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

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**Constitutional Law—FREEDOM OF SPEECH—CONTINUED EROSION OF A FUNDAMENTAL RIGHT—*Heffron v. International Society for Krishna Consciousness, Inc.*, 101 S. Ct. 2559 (1981).**

Professor Emerson, an influential first amendment scholar, has stated that first amendment freedom is essential for four values: (1) individual self-fulfillment, (2) advancement of knowledge and discovery of truth; (3) participation in decision making by all members of the society; and (4) achievement of a “more adaptable and hence a more stable community.”<sup>1</sup> Constitutional protection of freedom of speech is justified not only because of the values it serves, but because speech serves these values in a nonviolent and noncoercive way.<sup>2</sup>

The late Justice William O. Douglas was a leader in the movement to expand first amendment freedoms. He invoked the self-fulfillment value in *Griswold v. Connecticut*<sup>3</sup> and expanded this value in *Doe v. Bolton*.<sup>4</sup> The importance of individual self-fulfillment has been expounded on by Professor Laurence H. Tribe. Professor Tribe formulates “the central question posed by the Constitution’s most majestic guarantee” in the following language:

[I]s the freedom of speech to be regarded only as a means to some further end—like successful self-government, or social stability, or (somewhat less instrumentally) the discovery and dissemination of truth—or is freedom of speech in part also an end in itself, an expression of the sort of society we wish to become and the sort of persons we wish to be? No adequate conception of so basic an element of our fundamental law, . . . can be developed in purely instrumental or “purposive” terms.<sup>5</sup>

The growing emphasis on the function of the first amendment in protecting individual self-fulfillment reflects a concern with modern society’s tendency to inhibit the growth of individual autonomy and personality. Because of this tendency, the expansion of first amendment theory should be welcomed. In general, the Warren Court protected speech and expression, and therefore the value

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1. T. EMERSON, *THE SYSTEM OF FREEDOM OF EXPRESSION* 6-7 (1970).

2. See Baker, *Scope of the First Amendment Freedom of Speech*, 25 U.C.L.A. L. REV. 964, 990 (1978).

3. 381 U.S. 479, 482-84 (1965).

4. 410 U.S. 179 (1973), Justice Douglas declared in *Doe* that the first amendment was designed to secure “the autonomous control over the development and expression of one’s intellect, interests, tastes, and personalities.” *Id.* at 211 (Douglas, J., concurring).

5. L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 576 (1978).

of self-fulfillment, to an unprecedented degree.<sup>6</sup> These decisions, however, appear to be based on a favorable attitude toward first amendment values rather than on a well-developed theory of the first amendment. As a result, the Warren Court's decisions contain numerous ambiguities concerning when speech will be protected.<sup>7</sup>

The Burger Court has apparently accepted the traditional values underlying the first amendment, but has often failed to articulate those values or has not taken them to their logical conclusion.<sup>8</sup> The recent Supreme Court decision in *Heffron v. International Society for Krishna Consciousness, Inc.*,<sup>9</sup> reflects the Burger Court's lack of a coherent theory in analyzing first amendment issues. The pur-

6. See, e.g., *Food Employees Local 590 v. Logan Valley Plaza, Inc.*, 391 U.S. 308 (1968); *Scales v. United States*, 367 U.S. 203 (1961); *Yates v. United States*, 354 U.S. 298 (1957).

7. An example of this is *Brandenburg v. Ohio*, 395 U.S. 444 (1969). In *Brandenburg*, the Court modified the clear and present danger test which had served to except from protection conduct that would otherwise be covered by the first amendment. The test, as modified by *Brandenburg*, is said to afford protection to a greater area of expression than most other tests, but it is also criticized as being excessively vague. See Emerson, *First Amendment Doctrine and the Burger Court*, 68 CALIF. L. REV. 422, 436-37 (1980).

Ironically, the balancing standard that gives the least protection to first amendment rights was enunciated by the Warren Court in *United States v. O'Brien*, 391 U.S. 367 (1968). In *O'Brien*, the Court held that the government restriction was valid if: (1) it was within the constitutional power of the government; (2) it furthered an important or substantial governmental interest; (3) the interest was unrelated to the suppression of free expression; and (4) the incidental restriction on alleged first amendment freedoms was no greater than is essential to the furtherance of that interest. *Id.* at 377.

8. On the Burger Court's acceptance of the traditional values, see, e.g., *Cohen v. California*, 403 U.S. 15, 24-26 (1971). An example of the Burger Court's unresponsiveness to the call for development of the self-fulfillment value is the Court's treatment of the long-hair cases. See *Kelley v. Johnson*, 425 U.S. 238 (1976).

While not repudiating the preferred position of speech and expression supported by the Warren Court, the Burger Court has frequently ignored it. See, e.g., *California v. LaRue*, 409 U.S. 109, 118-19 (1972), where the Court upheld ordinances prohibiting certain kinds of entertainment in bars or nightclubs where liquor was served despite the Court's concession that the conduct was not obscene and constituted expression within the purview of the first amendment. See also *Lehman v. City of Shaker Heights*, 418 U.S. 298 (1974). In *Lehman*, the Court upheld a regulation which allowed the sale of commercial advertising space in rapid transit cars but prohibited the sale of that same space for political advertising. The Court focused on whether the policy was arbitrary and capricious and concluded that the city had reasonable legislative objectives betraying a preference for legislative judgment over first amendment values. *Id.* at 303-04.

The Burger Court has failed to invoke the strict scrutiny standard when first amendment interests were involved, see, e.g., *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 844-45 (1978); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974); and they have often employed a form of balancing giving little protection to first amendment rights if expression is only incidentally affected by a governmental interest unrelated to the suppression of free speech. See *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 79-82 (1976) (Powell, J., concurring).

9. 101 S. Ct. 2559 (1981).

pose of this note is to explore the ramifications of the *Heffron* decision, particularly the Court's failure to apply the appropriate analysis in determining when conduct constituting speech is entitled to constitutional protection.

Rule 6.05 of the Minnesota Agricultural Society, a public corporation which operates the annual state fair in Minnesota, provides that sale or distribution of any merchandise, including printed or written material, without a license, or from a licensed location on the fairgrounds, shall be a misdemeanor. Although the rule does not prevent organizational representatives from walking about the fairgrounds and communicating face-to-face with fair patrons,<sup>10</sup> an exhibitor must conduct any sales, distribution, or fund solicitation operations from a rented booth. Booth spaces are rented in a non-discriminatory fashion on a first-come, first-served basis. The rule applies to all nonprofit, charitable, and commercial enterprises.<sup>11</sup>

One day prior to the opening of the 1977 Minnesota State Fair, the International Society for Krishna Consciousness, Inc. (ISKCON), an organization espousing the views of the Krishna religion, and the head of one of ISKCON's temples, filed suit in Minnesota state court against numerous state officials seeking a declaration that Rule 6.05, on its face and as applied, violated their first amendment rights.<sup>12</sup> ISKCON asserted that the rule suppressed the practice of Sankirtan, a religious ritual which enjoins its members to go into public places to distribute or sell religious literature and to solicit donations for the support of the Krishna religion. The trial court summarily upheld the constitutionality of Rule 6.05.<sup>13</sup>

10. *Id.* at 2561-62.

11. *Id.* at 2562. In a footnote to the opinion, the Court lists organizations representing some of the charitable, religious, and other non-commercial organizations that rented booth space at the 1978 Minnesota State Fair. These included the American Heart Association, Abortion Rights Council of Minnesota, Christian Business Men's Association, Church of Christ, Minnesota Foster Parents Association, and United States-China Peoples Friendship Association. *Id.* at n.5.

12. 101 S. Ct. at 2562. The action was commenced under 42 U.S.C. § 1983 (1979) and MINN. STAT. § 555.01 (1978) for a judgment declaring that Rule 6.05 violates the first and fourteenth amendments of the United States Constitution. ISKCON also asked the trial court to enjoin the state officials from enforcing the rule against members of ISKCON practicing Sankirtan in public areas of the fairgrounds. *International Soc'y for Krishna Consciousness Inc. v. Heffron*, 299 N.W.2d 79, 82 (Minn. 1980).

13. 299 N.W.2d at 82. The trial court relied on the reasoning in *International Soc'y for Krishna Consciousness, Inc. v. Evans*, 440 F. Supp. 414 (SD Ohio 1977), finding the state's interest in providing all fairgoers with adequate access to each other and a minimum of congestion sufficient to sustain Rule 6.05's limitations as applied to ISKCON members. The court ordered that they (ISKCON members) be "prohibited from distributing materials

On appeal, the Minnesota Supreme Court reversed, holding that the rule unconstitutionally restricted the Krishnas' religious practice of Sankirtan.<sup>14</sup> The court discussed less restrictive means that would adequately serve the state's interest in preventing disorder, stating that the Agricultural Society could: (1) promulgate rules to specifically prohibit conduct that tends to create disorder—after the fact prosecution rather than a prior restraint on conduct; (2) limit the number of persons distributing and selling throughout the public areas; or (3) devise a place regulation less restrictive than Rule 6.05.<sup>15</sup> The state's justifications for Rule 6.05 were thus held inadequate to warrant the restrictions placed upon the members of ISKCON. The state then petitioned for certiorari.

The United States Supreme Court granted "certiorari in light of the important constitutional issues presented and the conflicting results reached in similar cases in various lower courts."<sup>16</sup> The Court pointed out that the issue was not whether the oral and written dissemination of the Krishnas' views and doctrines was protected by the first amendment, but rather whether Rule 6.05 was a permissible restriction on the place and manner of communicating those views.<sup>17</sup> The Court noted that the appropriate standard required for a valid time, place, and manner restriction is that the restriction: (1) not be based on the content or subject matter of the speech; (2) not be subject to arbitrary application;

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such as books, flowers, flags, incense, or artifacts and from engaging in sales or solicitation for monetary donations throughout the fairgrounds except from a booth rented from the Society." 101 S. Ct. at 2563, n.8. They were permitted, however, to "roam throughout those areas of the fairgrounds generally open to the public for the purpose of discussing with others their religious beliefs." *Id.* at 2563.

14. 299 N.W.2d at 81. It is important to note that the Minnesota Supreme Court rested its decision on the constitutional right to free exercise of religion, *id.*, although they continually speak throughout the opinion of "[f]irst [a]mendment rights." *Id.* at 83. This is somewhat confusing since freedom of speech and the free exercise of religion are both first amendment rights.

15. *Id.* at 84.

16. 101 S. Ct. at 2563 (footnote omitted). In a footnote to the opinion the Court lists six cases either invalidating or upholding a "booth" rule similar to Minnesota's and five other cases which raised related issues concerning religious groups' access to other types of public facilities, including airports, highway rest stops, a performing arts center, and the World Trade Center. *Id.* at n.9. For a listing of some of these related cases in state and lower federal courts, see *United States v. Silberman*, 464 F. Supp. 866, 870 (M.D. Fla. 1979).

17. 101 S. Ct. at 2563. The Court emphasized that it has often approved restrictions on first amendment activities as to reasonable time, place, and manner. *Id.* See, e.g., *Grayned v. City of Rockford*, 408 U.S. 104 (1972); *Adderley v. Florida*, 385 U.S. 39, 47-48 (1966); *Cox v. New Hampshire*, 312 U.S. 569 (1941). It is not refuted in *Heffron* that each of the activities restricted (distribution of literature, sale of literature, and solicitation of funds) is an expression of free speech and, therefore, constitutionally protected. 101 S. Ct. at 2563.

(3) serve a significant governmental interest; and (4) allow for alternative forums for the particular form of expression. The Court first concluded that Rule 6.05 was neither content based nor subject to arbitrary application and thus the rule did not violate either of the first two criteria.<sup>18</sup>

The Court then addressed whether the restriction served a significant governmental interest. This governmental interest "must be assessed in light of the characteristic nature and function of the particular forum involved."<sup>19</sup> After evaluating this issue, the Court concluded that the state's asserted interest in crowd control was viewed too narrowly by the Minnesota Supreme Court.<sup>20</sup> Justice White, writing for the majority,<sup>21</sup> stated that ISKCON had "no special claim to [f]irst [a]mendment protection"<sup>22</sup> and that the justification for the rule should be measured by the disorder that would result if all other religious, nonreligious, and noncommercial organizations could move freely about the fairgrounds distributing and selling literature and soliciting funds.<sup>23</sup> The Court found that the alternative means suggested by the Minnesota Supreme Court would not deal adequately with the problems posed by the much larger number of distributors that would be present if members of all organizations could move freely about.<sup>24</sup> The Court thus held

18. 101 S. Ct. at 2564-65. Although ISKCON argued that the rule *was* content based in that it preferred "listener-initiated" exchanges to those commenced by the speaker, the Court recognized that Rule 6.05 applied to all potential exhibitors alike and that the argument had "little force." *Id.* at 2564, n.12.

Rule 6.05 is not open to arbitrary application. It does not permit punishment for the expression of an unpopular point of view and is not open to subjective or discriminatory enforcement. *Id.* at 2564-65. *But cf.* *Coates v. City of Cincinnati*, 402 U.S. 611, 615 (1971) (Court held unconstitutional an ordinance punishing sidewalk assembly of three or more persons conducting themselves in a manner annoying to those passing by); *Cox v. Louisiana*, 379 U.S. 536, 552 (1965) (breach of the peace ordinance was construed to punish for merely espousing an unpopular view).

19. 101 S. Ct. at 2565. *See also* note 56 *infra* and accompanying text. *See, e.g.*, *United States v. O'Brien*, 391 U.S. 367 (1968). In *O'Brien*, the Court found that the government had a compelling interest in insuring that each draft registrant had a draft card in his possession and this was sufficient to justify a draft statute which forbid destroying a draft card. *Id.* at 377. *See also* note 7 *supra*.

20. 101 S. Ct. at 2566.

21. Justice White is joined in his opinion by Chief Justice Burger and Justices Stewart, Powell, and Rehnquist.

22. 101 S. Ct. at 2566.

23. *Id.* at 2567. It should be noted that ISKCON emphasized in its brief and oral argument to the Court that it was willing to rest its challenge wholly upon their general right to free speech. Nevertheless, the majority in *Heffron* chose to discuss *Sankirtan*, and hence the free exercise clause in a manner seemingly inconsistent with prior case law. *Id.* at 2569-70, n.3 (Brennan, J., concurring in part and dissenting in part).

24. *Id.* at 2566-67.

that the state had a significant governmental interest in crowd control that warranted a place or manner restriction.<sup>25</sup>

Finally, the Court discussed the requirement that alternative forums exist for the particular form of expression. Justice White stated that Rule 6.05 was "not vulnerable on this ground."<sup>26</sup> In support of this conclusion, Justice White stated that the rule: (1) did not prevent Sankirtan anywhere outside the fairgrounds; (2) did not deny ISKCON members access to the fairgrounds; and (3) did not deny the right to conduct any desired activity at some point within the forum.<sup>27</sup> Accordingly, the validity of Rule 6.05 was upheld.

In *Heffron*, the Court has again failed to carry its analysis to a logical conclusion. By not analyzing the validity of Rule 6.05 as it applies to each of the activities restricted, the majority failed to recognize that some of the state's asserted interests may be reasonable as applied to each of these activities (distribution of literature, sale of literature, and solicitation of funds) while others may not. Justice Brennan, joined by Justices Marshall and Stevens, concurring and dissenting in part in a separate opinion, joined the Court's judgment insofar as it upheld the rule's restrictions on sales and solicitations,<sup>28</sup> but maintained that Rule 6.05 was invalid as applied to distribution of literature because "the [s]tate could have drafted a more narrowly-drawn restriction on the right to distribute literature without undermining its interest in maintaining crowd control."<sup>29</sup>

In support of his conclusion, Justice Brennan relied on language used in *Village of Schaumburg v. Citizens for a Better Environ-*

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25. *Id.* at 2567. The state had also asserted interests in the rule as an antifraud measure and as a means to protect the fairgoers from harassment. The Court declined to reach the issues of whether these two purposes were constitutionally sufficient to support Rule 6.05 because of their holding that the rule was justified solely in terms of the state's interest in crowd control. *Id.* at 2565, n.13.

26. *Id.* at 2567.

27. *Id.* The Court's opinion rejected the claim that Rule 6.05 effects a total ban on first amendment activities since the booths are within the area of the fair where visitors are expected and encouraged to pass. *Id.* at 2568, n.16.

28. *Id.* at 2569.

29. *Id.* at 2572. Justice Blackmun, writing for himself, also concurred and dissented in part. He found the rule to be unconstitutional as applied to the distribution of literature for the reasons stated by Justice Brennan. He agreed it was constitutional as applied to the sale of literature and solicitation of funds, but reached the latter conclusion by a different analysis. Where Justice Brennan would uphold the rule as applied to sales and solicitation as an antifraud measure, Blackmun agreed with the majority's conclusion that Rule 6.05 is justified because of the state's interest in crowd control. *Id.* at 2572-73 (Blackmun, J., concurring in part and dissenting in part).

ment.<sup>30</sup> In *Schaumburg*, the Court stated:

[a state] may serve its legitimate interests, but it must do so by narrowly drawn regulations designed to serve those interests without unnecessarily interfering with [f]irst [a]mendment freedoms. . . . (citations omitted) "Broad prophylactic rules in the area of free expression are suspect. Precision of regulation must be the touchstone. . . ."<sup>31</sup>

Applying this language to the present case, Justice Brennan found that Rule 6.05 was not narrowly drawn to advance the state's interests, and therefore placed a significant restriction on ISKCON members' ability to exercise their first amendment rights.<sup>32</sup> Justice Brennan thus affirmed that part of the Minnesota Supreme Court's opinion that struck down Rule 6.05 as it applied to the distribution of literature.<sup>33</sup>

The *Schaumburg* rationale is illustrative of the Supreme Court's continuing search for the types of restrictions that may be legitimately imposed upon protected first amendment activities.<sup>34</sup> The Court has often held that activities protected by the first amendment are subject to reasonable time, place, and manner restrictions if the regulation serves a legitimate state interest and is narrowly drawn.<sup>35</sup> As early as 1941, the Court in *Cox v. New Hampshire*<sup>36</sup> upheld a licensing requirement for parades through city streets, finding that the state had authority to control the use of its public streets and therefore the authority to control the time, place, and manner of parades and processions.<sup>37</sup> Similarly in 1972, in

30. 444 U.S. 620, *rehearing denied*, 445 U.S. 972 (1980). *Schaumburg* dealt with an ordinance which required charitable organizations to obtain a permit to solicit door-to-door. The ordinance required that an organization applying for a permit show that 75% of the proceeds would be directly used for the organization's charitable purposes. The Court agreed with the court of appeals that the ordinance was overbroad and, therefore, violative of the first and fourteenth amendments. *Id.* at 636. For a discussion of the *Schaumburg* decision, see 9 FLA. ST. U.L. REV. 185 (1981). See also Marshall, *Village of Schaumburg v. Citizens for a Better Environment and Religious Solicitation: Freedom of Speech and Freedom of Religion Converge*, 13 LOY. L.A.L. REV. 953 (1980).

31. 444 U.S. at 637, quoting *NAACP v. Button*, 371 U.S. 415, 438 (1963) (citations omitted).

32. 101 S. Ct. at 2572.

33. *Id.* See text accompanying note 15 *supra*.

34. For other examples, see *Hynes v. Mayor of Oradell*, 425 U.S. 610, 616-17 (1976); *Niemotko v. Maryland*, 340 U.S. 268, 275 (1951) (Frankfurter, J., concurring in result). See also note 17 *supra* and accompanying text.

35. See text accompanying note 31 *supra*.

36. 312 U.S. 569 (1941).

37. *Id.* at 576.



*Grayned v. Rockford*,<sup>38</sup> the Court upheld an ordinance which prohibited deliberately noisy or diversionary activity which would disrupt normal school activities, finding that the ordinance was narrowly tailored to further Rockford's compelling interest in having its school environments conducive to learning.<sup>39</sup>

On the other hand, the Court has often struck down regulations which were not narrowly drawn. For example, in *Lovell v. City of Griffin*<sup>40</sup> the Court declared an ordinance which prohibited distribution of literature of any kind without first obtaining written permission to be facially invalid because it was "not limited to ways which might be regarded as inconsistent" with the state's asserted interest.<sup>41</sup> Similarly, in *Shelton v. Tucker*,<sup>42</sup> the Court invalidated a statute which required public school teachers to annually disclose their organizational ties. The Court pointed out that a state's purpose, however legitimate and substantial, "cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved."<sup>43</sup> More recently, the Court held in *Central Hudson Gas & Electric Corp. v. Public Service Commission*<sup>44</sup> that a PSC regulation was unconstitutional because it suppressed speech which in no way impaired the state's interest.<sup>45</sup>

Justice Brennan's assertion in *Heffron* that Rule 6.05 was not narrowly drawn to advance the state's interests is consistent with these prior decisions concerning time, place, and manner restrictions. Whereas the ordinance in *Grayned* was specifically tailored to restrict noise which would disrupt the school session, the regulation in *Heffron* is similar to the ordinance struck down in *Lovell* in that Rule 6.05 is not limited to ways which might necessarily be regarded as inconsistent with the maintenance of crowd control. As suggested by the Minnesota Supreme Court<sup>46</sup> and reiterated by

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38. 408 U.S. 104 (1972).

39. *Id.* at 119. *Cf.* *Adderley v. Florida*, 385 U.S. 39, 47-48 (1966) (a 5-4 decision of the Warren Court affirming the trespassing convictions of 32 Florida A & M students who claimed a first amendment right to peacefully protest on a jailhouse lawn); *Consolidated Edison Co. v. Public Serv. Comm'n*, 447 U.S. 530, 544 (1980) (invalidating an order of the Public Service Commission prohibiting the inclusion of inserts in monthly utility bills which discussed controversial issues of public policy).

40. 303 U.S. 444 (1938).

41. *Id.* at 451.

42. 364 U.S. 479 (1960).

43. *Id.* at 488.

44. 447 U.S. 557 (1980).

45. *Id.* at 570.

46. 299 N.W.2d at 84.

Justice Brennan, a legitimate interest in avoiding crowd disorder could be served by a carefully drawn statute which would either allow for the distribution of literature in some open areas of the fairgrounds where traffic patterns could handle that activity, or limit the number of persons distributing literature in the open areas.<sup>47</sup>

Rule 6.05 also fails to meet the correct standard for a permissible time, place, and manner restriction, as articulated in prior case law, because the regulation, as applied to the distribution of literature, was not shown to further the asserted state interest. In *Heffron* there was no evidence in the record to support the majority's finding that crowd control problems would be more significant if distribution of literature was not confined to a booth.<sup>48</sup> As Justice Brennan noted, the state had instead relied on a general, speculative fear of disorder which is insufficient to overcome the right to free expression.<sup>49</sup> Both Justice Brennan and Justice Blackmun asserted that allowing distribution of literature was unlikely to cause greater crowd control problems than already existed with the oral proselytizing that was allowed under the rule.<sup>50</sup>

A finding in *Heffron* that Rule 6.05, as it applied to the distribution of literature, was not shown to further the state's asserted interest would have been consistent with the analysis which the Court recently applied in *Schad v. Borough of Mount Ephraim*.<sup>51</sup> In *Schad*, decided three weeks prior to *Heffron*, the Court invalidated, on first amendment grounds, the convictions of the operators of an adult bookstore who had been penalized under a zoning

47. 101 S. Ct. at 2571.

48. *Id.* at 2570-71.

49. *Id.* at 2571. See *Tinker v. Des Moines Independent Community School Dist.*, 393 U.S. 503 (1969). In *Tinker*, the Court stated:

Under our Constitution, free speech is not a right that is given only to be so circumscribed that it exists in principle but not in fact. Freedom of expression would not truly exist if the right could be exercised only in an area that a benevolent government has provided as a safe haven for crackpots. The Constitution says that Congress (and the [s]tates) may not abridge the right to free speech.

*Id.* at 513.

50. 101 S. Ct. at 2570-73. Two recent circuit court decisions factually analogous to the instant case held rules similar to Rule 6.05 unconstitutional on the basis that the record failed to reflect evidence that serious disruption would result if the rules were invalidated. See *Edwards v. Maryland State Fair and Agricultural Soc'y, Inc.*, 628 F.2d 282, 286 (4th Cir. 1980) and *International Soc'y for Krishna Consciousness, Inc. v. Bowen*, 600 F.2d 667, 670 (7th Cir.), *cert. denied*, 444 U.S. 963 (1979). A similar finding in *Heffron* would be supported by three affidavits contained in the record. 101 S. Ct. at 2571, n.5.

51. 101 S. Ct. 2176 (1981).

ordinance prohibiting all live entertainment.<sup>52</sup> The Court found *no evidence* to support Mount Ephraim's asserted claim that live entertainment in the borough would cause additional problems with parking, trash, police protection, and medical facilities.<sup>53</sup> Because Mount Ephraim failed to establish that its interests could *not* be met by restrictions that were *less* intrusive on the protected forms of expression, the regulation was held unconstitutional.<sup>54</sup> In *Heffron*, the Court failed to hold the state to the burden of establishing that its interest in crowd control could not be met by restrictions less intrusive than Rule 6.05, as it specifically applied to the distribution of literature. Thus, the Court did not require Rule 6.05 to meet the standard employed in *Schad* for a time, place, or manner restriction.

A third shortcoming of the *Heffron* decision is its failure to adequately analyze the compatibility of distributing literature in the open areas of the fairgrounds with the normal activity that takes place on a fairground. In *Grayned* the Court stated that when determining whether a regulation is permitted to further significant governmental interests "[t]he crucial question is whether the manner of expression is basically incompatible with the normal activity of a particular place at a particular time."<sup>55</sup> In *Heffron*, Justice White reiterated this same analysis by stating that the interest "must be assessed in light of the characteristic nature and function of the particular forum involved,"<sup>56</sup> but then failed to adequately assess the characteristic nature of the fair. The Minnesota State Fair attracts large crowds who are free to roam about, give speeches, engage in face-to-face advocacy, campaign, or proselytize.<sup>57</sup> In general, it is a public forum for the communication of ideas and information. At this type of forum, where the fair officials themselves were distributing literature<sup>58</sup> and the atmosphere

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52. *Id.* at 2186. The Court cited the following language from *Grayned*: "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 [s]tate's legitimate interest." *Id.* (citing 408 U.S. at 116-117) (footnotes omitted).

53. 101 S. Ct. at 2185.

54. *Id.* at 2186-87.

55. 408 U.S. at 116. *Cf.* *Cameron v. Johnson*, 390 U.S. 611, 617 (1968) (Court upheld a statute prohibiting picketing in a manner that would interfere with free access to any courthouse); *Cox v. Louisiana*, 379 U.S. 559, 562, 565 (1965) (Court indicated that, because of the special nature of the place, persons could be constitutionally prohibited from picketing in or near a courthouse with the intent of interfering or obstructing the administration of justice.)

56. 101 S. Ct. at 2565.

57. *Id.* at 2569 (Brennan, J., concurring in part and dissenting in part).

58. *Id.* at 2571, n.5 (Brennan, J., concurring in part and dissenting in part).

is conducive to spontaneous and often disorderly communication of ideas, distribution of literature in the open areas of the fairgrounds is compatible with the normal activity of the fair. To restrict the distribution of literature to a rented booth is an overly intrusive means of achieving the state's interest in crowd control and inconsistent with the analysis enunciated in *Grayned* and by Justice White in *Heffron*.<sup>59</sup>

#### CONCLUSION

The *Heffron* decision is illustrative of the Supreme Court's continuing search for a just balance between time, place, and manner restrictions that may legitimately be imposed upon activities protected by the first amendment. Any restriction of first amendment activities must be narrowly tailored. In *Heffron*, the Court has failed to scrutinize each of the activities in issue and to assess the reasonableness of Rule 6.05 as it specifically applied to the distribution of literature. A valid time, place, and manner restriction must be shown to serve a substantial governmental interest and be narrowly tailored in such a way so as to infringe upon the protected form of speech in the least intrusive manner possible. The record in *Heffron* does not show that the crowd control problems asserted by the state would be increased if Rule 6.05 allowed distribution of literature in the open areas of the fairgrounds. Furthermore, the state did not establish that its interest could not have been met by a restriction less intrusive on the activity of literature distribution. Absent this evidence in the record, the holding in *Heffron* is inconsistent with the analysis of time, place, and manner restrictions that may legitimately be imposed on protected forms of expression.

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59. This conclusion is supported by the lack of evidence in the record to support a finding that, absent the rule, crowd control problems would be increased. See note 50 *supra* and accompanying text.