Florida State University Law Review

Volume 9 | Issue 1 Article 7

Winter 1981

Village of Schaumburg v. Citizens for a Better Environment, 444 U.S. 620 (1980)

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CASE NOTES

Constitutional Law—Freedom of Speech—Ordinance Restricting Solicitation of Funds by Charities Restricts Freedom of Speech—*Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620 (1980).

The Village of Schaumburg (Schaumburg), a municipal corporation on the outskirts of Chicago, enacted an ordinance which required charitable organizations to obtain a permit to solicit door-to-door.[1] The ordinance provided that an organization applying for a permit must show that seventy-five percent of the proceeds would be directly used for its charitable purpose. The ordinance further specified that salaries of solicitors, as well as administrative and fundraising expenses, could not be included in determining the percentage used for the charitable purpose.[2]

Citizens For A Better Environment (CBE), a charitable organization which advocates protection of the environment, was denied a solicitation permit because it failed to meet the seventy-five percent requirement. CBE brought suit in federal district court, alleging that such a requirement violated the first and fourteenth amendments.[3] CBE based its claim on the fact that, in addition to soliciting funds, the canvassers distribute literature and discuss topics of an environmental nature. Therefore, denial of the right to solicit violated CBE's first amendment freedom of speech rights.[4] Schaumburg, on the other hand, alleged that CBE raises funds which are primarily used for the salaries of its employees, as op-

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1. Schaumburg v. Citizens for a Better Environment, 444 U.S. 620, 623 n.2 (1980) setting forth Schaumburg, Ill., Code ch. 22, art. III, §§ 22-19—22-24 (1974) ("An Ordinance Regulating Soliciting By Charitable Organizations"). It provides that "[e]very charitable organization, which solicits or intends to solicit contributions from persons in the village by door-to-door solicitation or the use of public streets and public ways, shall prior to such solicitation apply for a permit." 444 U.S. at 620, 623. Charitable organizations are defined as "[a]ny benevolent, philanthropic, patriotic, not-for-profit, or eleemosynary group, association or corporation, or such organization purporting to be such, which solicits and collects funds for charitable purposes" in § 22-19 of the ordinance. 444 U.S. at 623 n.2.

2. Schaumburg v. Citizens for a Better Environment, 444 U.S. 620, 624 (1980) setting forth Schaumburg, Ill. Code ch. 22, art. III, § 22-20 (g) (1974). Permit applications must contain "[s]atisfactory proof that at least seventy-five percent of the proceeds of such solicitations will be used directly for the charitable purpose of the organization."

3. Citizens For A Better Environment v. Schaumburg, No. 76-c-470 (N. Ill. E.D.)

4. Hynes v. Mayor of Oradell, 425 U.S. 610 (1976); Thomas v. Collins, 323 U.S. 516 (1945); Martin v. Struthers, 319 U.S. 141 (1943); Cantwell v. Connecticut, 310 U.S. 296 (1940); Schneider v. Irvington, 308 U.S. 147 (1939); Lovell v. Griffin, 303 U.S. 444 (1938).

posed to being used for a charitable purpose; therefore, CBE must meet the stricter requirements for a commercial peddler before being issued a permit.[5] The district court granted summary judgment for CBE, stating that the ordinance was void on its face because it censored freedom of speech which is protected by the first and fourteenth amendments.[6]

The Court of Appeals for the Seventh Circuit affirmed.[7] Although the court stated that the seventy-five percent requirement might be valid for the more traditional charities,[8] it concluded that the requirement was unreasonable and an infringement of the first and fourteenth amendments. Such a requirement restricts solicitation by advocacy oriented groups which are more likely to incur greater operating costs, making them ineligible for the permit.[9] The court distinguished a fifth circuit opinion, *National Foundation v. City of Fort Worth*,[10] which upheld a similar type of ordinance limiting the costs of solicitation to twenty percent of the amount collected. That ordinance, however, allowed organizations with costs in excess of the limitation to show that their costs were not unreasonable. The court stated that "[a] fixed percentage limitation on the costs of solicitation might be undesirable and inapplicable if applied to all types of charitable organizations."[11]

The United States Supreme Court granted certiorari to review the court of appeal's holding that the Schaumburg ordinance vio-

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5. Schaumburg v. Citizens For A Better Environment, 444 U.S. 620, 622-23 n.1 (1980) setting forth SCHAUMBURG, ILL., CODE ch. 22, art. II §§ 22-6—22-18 (1974). Article II regulates commercial solicitation by requiring "for profit peddlers and solicitors" to acquire a commercial license. A commercial peddler must disclose whether he has ever been arrested for a misdemeanor or felony and can be denied a license if found to be a person of poor character or reputation. No similar disclosures are required of charitable solicitors.

6. Citizens For A Better Environment v. Schaumburg, No. 76-c-470 (N. Ill. E.D.).

7. Citizens For A Better Environment v. Schaumburg, 590 F.2d 220 (7th Cir. 1978). The court rejected Schaumburg's contention that summary judgment could not be granted because there was an issue of fact as to the nature of CBE's charitable purpose. The court looked only to CBE's challenge to the facial validity of the ordinance. *See* NAACP v. Button, 371 U.S. 415, 432 (1963) (In a first amendment challenge, the petitioner may question the validity of a statute whether or not he or she is directly affected by it.).

8. Although the court of appeals failed to define "the more traditional charitable organizations," the Supreme Court indicated that the more traditional charities are those which simply act as agents to transfer funds to other charities or provide money and services to the poor while the other types of charitable organizations, such as CBE, engage in research, litigation, lobbying, and other educational and charitable activities. Schaumburg v. Citizens For A Better Environment, 444 U.S. 620, 635 (1980).

9. *See* text *infra*, at note 46.

10. 415 F.2d 41 (5th Cir. 1969).

11. *Id.* at 46.

lated the first and fourteenth amendments.[12] The Court in *Schaumburg v. Citizens for a Better Environment*[13] affirmed, holding that the ordinance was overbroad because the seventy-five percent limitation "is a direct and substantial limitation on protected activity,"[14] i.e., solicitation of funds. The Court further stated that such a restriction "cannot be sustained unless it serves a sufficiently strong, subordinating interest that the Village is entitled to protect."[15] Upon a detailed analysis of Schaumburg's "proffered justifications," the Court concluded that the ordinance could not withstand scrutiny under the first amendment.[16]

The Supreme Court is continually searching for an equitable balance between restrictions that may legitimately be imposed and the first amendment rights that will necessarily be infringed upon.[17] A long line of cases leaves no doubt that charitable solicitation is a protected first amendment activity.[18] The regulation of free expression must contain no more restrictions than those absolutely necessary to further the interest being served.[19] In other words, a restriction upon charitable solicitation of funds must serve a justifiable and compelling state interest. It cannot be a means for the arbitrary suppression of certain kinds of speech or activities.

Many of the cases involving restrictions on solicitation have dealt with the issue of whether discretionary judgment is permissible in determining who can solicit. The Court has consistently held that leaving the issuance of a permit or the granting of permission to solicit within the discretion of an official is unconstitutional.[20] Despite the fact that the Schaumburg ordinance did not allow for discretion and appeared to follow prior decisions, the court of ap-

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12. Schaumburg v. Citizens for a Better Environment, 444 U.S. 620 (1980).

13. *Id.*

14. *Id.* at 636.

15. *Id.*

16. *Id.*

17. *See* Niemotko v. Maryland, 340 U.S. 268, 275 (1951): "Adjustment of the inevitable conflict between free speech and other interests is a problem as persistent as it is perplexing." (Frankfurter, J., concurring).

18. Hynes v. Mayor of Oradell, 425 U.S. 610 (1976); Thomas v. Collins, 323 U.S. 516 (1945); Martin v. Struthers, 319 U.S. 141 (1943); Cantwell v. Connecticut, 310 U.S. 296 (1940); Schneider v. Irvington, 308 U.S. 147 (1939); Lovell v. Griffin, 303 U.S. 444 (1938).

19. *See* United States v. O'Brien, 391 U.S. 367, 376-77 (1968).

20. Hynes v. Mayor of Oradell, 425 U.S. 610 (1976); Cantwell v. Connecticut, 310 U.S. 296 (1940); Schneider v. Irvington, 308 U.S. 147 (1939); Lovell v. Griffin, 303 U.S. 444 (1938).

peals held the ordinance unconstitutional.[21] The court based its holding on factors other than discretion.[22]

The Supreme Court, upon review, did not attempt to explain why an ordinance which does not allow for discretion, therefore appearing within the boundaries of past decisions, is unconstitutional.[23] Thus, the Court, which has long held any allowance of discretion to be unconstitutional, has now declared an ordinance which does not allow for discretion to be unconstitutional as well. The question left unanswered is what type of ordinance would pass constitutional muster. An examination of prior decisions is helpful in understanding the nature of the problem posed by this question.

The earliest relevant case is *Lovell v. Griffin*,[24] decided in 1938, in which the Supreme Court invalidated a municipal ordinance prohibiting the distribution of literature of any kind, at any time or place, without prior written permission from the city manager. The Court held that the ordinance was overbroad because it was not limited to an effort to maintain public order, prevent disorderly conduct, or protect the city's residents. *Lovell* is a pivotal case because ordinances of a similar type had previously been upheld by numerous state courts.[25] This decision laid a foundation for later cases which gave the Court the opportunity to further clarify its position.

The next two relevant Supreme Court cases involved solicitations by religious groups. The Court struck down the ordinances in both because the issuance of a permit involved the exercise of discretion of a state or city official. In *Schneider v. Irvington*,[26] a municipal ordinance stated that no one could canvass, solicit, or distribute circulars house-to-house without obtaining a written permit from the chief of police. The Court held this to be an unconstitutional denial of free speech because, in the discretion of the chief of police, the permit could be refused if the canvasser was not of

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21. 590 F.2d at 226.

22. *Id.* at 223-25. First amendment considerations were at the forefront of the court's analysis. The court found the right of free speech and expression, as well as the dissemination and receipt of ideas, to be controlling. Via the first amendment analysis, the court ultimately concluded that the Schaumburg ordinance had unreasonably obstructed the collection of funds.

23. 444 U.S. 620 (1980).

24. 303 U.S. 444 (1938).

25. Z. CHAFEE, FREE SPEECH IN THE UNITED STATES 401 (1969). *See, e.g.*, Massachusetts v. Kimball, 13 N.E.2d 18 (Mass. 1938); Coughlin v. Sullivan, 126 A. 177 (N.J. 1924); Milwaukee v. Kassen, 234 N.W. 352 (Wis. 1931).

26. 308 U.S. 147 (1939).

good character.[27] The Court emphasized that a municipality could enact regulations in the interest of public safety and welfare, and could "lawfully regulate the conduct of those using the streets," so long as the fundamental rights of freedom of speech and press were not abridged.[28]

The second case, *Cantwell v. Connecticut*[29], involved Jehovah's Witnesses who were convicted in state court of violating a statute which forbade solicitation by religious or charitable organizations without official approval. The Court, in reversing the convictions, held that "[t]he general regulation, in the public interest, of solicitation . . . [which] does not unreasonably obstruct or delay the collection of funds is not open to any constitutional objection . . . ."[30] The Court found, however, that the requirement of a license, the issuance of which rests upon the "determination by state authority as to what is a religious cause,"[31] is an invalid prior restraint on freedom of religion and speech.[32]

Prior to *Valentine v. Chrestensen*,[33] the solicitation cases reviewed by the Supreme Court concerned only religious or charitable organizations. In *Valentine*, however, the Court distinguished between charitable solicitation and commercial solicitation. The Court held that commercial speech was not protected by the first amendment and was therefore subject to greater restraints.[34] There remained the problem of how to distinguish between commercial and non-commercial leaflets. Inevitably, a subjective test would have to be used to determine the principle purpose of the leaflets.[35] The Court apparently did not consider the use of discretion in this manner to be unconstitutional, despite the fact that this could amount to a prior restraint if a non-commercial solicitor had to

27. *Id.* at 164-65.

28. *Id.* at 160.

29. 310 U.S. 296 (1940).

30. *Id.* at 305.

31. *Id.* at 307.

32. *Id.* at 306. *See also* Organization for a Better Austin v. Keefe, 402 U.S. 415, 419 (1971); New York Times Co. v. Sullivan, 376 U.S. 254 (1964).

33. 316 U.S. 52 (1942).

34. *Id.* at 54. *But see* Virginia Pharmacy Bd. v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1976), where the Court struck down a Virginia statute that prohibited advertising and thereby determined that commercial speech is protected by the first amendment. Thus, the law of *Valentine* no longer applies. However, the Court in *Schaumburg* found that, in examining the historical perspective of past decisions, the distinction between commercial and non-commercial speech is noteworthy. 444 U.S. at 632.

35. Resnik, *Freedom of Speech and Commercial Solicitation*, 30 CAL. L. REV. 655, 657 (1942).

prove his material was indeed non-commercial.

The Court has, for a variety of reasons, struck down several other attempts to limit solicitation. For example, an ordinance which prohibited door-to-door distribution of leaflets and handbills was invalidated because the right of the homeowner to warn off solicitors is considered sufficient protection for his privacy when balanced against the weightier rights of free speech and religion.[36] In contrast, the Court upheld an ordinance which prohibited door-to-door solicitation for the sale of goods without prior consent of the occupants, reasoning that the homeowners' privacy outweighs freedom of speech.[37] Once again, the Court drew a distinction between commercial and non-commercial solicitation of funds.[38]

The most recent Supreme Court case on point, prior to *Schaumburg*, is *Hynes v. Mayor of Oradell*,[39] which invalidated for vagueness an ordinance requiring persons wishing to solicit door-to-door for a political or charitable purpose to register for identification. The Court reaffirmed its previous decisions in upholding a municipality's authority to protect its citizens by the regulation of solicitation. The Court further stated that "[a] narrowly drawn ordinance, that does not vest in municipal officials the undefined power to determine what messages residents will hear"[40] would not violate the first amendment.

Throughout the cases just cited, the overriding and irrefutable theme has been that the solicitaion of funds is an expression of free speech. Therefore, to prohibit or unnecessarily restrict this type of solicitation is an infringement upon the first amendment. The *Schaumburg* decision is illustrative of the Court's continuing search for the types of restrictions that may legitimately be imposed upon a protected first amendment activity such as the charitable solicitation of funds. The Court acknowledged Schaumburg's substantial interest in protecting its citizens from fraud and unnecessary annoyance, but held that the seventy-five percent requirement was of slight value in promoting those interests.[41]

Schaumburg claimed that the ordinance was necessary to protect its residents. The purpose of the ordinance supposedly was to ensure that charitable organizations are what they say they are. How-

36. Martin v. Struthers, 319 U.S. 141 (1943).
37. Breard v. Alexandria, 341 U.S. 622 (1951).
38. *See* note 34 *supra*.
39. 425 U.S. 610 (1976).
40. *Id.* at 616-17.
41. 444 U.S. at 636.

ever, if Schaumburg's justification for the ordinance was to prevent fraud, it could have done so by less restrictive means than the seventy-five percent requirement.[42]

On its face, the Schaumburg ordinance appeared to be constitutional in that it followed precedent by not allowing for discretion in the issuance of permits.[43] The absence of discretionary judgment, however, does not ensure that this type of ordinance will be upheld, as is apparent by the Court's decision. Such an inflexible ordinance would limit the types of charitable organization that could solicit funds and would arbitrarily suppress the types of speech that the residents of Schaumburg could be exposed to. This becomes more evident upon inquiry into the effects of such an ordinance.

The inflexibility of the seventy-five percent requirement would bar many types of charities, including many of the more traditional ones, from soliciting funds.[44] Schaumburg did not offer an explanation of how the seventy-five percent figure was determined, and statistics do not support that figure as an accurate portrayal of the amount of funds that a charity would normally use "directly" for its charitable purpose.[45]

Newly formed organizations that support unpopular causes are especially likely to be barred from soliciting. They are far more likely to employ paid solicitors and incur greater operating costs, as opposed to the more traditional charities that can more readily rely upon volunteers. Hence, the ordinance is, in effect, promoting the causes of the more traditional types of charities while discouraging those of advocacy-oriented charities.[46]

An equally important consideration is that the residents of Schaumburg have a right to be exposed to the concepts that CBE advocates. By prohibiting CBE from soliciting, the ordinance denies these people the opportunity not only to hear CBE's views, but the right to decide whether or not to contribute.[47] Schaumburg

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42. 444 U.S. at 637-38. Penal laws could have been enacted to prohibit and punish fraudulent misrepresentations, or public disclosure of finances could be required.

43. *See* note 18 *supra*.

44. *See* note 8 *supra*.

45. *See* Gross, *Costs of Fundraising*, PHILANTHROPY MONTHLY (March 1975). This article reported a study of the largest organizations in Illinois which solicit funds. It showed an *average* fund-raising cost of twenty-six percent.

46. *See* note 8 *supra*.

47. *See* Virginia Pharmacy Bd. v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 757 (1976); Procunier v. Martinez, 416 U.S. 396, 408-09 (1974); Kleindienst v. Mandel, 408 U.S. 753, 762-63 (1972); Martin v. Struthers, 319 U.S. 141, 143 (1943).

claimed that the ordinance was protecting the privacy of its residents,[48] but surely this interest was outweighed by the resulting infringement upon the residents' first amendment rights. The first amendment protects the dissemination and *receipt* of ideas.[49]

In its holding, the Court distinguished *National Foundation* by noting that the Schaumburg ordinance differed because it did not allow for a showing that costs were reasonable.[50] Thus, the Court implicitly approved the ordinance in *National Foundation* as an appropriate alternative to the inflexibility of the Schaumburg ordinance.[51]

Although *National Foundation* is not controlling, it appears to contain the answer to the question left unanswered by *Schaumburg*. Some discretion in the issuance of solicitation permits would have to be left to authorities because inquiries into the internal affairs and nature of organizations would be necessary to determine if costs are reasonable. The Court, in *Schaumburg*, correctly declared the ordinance unconstitutional, basing its holding on the more obvious effects of the ordinance, rather that addressing the issue of discretion. As a result of this gap in the opinion, the Court unfortunately did not create a clear guideline for the enactment of future ordinances. Had the discretion issue been squarely faced by the Court, it is reasonable to speculate that *National Foundation* would have provided the needed "middle ground" as a basis for determining the amount of permissible official discretion.

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48. *See* Rowan v. United States Post Office Dep't, 397 U.S. 728 (1970); Martin v. Struthers, 319 U.S. 141 (1943).

49. Procunier v. Martinez, 416 U.S. 396, 408-09 (1974).

50. *See* text at notes 10-11, *supra*.

51. *Id.* Justice Rehnquist, the sole dissenter in *Schaumburg*, found the Court's tacit approval of the ordinance in *National Foundation* "somewhat surprising" and further stated that "[g]iven the potential for abuse of this open-ended grant of discretion, I would think that Fort Worth's ordinance would be more, not less, suspect than Schaumburg's." (Rehnquist, J., dissenting). 444 U.S. at 643 n.1.