the "imposter" argument in a circular manner. Each party that seeks exemption from a regulation represents an untold number of similar applicants (a version of the overbreadth doctrine); the Park Service is forbidden from questioning the sincerity or validity of the asserted first amendment message of any applicant (a requirement of the content-neutrality doctrine); therefore, the Park Service must grant all requested permits. This result, however, threatens serious damage to the parks. To avoid such damage, the Park Service must deny all applicants.

Justice Marshall objected to this reasoning on several grounds. He objected, as Justice Brennan had in *Heffron*,[40] to submission to the "mere apprehension of disturbance" which the Park Service might face. He also objected to the Court's refusal to differentiate between valid and invalid first amendment claims, and cited situations in which the government routinely makes such a distinction.[41]

Justice Marshall concluded that the use of the content-neutrality doctrine in this case resulted in an ironic perversion of its original purpose. Although the doctrine had been created to expand freedom of speech, the Court's preoccupation with the "imposter problem" resulted in a limitation of expressive freedom, and transformed "the ban against content-distinctions from a floor that offer[ed] all persons at least equal liberty under the First Amendment into a ceiling that restrict[ed] persons to the protection of First Amendment equality — but nothing more."[42]

The preceding examination of the requirement that a regulation "further a substantial governmental interest" leads to several conclusions.[43] First, the modifier "substantial" is misplaced. It is the substantiality of the "furtherance" of the interest, and not the substantiality of the interest, that a Court is to determine. Second,

---

39. *See supra* text accompanying note 11.

40. 452 U.S. 640 (1981). Justice Brennan said, "[U]ndifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression." *Id.* at 662 (quoting Tinker v. Des Moines School Dist., 393 U.S. 503, 508 (1969)).

41. As examples of that type of inquiry, Justice Marshall specified Wisconsin v. Yoder, 406 U.S. 205 (1972), and Welsh v. United States, 398 U.S. 333 (1970). Under *Yoder*, members of a group holding "deep religious conviction" might be exempt from compulsory education laws. 406 U.S. at 215-16. Similarly, in *Welsh*, the Court required the Selective Service System, in conferring conscientious objector status, to distinguish between those who operate under a personal, moral, or philosophical code, and those whose consciences are motivated "by a deeply held moral, ethical, or religious belief." 398 U.S. at 343-44.

42. 104 S. Ct. 3079.

43. *O'Brien*, 391 U.S. 367, 377 (1968).

using the *Heffron* approach, a court must consider the effect of a regulation on all potential first amendment claimants, and not just on the parties before the court.[44] The result is that even where the government derives no benefit from the application of a regulation to a particular party, a court may uphold the regulation if its universal application will result in the desired benefit. The law will not favor exceptions. Thus, the Court said in *CCNV*:

> If the Government has a legitimate interest in ensuring that the National Parks are adequately protected, which we think it has, and if the parks would be more exposed to harm without the sleeping prohibition than with it, the ban is safe from invalidation under the First Amendment as a reasonable regulation on the manner in which a demonstration may be carried out.[45]

III. The Narrowness of the Regulation

Both the time, place, and manner test and the *O'Brien* test have a narrowness requirement. Under the time, place, and man-

---

44. *See supra* notes 26-27 and accompanying text.

45. 104 S. Ct. at 3071. The Court's refusal to balance the governmental interest against the first amendment dovetails with the use of the "fails anyway" approach. *See supra* note 13. Through the "fails anyway" approach, the Court avoids the need to define the limits of the first amendment. Similarly, by concentrating on the regulation's furtherance of the governmental interest, rather than on the "importance" of that interest, the Court avoids the unsavory task of assigning relative weights to such intangible concepts.

Neither the government, nor Justice Marshall, favors the Court's avoidance of line drawing and balancing through the use of the "fails anyway" approach. Their positions are well illustrated in Justice Marshall's *CCNV* dissent, which contains an implied colloquy between the government and Justice Marshall. The government urged the Court to hold that, under no circumstances, could "sleep" qualify for first amendment protection. According to the government, a contrary holding would logically place even political assassinations within first amendment limits. Justice Marshall responded that "balancing" would avoid such an absurd result:

> The Government's argument would pose a difficult problem were the determination whether an act constitutes "speech" the end of First Amendment analysis. But such a determination is not the end. If an act is defined as speech, it must still be balanced against countervailing government interests. The balancing which the First Amemdment requires would doom any argument seeking to protect anti-social acts such as assassination or destruction of government property from government interference because compelling interests would outweigh the expressive value of such conduct.

104 S. Ct. at 3076.

The Court's approach in *CCNV* was much simpler. It circumvented the need to balance. Applying the reasoning of *CCNV* to the assassination situation would reap the following result: Because the law which forbids assassination is content-neutral and leaves open other avenues for expression, and because the goal of protecting the lives of public figures is both valid and significant, and is furthered by the law, the law is valid, whether or not an assassination is a "first amendment act."

ner test, a narrowly drawn statute or regulation must serve a significant governmental interest.[46] Under the *O'Brien* test, the resulting restriction on first amendment freedoms must be "no greater than is essential to the furtherance" of the governmental interest.[47]

Courts have used the narrowness requirement in the past to invalidate oppressive laws without reaching thorny constitutional questions. In *Stromberg v. California*,[48] the first case in which the Court invalidated a law on first amendment grounds, the Court invalidated a state statute only because the law was capable of prohibiting benign behavior. The statute prohibited public display of a red flag as a sign, symbol, or emblem of opposition to organized government.[49] Stromberg was convicted for leading a children's camp in saluting a red flag. The Court voided the statute because a court could theoretically construe it to prohibit legitimate as well as illegitimate opposition to the government.[50]

The Court also applied a narrowness analysis in *Schneider* v. *State*.[51] Schneider was convicted for passing out leaflets in violation of a municipal antilitter ordinance. The Court held in Schneider's favor because it found that the municipality could achieve its legitimate goal of maintaining clean streets by narrower means which did not limit the dissemination of information. The Court suggested punishment of those persons who actually threw papers on the streets, rather than a general restriction on distribution.[52] In effect, the Court required the municipality to meet its goal through less restrictive means.

---

46. *See supra* text accompanying notes 8-11.

47. *See supra* text accompanying note 11.

48. 283 U.S. 359 (1931).

49. *Id.* at 369.

50. *Id.*

51. 308 U.S. 147 (1939).

52. *Id.* at 162-63.

See Note, *Time, Place, & Manner Regulations of Expressive Activities in the Public Forum*, 61 NEB. L. REV. 167 (1982). The Note reads in pertinent part:

> 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. 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.

Id. at 182.

In *Community for Creative Non-Violence v. Watt*,[53] the court of appeals told the Park Service to protect the parks in a less restrictive manner than through a total ban on camping. The court supported its mandate by reference to the *O'Brien* "no greater [restriction] than is essential" test.[54] The court of appeals, in a footnote, expressly rejected the suggestion that the Court in *Heffron* had abandoned the *O'Brien* less restrictive means requirement.[55] The dissent did not challenge the appropriateness of the less restrictive means test; it merely argued that there were no appropriate less restrictive means available.[56]

On appeal, the Supreme Court said the Park Service need not formulate a less restrictive alternative to the ban on camping.[57] It said any possible alternative "would still curtail the total allowable expression" of demonstrators.[58] Such suggestions of alternatives, according to the Court, amounted to nothing more than disagreement with the Park Service as to the means and levels of protection that it should accord to the parks. Significantly, the Court concluded its less restrictive alternative discussion with a disclaimer that the judiciary did not possess the authority, wisdom, or competence to oversee the protection of the parks.[59]

What then, is the present place of the less restrictive means

---

53. 703 F.2d 586 (D.C. Cir. 1983).

54. The court stated that the Park Service's administrative difficulties in dealing with problems caused by camping demonstrators "must be found wanting under *O'Brien's* 'no greater [restriction] than is essential' test; any interest in preventing other 'camping' activity can be furthered by a less restrictive means." *Id.* at 596-97.

55. The footnote reads, in relevant part:

> It has been suggested by some that the Supreme Court in *Heffron* . . . signaled a departure from the less restrictive means test of *O'Brien*. We find, however, that the majority in *Heffron* did apply the test to the regulation of ISKCON's activities. The Court examined the alternatives put forward by ISKCON—penalizing disorder, limiting the number of people authorized to conduct the activity, restricting the activity to certain locations within the forum—and concluded that "it is quite improbable that the alternative means . . . would deal with the problems posed . . . ." Such is not the case here; the alternative put forward in *Heffron* itself, for instance, would better serve the Park Service's interests than a total ban on sleep and would be less restrictive of the first amendment activity proposed . . . .

703 F.2d at 597 n.28 (citations omitted).

56. *Id.* at 621.

57. 104 S. Ct. at 3072.

58. *Id.*

59. The Court's exact words were: "We do not believe, however, that either *United States v. O'Brien* or the time, place, and manner decisions assign to the judiciary the authority to replace the Park Service as the manager of the Nation's parks or endow the judiciary with the competence to judge how much protection of park lands is wise and how that level of conservation is to be attained." 104 S. Ct. at 3072.

analysis in the time, place, and manner and *O'Brien* tests? In *Regan v. Time*,[60] decided only weeks after *CCNV*, the Court partially answered this question. Justice White, writing for the Court, stated that "the less restrictive alternative analysis . . . has never been a part of the inquiry into the validity of a time, place, and manner regulation."[61] He wrote that it was "enough" if the end was legitimate, and the means substantially served the end.[62]

Although *Regan* disposes of the question of less restrictive means as applied to the time, place, and manner test, it does not expressly dispose of the question in regard to the *O'Brien* test. The language of the *O'Brien* test — "if the incidental restriction on alleged First Amendment freedoms is no greater than is essential"[63] — seems to call for a narrowness analysis. Yet, future cases may hold otherwise, for several reasons.

First, no court has cited *O'Brien* as authority for the proposition that the government must identify and implement any feasible less restrictive means. Second, the Court in *CCNV* said the time, place, and manner test was the equivalent of the *O'Brien* test.[64] In its words, the two tests were "little, if any, different."[65] If the *O'Brien* test is identical to the time, place, and manner test, and if Justice White is correct in stating that the time, place, and manner test does not require a less restrictive means analysis, then perforce, the *O'Brien* test should not require a less restrictive means analysis.

Even if the *O'Brien* test originally contemplated a less restrictive means analysis, the analysis could be subject to excision.[66] Justice Rehnquist expressly stated: "I have some doubt that the first enunciation of a group of tests such as those established in *O'Brien* sets them in concrete for all time . . . ."[67] Such sentiment, coupled with the Court's newfound reticence concerning its "authority," "wisdom," and "competence" to invalidate governmental regulations, even when they implicate first amendment rights, points to a

60. 104 S. Ct. 3262 (1984).
61. *Id.* at 3271-72.
62. *Id.*
63. 391 U.S. at 376.
64. 104 S. Ct. at 3071.
65. *Id.*
66. It may be that in *Regan*, Justice White effected a change by removing a less restrictive means analysis from the time, place, and manner test. Such an analysis may have been inherent in the test. In *Schneider v. State*, a prototype time, place, and manner case, the Court applied a less restrictive means analysis, and based its holding on the perceived failure of the regulation to meet the requirement. 308 U.S. 147 (1939).
67. Smith v. Goguen, 415 U.S. 566, 599 (1974) (Rehnquist, J., dissenting).

narrowing of judicial review of such regulations.

IV. The First Amendment and Substantive Due Process

The Court made a noteworthy choice of terms in its disclaimer in *CCNV*.[68] "Authority," "wisdom," and "competence" are terms pregnant with connotations. They are the buzz-words of "anti-*Lochner*ism."[69] Since the demise of economic due process,[70] the words have signaled judicial overreaching into areas that are these proper domain of the political process. A court that exceeds the bounds of judicial wisdom and competence is guilty of committing judicial legislation, of usurping the function of the political process by substituting its own judgement for that of the legislature.

The relationship between economic due process and the first amendment may seem attenuated, but the Court has intertwined the two concepts in the past. The Justices who were dissenters during the *Lochner*[71] era were able to use the logic of economic due process to win judicial protection for certain first amendment free-

---

68. *See supra* note 59.

69. In Lochner v. New York, the Court struck down a state labor law which limited the number of hours that bakery employees could work. 198 U.S. 45 (1905). The Court stated, "The general right to make a contract in relation to his business is part of the liberty of the individual protected by the Fourteenth Amendment of the Federal Constitution." *Id.* at 53. The Court saw the case as pitting "the power of the State to legislate" against "the right of the individual to liberty of person and freedom of contract." *Id.* at 57. The Court further stated:

> In every case that comes before this court, therefore, where legislation of this character is concerned and where the protection of the Federal Constitution is sought, the question necessarily arises: Is this a fair, reasonable and appropriate exercise of the police power of the State, or is it an unreasonable, unnecessary and arbitrary interference with the right of the individual to his personal liberty . . . .

Id. at 56.

Justice Harlan, in dissent, said that the determination of the reasonableness of legislation rested with the legislature, not with the courts:

> If the end which the legislature seeks to accomplish be one to which its power extends, and if the means employed to that end, although not the wisest or best, are yet not plainly and palpably unauthorized by law, then the court cannot interfere. . . .
>
> . . . .
>
> . . . Under our system of government the courts are not concerned with the wisdom or policy of legislation.

Id. at 68-69.

70. The term "economic due process" describes use of the due process clause of the fourteenth amendment to strike down state economic laws. For a discussion on the demise of economic due process, see Lusky, *Footnote Redux: A* Carolene Products *Reminisence*, 82 Colum. L. Rev. 1093, 1094 (1982).

71. *See supra* note 58.

doms. In *Near v. Minnesota*[72] in 1931, and again in *Grosjean v. American Press Co.*[73] in 1936, the Court engaged in a form of "*Lochner*izing" when it extended freedom of the press. In 1937, in *De Jonge v. Oregon*,[74] the Court used the same approach to buttress the right to peaceable assembly. In 1937, however, the Court retreated from economic due process which "ended this free ride on the coat-tails of the more tradition bound Brothers."[75] Although the Court rejected heightened judicial scrutiny in cases of economic legislation, Justice Stone, in footnote four of his opinion in *United States v. Carolene Products*,[76] sought to assure that decisions like *Carolene Products* did not slam the door on the emerging civil liberties.[77]

The divergence of values that surfaced in *Carolene Products* surfaced again in two later cases involving flag salutes. In *Minersville School District v. Gobitis*,[78] in 1940, the Court upheld a school board decision to exclude Jehovah's Witness students from school for refusing to salute the flag. In *West Virginia State Board of Education v. Barnette*,[79] in 1943, the Court completely reversed itself. In both cases, Jehovah's Witnesses challenged compulsory flag salute statutes. Both cases deal with judicial and legislative competency in dealing with first amendment and due process issues.[80]

Justice Frankfurter opened the *Gobitis* opinion by stating that the case presented a clear statement of the conflict between liberty and governmental authority. He said: "A grave responsibility confronts this Court whenever in course of litigating it must reconcile the conflicting claims of liberty and authority. But when the liberty involved is liberty of conscience, and the authority is authority to safeguard the nation's fellowship, judicial conscience is put to its severest test."[81] After identifying national unity as the pre-

72. 283 U.S. 697 (1931).

73. 297 U.S. 233 (1936).

74. 299 U.S. 353 (1937).

75. Lusky, *supra* note 70, at 1095.

76. 304 U.S. 144 (1938).

77. The famous *Carolene* footnote reads in part: "There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within the specific prohibition of the Constitution, such as those of the first ten amendments, which are deemed equally specific when held to be embraced within the Fourteenth." *Id.* at 152 n.4.

78. 310 U.S. 586 (1940) (overruled by 319 U.S. 624 (1943)).

79. 319 U.S. 624 (1943).

80. *Id.* at 638-39; 310 U.S. at 594-95.

81. 310 U.S. at 591.

dominant value, Justice Frankfurter concluded that it was the legislature's task to determine how to attain that end, not the Court's. He said the courtroom was not the proper arena for debating issues of educational policy. The Court had no authority in the area of education, and therefore, the Court could not judge the wisdom of the legislature in choosing the means.[82]

Justice Stone, in dissent in *Gobitis*, pointed to the *Carolene Products* footnote message concerning "the importance of a searching judicial inquiry into the legislative judgment in situations where prejudice . . . may tend to curtail the operation of those political processes ordinarily to be relied on to protect minorities."[83] Justice Stone did not perceive the interest in national unity to be an absolute value insulated from judicial scrutiny.[84]

Three years later in *Barnette*,[85] Justice Stone's view prevailed. In *Barnette*, the Court overruled *Gobitis*. In the *Barnette* opinion, the Court announced that it was determining the constitutionality, not the wisdom, of the flag salute statute.[86] For this reason, the Court's inquiry was within its competence.

Courts have continued to apply substantive due process analysis to "fundamental rights issues,"[87] but the process has not been unopposed.[88] Justice Frankfurter mounted an attack on the

---

82. *Id.* at 598.

83. *Id.* at 606-07.

84. *Id.*

85. 319 U.S. at 630-34.

86. *Id.* at 639. The Court, according to Justice Jackson, had a duty to the Constitution that it could not shirk:

> The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.

Id. at 638.

87. The phrase "substantive due process" identifies the notion that the "due process" guarantees of the fifth and fourteenth amendments mandate not only that every citizen have his legal rights determined through standard procedural measures, but also that the government cannot abridge certain "fundamental rights" consistent with due process. For an article in opposition to this notion, see Dixon, *The "New" Substantive Due Process and the Democratic Ethic: A Prolegomenon*, 1976 B.Y.U. L. REV. 43.

88. Justice McReynolds, whom Justice Black once typified as the epitome of the due process judiciary, made a most ironic comment in dissent in Hague v. Committee for Indus. Org., 307 U.S. 496 (1939). In *Hague*, the Court struck down local laws that repressed freedom of speech and assembly. *Id.* at 532. Justice McReynolds, who had so often been accused of imposing his "wisdom" in areas where the Court was not "competent" to make determinations, said, "Wise management of such intimate local affairs, generally at least, is beyond the competency of federal courts, and essays in that direction should be avoided." *Id.*

The Court has used "anti-*Lochner*" language to attack extensions of "fundamental rights." The Court struck down a Texas criminal abortion statute in Roe v. Wade, 410 U.S. 113 (1973), and its companion case, Doe v. Bolton, 410 U.S. 179 (1973). In Doe v. Bolton, Justice White, joined in dissent by Justice Rehnquist, said, "[T]he upshot [was] that the people and the legislatures of the 50 States [were] constitutionally disentitled to weigh the relative importance of the continued existence and development of the fetus on the one hand, against a spectrum of possible impacts on the mother, on the other hand." 410 U.S. at 222.

Justice Blackmun, writing for the Court in Roe v. Wade, bore in mind "Mr. Justice Holmes' admonition in his now vindicated dissent in *Lochner v. New York*." 410 U.S. at 117 (citation omitted). Despite the plethora of opinions, it was clear to all that the Roe v. Wade decision determined an allocation of authority. Professor Ely, in a reference to the *Carolene Products* footnote, stated that it was Justice Stone's suggestion that "constitutional directive or not, the Court should throw *its* weight on the side of a minority demanding in court more than it was able to achieve politically." Ely, *The Wages of Crying Wolf: A Comment on* Roe v. Wade, 82 YALE L.J. 920, 934 (1973). Commenting on *Roe v. Wade*, Professor Ely pointed out that although there were very few women in the legislatures, "no fetuses sit in our legislatures." *Id.* at 933.

Professor Tribe spoke more directly to the point:

> The Court was not, after all, choosing simply between the alternatives of abortion and continued pregnancy. *It was instead choosing among alternative allocations of decisionmaking authority*, for the issue it faced was whether the woman and her doctor, rather than an agency of government, should have the authority to make the abortion decision at various stages of pregnancy.

Tribe, *Foreword: Toward a Model of Roles in the Due Process of Life and Law*, 87 HARV. L. REV. 1, 11 (1973) (emphasis added).

In another case, Chief Justice Burger dissented from the Court's opinion, which struck down a state law that forbade distribution of birth control devices to unmarried persons. He too saw the issue as one of allocation of decisionmaking authority: "[T]hese opinions seriously invade the constitutional prerogatives of the States and regrettably hark back to the heyday of substantive due process." Eisenstadt v. Baird, 405 U.S. 438, 467 (1972) (Burger, C.J., dissenting).

In dissent in several cases extending aliens' rights, certain Justices have attacked the substantive due process approach to fundamental rights. In Plyler v. Doe, the Court affirmed the obligation of a state to provide an education, at its own expense, to "undocumented children." 457 U.S. 202 (1982). Chief Justice Burger, joined by Justices White, Rehnquist, and O'Connor, dissented:

> Were it our business to set the Nation's social policy, I would agree without hesitation that it is senseless for an enlightened society to deprive any children . . . of an elementary education. . . . However, the Constitution does not constitute us as "Platonic Guardians" nor does it vest in this Court the authority to strike down laws because they do not meet our standards of desireable social policy, "wisdom," or "common sense." We trespass on the assigned function of the political branches under our structure of limited and separated powers when we assume a policymaking role as the Court does today.

Id. at 242 (Burger, J., dissenting).

In Sugarman v. Dougall, the Court ruled that aliens must have equal rights to receive employment within the civil service. 413 U.S. 634 (1973). Justice Rehnquist, in dissent, attacked the underpinnings of the Court's opinion:

> On the "authority" of this footnote, which only four Members of the Court in *Carolene Products* joined, the Court in [one of the cases cited] merely stated that "classifications based on alienage . . . are inherently suspect" because "[a]liens as a class are a prime example of a 'discrete and insular' minority . . .

Carolene Products footnote in *Kovacs v. Cooper.*[89] In *Kovacs*, a first amendment case, the Court upheld a statute banning the broadcasting of messages from loudspeakers mounted on vehicles. Justice Frankfurter, concurring in the judgment, took the opportunity to object to the majority's reference to the "preferred position of freedom of speech" which had "uncritically crept into some recent opinions of this Court."[90]

Justice Black continued the battle against substantive due process in *Tinker v. Des Moines.*[91] The majority expressed its opinion that the case's controlling principle was that "First Amendment rights, applied in light of the special characteristics of the school environment, are available to students and teachers."[92] Justice Black, in dissent, stated that the Court had long since repudiated the notion that judges could overrule legislators when laws struck them as unreasonable. He characterized the Court's action (voiding the antiarmband rule) as a return to "the McReynolds due process concept."[93]

Chief Justice Burger echoed similar sentiments in his dissent in *Spence v. Washington.*[94] Spence was convicted for taping a peace symbol to a United States flag in violation of a state statute.

---

for whom such heightened judicial solicitude is appropriate."

Id. at 656 (Rehnquist, J., dissenting).

Justice Blackmun took a swipe at substantive due process in Furman v. Georgia, 408 U.S. 238 (1972). The majority struck down capital punishment. Justice Blackmun, in dissent, said:

> [W]ere I a legislator, I would do all I could to sponsor and to vote for legislation abolishing the death penalty. . . . There—on the Legislative Branch of the State or Federal Government, and secondarily, on the Executive Branch—is where the authority and responsibility for this kind of action lies. The authority should not be taken over by the judiciary in the modern guise of an Eighth Amendment issue.
>
> I do not sit on these cases, however, as a legislator, responsive, at least in part, to the will of constituents. Our task here . . . is to pass upon the constitutionality of legislation that has been enacted and that is challenged. This is the sole task for judges. We should not allow our personal preferences as to the wisdom of legislative and congressional action, or our distaste for such action, to guide our judicial decision in cases such as these.

Id. at 410-11 (Blackmun, J., dissenting).

89. 336 U.S. 77 (1949). Justice Frankfurter said: "A footnote hardly seems to be an appropriate way of announcing a new constitutional doctrine, and the *Carolene* footnote did not purport to announce any new doctrine; incidentally, it did not have the concurrence of a majority of the Court." *Id.* at 90-91 (Frankfurter, J., concurring).

90. *Id.* at 90.

91. 393 U.S. 503, 506 (1969).

92. *Id.* at 506.

93. *Id.* at 520. For a brief discussion on McReynolds's view, see *supra* note 88.

94. 418 U.S. 405 (1974).

The Court held that the first amendment protected the expressive act, and that "no interest the State may have in preserving the physical integrity of a privately owned flag was significantly impaired on these facts . . . ."[95] Chief Justice Burger disagreed. He said, "If the constitutional role of this Court were to strike down unwise laws or restrict unwise application of some laws, I could agree with the result reached by the Court. This is not our function, however, and it should be left to each State and ultimately to the common sense of its people to decide how the flag . . . should be protected."[96]

The preceding analysis indicates that there has always been an undercurrent of dissatisfaction within the Court, because of the Court's high degree of scrutiny of alleged infringements of first amendment rights in cases that challenge neutral statutes. In the *CCNV* case, the minority undercurrent rose to the surface and became the majority. The terms "wisdom" and "competence" stand out in *CCNV* because the Court has not used these words to uphold a governmental regulation in the face of a first amendment challenge since the *Gobitis* case in 1940.

V. Conclusion

Under the time, place, and manner test and the *O'Brien* test, a governmental regulation which incidentally limits free speech must further a substantial governmental interest. Yet in truth, the Court subjects only the "furtherance" aspect to scrutiny; the Court is not likely to evaluate the underlying "interest." The Court has given a broad reading to the scope of "furtherance." Using the *Heffron* approach, which was reaffirmed in *CCNV*, the Court looks to the overall effect of a regulation rather than confining its inquiry to the case at hand. If application of a regulation, in general, will have its intended effect, the Court will uphold the regulation even though the regulation only results in minimal furtherance of the asserted governmental interest in the case before the Court.

The tests also require the challenged regulation to be narrowly drawn. It is hard to see, however, how this narrowness requirement protects first amendment claimants. The Court will not engage in a less restrictive means analysis. Nor is the Court eager to substitute its own "judgment" or "wisdom" for that of a governmental

95. *Id.* at 415.
96. *Id.* at 416.

agency. In *CCNV*, the Court took the unprecedented position that such matters, even when they implicate first amendment rights, may not be within the Court's "competence."

As applied in *CCNV*, neither the time, place, and manner test nor the *O'Brien* test, present much of a hurdle for a governmental entity to clear in justifying a regulation that incidentally limits expressive conduct. The Court does not read these tests as written. As construed, these tests add up to less than the sum of their parts.

JAMES B. PUTNEY