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Constitutional Law-First Amendment-Symbolic Speech-Clark v. Community for Creative Non-Violence

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COMMENTS ON DECISIONS

Constitutional Law—First Amendment—Symbolic Speech—Clark v. Community for Creative Non-Violence

In the case of Clark v. Community for Creative Non-Violence, the Supreme Court, in a 7-2 decision, held that certain National Park Service regulations, which were applied to prohibit proposed sleeping demonstrations by the Community for Creative Non-Violence did not violate the first amendment. This decision raises a question as to the inevitable “chilling effect” on the use of sleeping as symbolic speech in public forums under the first amendment that goes beyond the specific facts of the case.

The implications of Clark are not easily discernible. In light of the prolific first amendment cases handed down through the years, the decision may be seen by some as a legal aberration. To others, however, the decision signifies an alarming trend by the Supreme Court towards the erosion of rights in the free speech arena. It is for this reason that the vigorous dissenting opinion of Justice Marshall will be of particular import to this comment.

I. Background of the Case

The Community for Creative Non-Violence (CCNV) is an unincorporated religious association that works on behalf of the

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1. The petitioner to the Supreme Court is William P. Clark, Secretary of the Interior. The four previous suits before the federal courts were filed against “James Watt, Secretary of the Interior.” Only weeks after the Court’s October 1983 term, Watt was replaced as Secretary by Clark.
3. Justice White wrote the opinion of the Court, and was joined by Justices O’Connor, Rehnquist, Blackmun and Stevens; Chief Justice Burger wrote a separate concurrence, Justice Marshall wrote a dissenting opinion, joined by Justice Brennan.
4. Clark, 104 S. Ct. at 3065.
5. The first amendment provides in part that: Congress shall make no law... abridging the freedom of speech... or of the right of the people peaceably to assemble, and to petition the Government for a redress of grievances. U.S. Const. amend. I.

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poor and homeless by supplying food, shelter and other assistance to them. In order to draw attention to the desperate plight of the homeless, CCNV planned a demonstration in Lafayette Park in Washington, D.C. The demonstration was to take place from November 26, 1981 through March 20, 1982. In the fall of 1981, CCNV applied to the National Park Service (Park Service) for a permit. The Service was informed that CCNV would provide the demonstrators with shelter in the form of tents, sleeping bags and blankets. The Park Service granted CCNV a seven-day renewable permit for a demonstration that would include the erection of nine "symbolic" tents, but denied the group permission to sleep in the tents, citing a Park Service regulation which restricted "camping" to areas designated by the Superintendent of National Capital Parks. Lafayette Park was not a designated camping area.

After it received the Park Service's denial, CCNV filed suit in the District Court for the District of Columbia seeking to enjoin the Park Service from denying them permission to demonstrate in the above manner. The district court granted CCNV's motion for summary judgment, and the Park Service appealed.

The Court of Appeals for the District of Columbia avoided the constitutional question presented by the case merely by invoking the principle that courts have a duty to exercise self-restraint by not passing upon the constitutionality of a statute or regulation, if it is possible to construe the statute or regulation

7. President Jefferson set aside seven acres in the heart of Washington, D.C. as a park for the use of residents and visitors. It is located across Pennsylvania Avenue from the White House. Clark, 104 S. Ct. at 3067.
8. Watt I, 670 F.2d at 1214.
9. Since 1983, the Interior Department, through the National Park Service, has been responsible for managing and maintaining all of the national parks, 16 U.S.C.A. §§ 1, 1a-1, 3 (1983).
10. Watt I, 670 F.2d at 1214.
11. Id. at 1215. Permission to erect the symbolic tents was granted pursuant to 36 C.F.R. § 50.19(e)(8) (1982), which states in pertinent part that "temporary structures may be erected for the purposes of symbolizing a message . . . ."
12. Watt I, 670 F.2d at 1214 (citing 36 C.F.R. § 50.27(a) (1985)).
13. Id.
14. Id. at 1214-15.
15. Id. at 1215.
in a way that would avoid the constitutional question. The court interpreted the Park Service's regulations in such a way as would allow CCNV to sleep in the tents as an intrinsic part of their protest against governmental policies which, it was alleged, contributed to the lack of shelter. To support this interpretation, the court also relied on a policy statement issued by the Park Service contemporaneously with the promulgation of its camping regulations. Thus, the court concluded, the regulations actually allowed plaintiffs to sleep in the tents as part of their protest and the Park Service had merely misinterpreted its own regulations. As the court asserted, "in this case sleeping itself may express the message that these persons are homeless and so have nowhere else to go."

Within a few months of this decision, the Park Service revised its regulations. Its new regulations prohibited the act of sleeping in national parks "when it reasonably appears, in light of all the circumstances, that the participants in conducting these activities are in fact using the area as a living accommodation regardless of the intent of the participants or the nature of any other activities in which they may also be engaging." The Park Service justified this prohibition as a means of protecting parks from "activities for which they are not suited and the impacts of which they cannot sustain."

After the Park Service revised its regulation, CCNV applied for a permit to stage a demonstration that would include sleeping in symbolic tents during the winter of 1982-83. The pur-
pose of the demonstration was identical to that of the previous demonstration; that is, to impress the plight of the homeless upon the Reagan Administration, Congress, and the public. The Park Service granted CCNV a permit to stage a round-the-clock demonstration and to set up two symbolic campsites, one on the Washington, D.C. Mall with a maximum of 100 participants and 40 tents, and one in Lafayette Park with approximately 50 participants and 20 tents. But, relying upon the newly revised anti-camping regulations, the Park Service denied a permit for the demonstrators to actually sleep in the tents. CCNV then applied for a court order invalidating the permit’s prohibition against sleeping in the tents as an unconstitutional infringement upon its first amendment rights of freedom of speech. The prohibition, CCNV argued, struck at the core message the demonstrators wished to convey—that homeless people have no permanent place to sleep.

After cross motions for summary judgment were filed, the district court held in favor of the Park Service. This time, the court emphasized the fact that on its permit application CCNV had stressed the necessity of providing sleeping accommodations so as to attract homeless persons to participate in the demonstration. This, according to the court, indicated that CCNV’s motive in seeking sleeping accommodations was to attract participants for its demonstration and was not solely to express a message. The court added that because the Park Service regulations were neutral in content, they did not violate the first amendment.

The Court of Appeals for the District of Columbia, in a sharply divided en banc opinion, held that if the regulations

24. Id. at 587.
25. Id.
26. Id.
27. Id.
28. Id.
29. Id.
30. Id.
31. Id.
32. Id.
33. See Clark, 105 S. Ct. at 3068. ("The 11 judges produced 6 opinions. Six of the judges believed that application of the regulations so as to prevent sleeping in tents would infringe the demonstrators’ first amendment right of free expression. The other five judges disagreed and would have sustained the regulations as applied to the pro-
were applied so as to prevent sleeping in the tents, there would be an infringement of the demonstrators' first amendment right of free expression. The court began by recognizing that first amendment activities may be subject to reasonable time, place, and manner restrictions. Yet the court concluded that the Park Service failed to establish that the asserted governmental interest—maintaining the beauty of the parks—would be furthered by forbidding the demonstrators to sleep in the tents. Once again, the Park Service appealed.

The Supreme Court granted the government's petition for certiorari, and held that the revised Park Service regulations did not violate CCNV's first amendment rights. The Court found that the revised Park Service regulations are indeed reasonable time, place, and manner restrictions upon any type of expression, whether oral, written, or symbolized by conduct. The regulations are content neutral, said the Court, and furthermore leave open ample alternative methods of communicating CCNV's intended message regarding the homeless. According to the Court, the regulations are narrowly tailored so as to focus on the government's substantial interest in maintaining the parks in an attractive and intact condition, so they are readily available to all who wish to enjoy them. Lastly, the court stated, the regulations are sustainable because they meet the standards for a valid regulation of expressive conduct.

II. BACKGROUND

For over a half century, the Supreme Court has grappled with problems involving two of the freedoms guaranteed by the first amendment—the freedoms of speech and of peaceable assembly. Difficulty arises because the exercise of these freedoms often conflict with the legitimate state interest in keeping public order. Or, as one commentator has simply stated, "[f]or each

posed demonstration).  
34. Id.  
35. Watt II, 703 F.2d at 598-99.  
36. Clark, 104 S. Ct. at 3066.  
37. Id.  
38. Id.  
39. Id.  
40. Id. at 3066-67.
group of demonstrators that wishes to assemble on a street corner and disseminate its ideas, there is always a public official responsible for assuring that the demonstration will be peaceful and will not disrupt competing activities."\(^{41}\)

Conduct that can be defined as symbolic expression presents an added difficulty in first amendment analysis. Does the first amendment protect expressive non-verbal conduct? And, if so, when, if ever, may the government infringe upon that protected right? On various occasions, the Supreme Court has suggested some answers to these fundamental questions.

The Supreme Court, in *Stromberg v. California*,\(^ {42}\) held that certain non-verbal conduct is protected under the first amendment. The Court therefore struck down a California statute that prohibited the displaying of a red flag when the display was meant to symbolize opposition to organized government.\(^ {43}\) In *Stromberg*, the appellant was convicted of violating this California statute, and appealed alleging a violation of his first amendment rights.\(^ {44}\) In holding for the appellant, the Court excised the clause in the statute that condemned the displaying of a flag "as a sign, symbol or emblem of opposition to organized government" because, according to the Court, that clause might be construed in such a way as to include "peaceful and orderly opposition to government by legal means and within constitutional limitations."\(^ {45}\)

Some 35 years later, the Supreme Court was again faced with a case involving expressive non-verbal conduct and again affirmed the protected nature of such conduct. In *Brown v. Louisiana*,\(^ {46}\) the Court asserted that first amendment rights are not confined to verbal expression, but "embrace appropriate types of action which certainly include the right in a peaceable and orderly manner to protest by silent and reproachful presence, in a place where the protestant has every right to be, the unconstitutional segregation of public facilities."\(^ {47}\) The action at issue in

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42. 283 U.S. 359 (1931).
43. *Id.* at 369-70.
44. *Id.* at 361.
45. *Id.* at 369.
47. *Id.* at 141-42.
Brown involved five black men who had protested the segregational practices of Louisiana public libraries by having one of them sit down in a library while the others stood near him.46 Three years after Brown was decided, the Court again considered the issue of suppression of expressive non-verbal action. In Tinker v. Des Moines School District,49 the Court held that the suspension of junior high school students for wearing black armbands violated the students' first amendment rights because the armbands were intended to symbolize the students' opposition to the Vietnam War.50 After noting the fact that the school's rule against the wearing of such armbands was promulgated in anticipation of the organized student protest, the Court asserted that what was being suppressed was not "actually or potentially disruptive conduct," but instead something that was nearly "pure speech."51

The Tinker decision is significant for two reasons. First, the Court noted that the school officials acted out of "an urgent wish to avoid the controversy which might result from the expression."52 This subjective fear was not a valid reason for infringing upon a protected freedom, said the Court.55 Second, the Court found it relevant that the school officials' rule lacked content neutrality in that it did not prohibit the wearing of all symbols of politically controversial significance.54 In fact, the Court found that evidence of students wearing political campaign buttons and Nazi Iron Crosses abounded.56 The Court affirmed that it would not tolerate such blatant discrimination.56

Finally, in Spence v. Washington,57 the Court held that the display of a United States flag with a removable peace sign attached to it was conduct protected under the first amendment.58 The Spence decision is particularly significant because, for the

48. Id. at 131.
50. Id. at 505-06.
51. Id. at 505.
52. Id. at 510.
53. Id.
54. Id. at 510-11.
55. Id. at 510.
56. Id. at 511.
58. Id. at 414-15.
first time, the Court formulated a viable framework for determining whether conduct will be considered "speech" within the context of the first amendment. In this case, petitioner Spence hung from the window of his apartment a United States flag with a large peace sign affixed to it with removable tape. He was convicted under a Washington statute forbidding the exhibition of an American flag to which is attached or superimposed figures, symbols, or other extraneous materials. Spence claimed that he had displayed the flag in order to protest both the Kent State killings (which had occurred a few days earlier) and the American invasion of Cambodia. The Court reversed Spence's conviction, after finding that Spence had engaged in a form of communication without the use of spoken or printed word.

In order to determine whether Spence's activity was "sufficiently imbued with the elements of communication to fall within the scope of the First and Fourteenth amendments," the Court examined "the nature of the activity, combined with the factual context and environment in which it was undertaken." Applying these principles to Spence, the Court said that the nature of his activity was the displaying of a flag with a peace symbol affixed as a protest. The historical context for the protest was the Cambodian invasion and the recent Kent State massacre. According to the Court, this context gave meaning to the symbol. The Court held that Spence had engaged in constitutionally protected activity because "an intent to convey a particularized message was present, and in the surrounding circumstances the likelihood was great that the message would be understood by those who viewed it."

Although the Spence analytical framework is significant for ascertaining first amendment protection for symbolic expression, it is not dispositive. Sometimes, for example, the state's interest in regulating the conduct is inapposite to the conduct's expres-

59. Id. at 405.
60. Id. at 408.
61. Id. at 414-15.
62. Id. at 409.
63. Id. at 409-10.
64. Id. at 408.
65. Id. at 410-11.
66. Id. It is important to note that in Spence, Spence's flag was privately owned, and his conduct took place on private property.
sive conduct. When this occurs, the Court has applied a balancing test in which the state’s interest in regulating the conduct may be found to outweigh the protestant’s interest in using that particular mode of expression. This is what happened in *U.S. v. O'Brien*, a case that preceded *Spence*.

O'Brien and several others were arrested for burning their Selective Service registration certificates on the steps of a courthouse, before a sizable crowd which included F.B.I. agents. He was convicted for violating a federal statute prohibiting the knowing destruction or mutilation of a Selective Service certificate. O'Brien appealed on free speech grounds.

The Supreme Court asserted that "when 'speech' and 'non-speech' elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the non-speech element can justify incidental limitations on first amendment freedoms." Thus, the test enunciated by the Court in *O'Brien* to determine whether a governmental regulation is sufficiently justified is: 1) Is the regulation within the constitutional power of the government? 2) If so, does it further an important or substantial governmental interest? 3) If so, is the governmental interest which the regulation seeks to promote unrelated to the suppression of free expression? 4) If so, is the incidental restriction on alleged first amendment freedoms no greater than is essential to further that governmental interest? In *O'Brien*, the Court found all of the requirements were satisfied and thus found the regulation sufficiently justified.

The application of the *O'Brien* test poses some problems. The first prong of the test (that the regulation be within the constitutional power of the government) rarely poses a problem. However, the second prong (that the regulation further an important or substantial governmental interest) may present a problem. Because such words as "important" and "substantial" may be interpreted in a variety of ways, the Court in *O'Brien*

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68. *Id.* at 369.
69. *Id.* at 370.
70. *Id.*
71. *Id.* at 376.
72. *Id.* at 377.
73. *Id.*
74. *Watt II*, 703 F.2d at 614 (Wilkey, J., dissenting).
listed such adjectives as "compelling; subordinating; paramount; cogent; strong" to describe the nature of the governmental interest in regulating the non-speech element of expressive conduct which can justify curtailment of first amendment rights. If one assumes that this list is exhaustive, mere governmental or administrative convenience could never pass constitutional muster as far as first amendment treatment is concerned.

Since O'Brien, there have been a number of Supreme Court cases that involve the second prong of the test. In one such case, Heffron v. International Society for Krishna Consciousness, the Court upheld a state regulation that provided that anyone who wished to sell or distribute merchandise (including printed material) or solicit funds at the Minnesota State Fair must do so only from an assigned booth. The International Society for Krishna Consciousness (ISKON) objected to the regulation on first amendment grounds. The Court, however, found a significant governmental interest in protecting the "safety and convenience" of fairgoers, and the "orderly movement of the crowd." Also, after finding the fairground to be a public forum, the Court found the governmental interest in public safety particularly substantial and narrowly drawn.

The third prong of O'Brien (that the governmental interest be unrelated to the suppression of free expression) has been interpreted to mean that any curtailment of free expression must be incidental to the prevention of a harm which would result whether or not the message is conveyed. If the harm that a

75. O'Brien, 391 U.S. at 376-77 (footnotes omitted).
78. Id. at 643.
79. Id. at 644-45. Specifically, ISKON sought injunctive relief prohibiting enforcement of the rule against their members. They asserted that the rule would suppress the practice of Sankirtan, one of its religious rituals, which enjoins its members to go into public places to distribute or sell religious literature and to solicit donations for the support of their religion.
80. Id. at 649-51.
81. Id. at 654-55.
82. See, e.g., Schneider v. New Jersey, 308 U.S. 147 (1939) (Attempts to prevent lit-
state seeks to prevent arises solely because of the communicative nature of the conduct, the regulation will fail the third prong of

O'Brien.

The fourth prong of O'Brien (that the restriction on free expression be no greater than necessary to the furtherance of the governmental interest) has been interpreted in at least two different ways. One interpretation, the "weak construction," merely requires that there be no less restrictive alternative which could achieve the government's objective as efficiently as does the challenged regulation.83 The other interpretation, which is more favorable to those seeking first amendment protection, balances the value of the first amendment freedom against the loss in efficiency to the governmental objective if the Government is forced to utilize a less restrictive alternative.84

Notwithstanding the substantial impact that O'Brien and Spence have made on first amendment free-speech analysis, there is yet another class of cases that are equally significant. These are the cases that deal with time, place, and manner restrictions.

The first amendment does not give absolute protection to every individual to communicate whenever or wherever he or she pleases.85 Nor does it ensure to anyone the freedom to use any method of communication in any circumstances. Even expressive activities that fall within the confines of the first amendment may be subject to reasonable "time, place, and manner" restrictions.86 Generally, the Supreme Court looks for three basic requirements in such restrictions. These are: 1) the regulation must be content neutral; 2) the regulation must serve a significant governmental interest; and 3) there must be an available

83. Ely, supra note 82, at 1484-85.
84. Id. at 1482-1490.
85. Heffron, 452 U.S. at 647-48; Clark, 104 S. Ct. at 3069.
86. Heffron at 647-48; Clark at 3069.
alternative channel of communication. Although it had been initially discussed some 43 years ago, the time, place, and manner concept has only recently resurfaced. The exact holding of the Heffron decision was based on such an analysis. First, the Minnesota regulation in Heffron was content-neutral, said the Court, in that it did not serve to regulate the content of the speech. Second, according to the Court, the regulation served a significant governmental interest in crowd control. Lastly, the Court found that the regulation left open alternative channels for the communication of the desired information.

When the Court does consider time, place, and manner restrictions, it looks to see if the regulation furthers a certain governmental interest. An "undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression." In other words, the government must show that the forbidden conduct would actually and substantially interfere with the government's objective.

The characteristics of the situs or "forum" where the particular expressive conduct will take place must also be considered when engaging in time, place, and manner analysis. The logical nexus between the two was shown in United States v. Grace.

Grace and others were informed by police officers that their actions in carrying signs or distributing leaflets on the public sidewalks around the Supreme Court building violated a federal statute which made it unlawful to "display . . . any flag, banner, or device designed or adapted to bring into public notice any party, organization, or movement." Grace challenged that stat-

89. Cox, 312 U.S. at 569.
90. Heffron, 452 U.S. at 647-55.
91. Id. at 649.
92. Id. at 650-51.
93. Id. at 654-55. The Court stated that the rule does not prevent ISKON from practicing Sankirtan anywhere outside the fairgrounds. ISKON members may mingle with the crown and orally propagate their views, and they may arrange for a booth and distribute and sell literature and solicit funds from that location on the grounds.
94. Tinker, 393 U.S. at 508.
95. Id. at 508-09.
96. Id.
98. Id. at 173-74.
ute on first amendment free speech grounds. The Court, noting that public sidewalks—even those surrounding the Supreme Court building—have traditionally been considered to be public forum property, held that reasonable time, place, and manner restrictions apply. Here, however, because that statute called for a total ban on expressive conduct outside the Supreme Court building, it could not be upheld unless it was narrowly drawn to accomplish a compelling governmental interest. The government’s interest in protecting the Court from outside influence or preventing it from appearing to the public that the Court was subject to such influence was not particularly compelling.

It was against this formidable amalgamation of first amendment balancing tests that the Supreme Court chose to consider the interests at stake for CCNV and the government in Clark v. Community for Creative Non-Violence.

III. THE DECISION

In his majority opinion, Justice White began by agreeing with the court of appeals that the proposed overnight sleeping in tents by CCNV was expressive conduct that was, to some extent, protected by the first amendment. However, the assumption of constitutional protection merely began the Court’s inquiry.

The Court then proceeded to apply the reasonable time, place, and manner test to the Park Service restrictions. The respondents contended that the regulations were discriminatorily apply because the Park Service had permitted two previous sleeping demonstrations. CCNV therefore asserted an equal

99. Id. at 174-76.
100. Id. at 177.
101. Id.
102. Id. at 183.
103. Clark, 104 S.Ct. at 3065.
104. Id. at 3068-69. In a footnote, the Court rejected the court of appeals’ plurality suggestion that the burden on the respondent (CCNV) is limited to “the advancement of a plausible contention” that their conduct is expressive (Citing Watt II, 703 F.2d at 593 n.16). The Court stated that although it is common to place the burden upon the government to justify impingement on first amendment rights, it is the obligation of the person desiring to engage in assertedly expressive conduct to demonstrate that the first amendment even applies. Id. at 3069 n.5.
105. Id.
106. Id.
107. Respondent’s Opening Brief at 17-18, Clark v. Community for Creative Non-
protection claim. The Court averred that respondents had presented only "isolated instances of undiscovered violations of the regulations." The Court in turn agreed with the government that the regulations forbidding sleeping met the tests of Heffron and its progeny.

The content-neutrality test is met, said the Court, because the prohibition on camping was not being applied because of disagreement with the message CCNV wished to convey. The building of the symbolic city, the holding of signs, and the presence of those who wished to demonstrate in a day-night vigil left the demonstration wholly intact.

The government's substantial interest test is also met, said the Court. Indeed, the Court agreed with petitioner's argument that if the respondent and the demonstrators were to sleep in these national parks, it would create a threat to park beauty. The Court also emphasized the government's substantial interest in park maintenance. According to the majority of the Court, to permit camping would be totally inimical to the purpose of keeping the parks attractive and intact, readily available to the throngs of people who wish to use and enjoy them.

While the Court did not specifically explore the available alternatives test, it alluded to possible alternatives such as having the respondents "take their turns in a day-and-night vigil" in the national park and "delivering to the media" their in-

Violence, 104 S. Ct. 3065 (1984) [hereinafter cited as Respondent's Brief]. In May of 1982, about 1,000 Vietnam War veterans were permitted by the Park Service to sleep overnight in the Mall in order to present a mock war "firebase." The Park Service concluded that the demonstration did not violate the new anti-camping regulations. 36 C.F.R. § 50.27(a) (1982) defines camping as: "the use of park land for living accommodation purposes such as sleeping activities, or making preparations to sleep. . . ." The veteran's conduct does appear to be "sleeping activities" within the meaning of the section.

The second prior occasion occurred in August of 1982 when the Park Service allowed one dozen Arab women to sleep overnight as part of a vigil and fast to protest the Israeli blockage of Beirut.

108. Id. at 91 n.50.
110. Id. at 3070-71.
111. Id. at 3070.
112. Id. at 3070-71.
113. Id. at 3070.
115. Clark, 104 S.Ct. at 3070.
tended message.\textsuperscript{116}

Next the Court asserted that the major value of sleeping would have been only facilitative.\textsuperscript{117} The Court agreed with petitioner's argument that there was no way to tell the difference between sincere protestors and those who only wished to sleep in tents for mere shelter.\textsuperscript{118} The petitioners contended that the poor and homeless would participate, or be present at all, only if they were provided sleeping accommodations.\textsuperscript{119} As evidence, the Court cited the very words on respondent's permit application: "Without the incentive of sleeping or a hot meal, the homeless would not come to the site."\textsuperscript{120}

The Court then looked beyond the issue at hand, to how the regulation may be validly applied in future cases.\textsuperscript{121} The Court voiced concern that other groups would demand permission to deliver an asserted message by camping in the parks.\textsuperscript{122} Other groups would surely have as credible a claim as respondents, and to deny permits to some while granting them to others would cause difficult problems for the Park Service,\textsuperscript{123} according to the majority. Because it believed that the government had a legitimate interest in ensuring that the national parks were adequately protected, the Court held that the regulation was a reasonable restriction on the manner in which a first amendment demonstration may be carried out.\textsuperscript{124}

Finally, in a somewhat brief analysis, the Court decided that the \textit{O'Brien} test, as applied to the regulations, was satisfied.\textsuperscript{125} The regulations were "not unconstitutional on their face"\textsuperscript{126} or "beyond the constitutional power of the government to enforce."\textsuperscript{127} Also, as the Court had previously found, the government's interest in preserving park property was substantial. This interest was served by the measures taken by the Park Ser-

\begin{thebibliography}{99}
\bibitem{footnote116} Id. See also Petitioner's Brief, \textit{supra} note 114, at 16-17.
\bibitem{footnote117} \textit{Clark}, 104 S.Ct. at 3070.
\bibitem{footnote118} Id.
\bibitem{footnote119} \textit{Clark}, 104 S.Ct. at 3070.
\bibitem{footnote120} Id.
\bibitem{footnote121} Id.
\bibitem{footnote122} Id.
\bibitem{footnote123} Id.
\bibitem{footnote124} Id.
\bibitem{footnote125} Id.
\bibitem{footnote126} Id.
\bibitem{footnote127} Id.
\end{thebibliography}
vice—the proscription of sleeping, except in designated areas. Additionally, the Court found the asserted governmental interest was unrelated to the suppression of expressive conduct.

The Court disagreed with the court of appeals as to the fourth prong of the *O'Brien* test. The court of appeals viewed the regulation as unnecessary, and therefore invalid, because it found there were less speech-restrictive alternatives that could have satisfied the government's interest in park preservation.

The court of appeals also suggested that the Park Service could reduce the size, duration, or frequency of demonstrations, thereby minimizing the threat of possible injury to the parks. According to the Supreme Court, however, this amounted to no more than a disagreement with the Park Service over how to protect the parks or how an acceptable level of preservation is to be attained.

The Supreme Court also asserted that neither *O'Brien* nor the traditional time, place, and manner tests gave the judiciary any authority to replace the Park Service as overseer of the nation's parks, or endowed the judiciary with the competence to judge the quantum of protection wisely prescribed by the Park Service.

Chief Justice Burger, in his concurrence, asserted that what the respondents called speech is, in reality, conduct and that respondents were therefore "picketing" in the park. In his view, because they were picketing, they were interfering with the

128. *Id.*
129. *Id.*
130. *Id.*
131. *Id.*
132. *Id.* See also Petitioner's Brief, supra note 114, at 16-18. The government's major argument was indeed the threat to park beauty. They asserted that the prohibition was well-suited and narrowly-tailored to the end of preserving the parks for their unique and multifarious uses. The majority relied on this argument.
133. *Clark*, 104 S. Ct. at 3072.

The first and fourteenth amendments... take away from government... all power to restrict freedom of speech... and assembly where people have a right to be for such purposes. Picketing is not speech, and therefore is not of itself protected by the first amendment.

As indicated in the text (the sentence following footnote 134), the Chief Justice interpreted CCNV's activities as picketing, and therefore, as unprotected first amendment conduct.
rights of others to use the parks for their intended purposes.\textsuperscript{135} The Chief Justice pointed out that while the constitution guarantees that people may make “statements,” there are other areas in Washington, D.C. where respondents may make their statements. By saying this, the Chief Justice summarily dismissed respondent’s contention that the site chosen was of significant importance to them.\textsuperscript{136} Finally, the Chief Justice opined that this entire suit was frivolous and time-consuming. “It trivializes the first amendment to seek to use it as a shield in the manner asserted here,”\textsuperscript{137} said the Chief Justice.

The dissenting opinion, of Justice Marshall, expressed concern that the majority did not seriously consider respondent’s first amendment claims.\textsuperscript{138} Also, the dissent saw a misapplication of the reasonable time, place, and manner test.\textsuperscript{139} Specifically, the dissent interpreted that test as requiring that the governmental interest in the preservation of the national parks be strictly scrutinized to ensure that expressive activity protected by the first amendment remains free of unnecessary limitations.\textsuperscript{140}

First, the activity in question is symbolic speech protected by the first amendment, said the dissent.\textsuperscript{141} The dissenters, therefore, took a closer look at the nature of the conduct at issue and the context in which it would have been displayed.\textsuperscript{142} They noted, for example, that the majority never mentioned the outcome of the case that was litigated under the old Park Service regulations, that the proposed demonstration was to take place during the winter season, and that the respondents were particularly careful in choosing their situs.\textsuperscript{143} The dissent concluded that this augmented respondent’s claim of first amendment protection for their proposed expressive activity.\textsuperscript{144} Also, while the

\begin{enumerate}
\item \textsuperscript{135} Id.
\item \textsuperscript{136} Id. at 3072-73. See also Respondent’s Brief, supra note 107, at 22-23. CCNV’s major argument was that the sites chosen—Lafayette Park and the Mall in Washington, D.C.—were specifically chosen because of their political locale.
\item \textsuperscript{137} 104 S. Ct. at 3073.
\item \textsuperscript{138} Id. (Marshall, J., dissenting).
\item \textsuperscript{139} Id.
\item \textsuperscript{140} Id.
\item \textsuperscript{141} Id.
\item \textsuperscript{142} Id.
\item \textsuperscript{143} Id., at 3073-74 and at 3072 n.1.
\item \textsuperscript{144} Id.
\end{enumerate}
majority proudly described the historical significance of Lafayette Park and the Mall, they eschewed the fact that this would be a powerful forum for respondents. When all of this was added together, the dissent found that CCNV's purpose (to impress upon the public consciousness in as dramatic a way as possible the widespread homeless problem) was clearly stated.\textsuperscript{145}

Citing precedent, the dissent concluded that the sleeping in the tents in a national park qualified as symbolic speech subject to first amendment protection.\textsuperscript{146} Relying on \textit{Spence}, the dissent pointed out the importance of context in determining whether an act can be regarded as "speech."\textsuperscript{147} The dissent believed that the majority should have looked to the intent of the speaker (whether there was an intent to convey a particularized message), and to the perception of the audience (whether the likelihood was great that the message would be understood by those who viewed it).\textsuperscript{148} Apparently, the majority was swayed by the petitioner's argument that the symbolic sleeping demonstrations differed from symbolism presented in the \textit{Stromberg, Brown}, and \textit{Tinker} cases. According to the majority, in the case at bar, sleeping conveys no emotions, no opinions, and no ideas, while in the previous cases, the conduct was inherently expressive.\textsuperscript{149} The dissent responded to this by maintaining that while blacks sitting in a "whites only" library in Louisiana in 1965 was powerfully expressive, so too is sleeping in a national park overnight to demonstrate the plight of the homeless.\textsuperscript{150} Sleeping, when looked at from this particular context, is quite symbolic, said the dissent.\textsuperscript{151}

Second, the dissent dismissed the government's argument that it would be impossible to distinguish \textit{bona fide} protestors from imposters who simply desire to sleep in the park.\textsuperscript{152} As the respondents pointed out, government agents would have made valid inquiries as to the good faith and sincerity of the individu-
als involved.\textsuperscript{153} Also, according to the dissent, any administrative difficulties the Park Service envisioned, in the absence of proof, would be nothing more than a vague apprehension.\textsuperscript{164}

Third, the dissent strongly asserted that the regulations, as applied to the respondents, failed to satisfy the reasonable time, place, and manner test.\textsuperscript{155} For example, the dissent stated that although the government’s interest in park maintenance is substantial, neither the government nor the majority could explain why prohibiting respondent’s planned activity would substantially further that interest.\textsuperscript{156} Clearly, the dissent interpreted the substantial governmental interest requirement in a stricter sense than did the majority.

The dissenters also saw flaws in the government’s contention that the ban on sleeping relieved the government of an administrative burden, and that the ban would increase the probability that the purpose of the regulation, to limit wear and tear on park properties, would be materially served.\textsuperscript{157} The flaw, said the dissent, is that neither the majority nor the government presented factual evidence that would evince a real and not a speculative problem.\textsuperscript{158} No evidence was presented indicating that symbolic sleeping would cause substantial wear and tear on park property. In sum, the dissent contended that “all that the Court’s decision advances are the prerogatives of a bureaucracy that over the years has shown an implacable hostility toward citizens’ exercise of first amendment rights.”\textsuperscript{159}

The majority’s minimal scrutiny of “content-neutral” governmental regulations particularly disturbed the dissenters.\textsuperscript{160} The dissent believed that once the Court narrowly limited its concern to whether a given regulation creates a content-based distinction, it overlooked the fact that content-neutral restrictions are also capable of unnecessarily restricting protected ex-

\begin{itemize}
  \item \textsuperscript{153} Respondent’s Brief, \textit{supra} note 114, at 80.
  \item \textsuperscript{154} \textit{Clark}, 104 S.Ct. at 3076.
  \item \textsuperscript{155} \textit{Id.} at 3077-78.
  \item \textsuperscript{156} \textit{Id.}
  \item \textsuperscript{157} \textit{Id.} at 3078.
  \item \textsuperscript{158} \textit{Id.} (citing \textit{U.S. v. Grace}, 461 U.S. 171 (1983); and \textit{Tinker v. Des Moines School District}, 393 U.S. 503 (1969)).
  \item \textsuperscript{159} \textit{Id.}
  \item \textsuperscript{160} \textit{Id.} at 3079.
\end{itemize}
pressive activity. An essential tool of first amendment analysis is the general prohibition against content-based regulations. The dissent contended that it helps to put into operation the tenet that "government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views."

Lastly, the dissenters were distressed at the assumptions made by the majority regarding those who formulate and administer content-neutral regulations. What is alarming to the dissent is that the Court assumed that the balance struck is deserving of deference so long as it does not appear to be tainted by content discrimination. That is, the dissent averred that "the Court fails to recognize . . . that public officials have strong incentives to overregulate even in the absence of an intent to censor particular views." Typically, public officials try to accommodate two groups: the general public and those who seek to use a particular forum for first amendment purposes. Yet the political power of the mainstream population is likely to be far greater than that of those who fall into the latter group. In fact, the dissent noted that there is a substantial possibility in the case at bar that the impetus behind the revision may have derived less from concerns about administrative difficulties and wear on the park facilities, than from other, more political concerns. The dissent stated outright that the case litigated under the old Park Service regulations which favored the respondents, and involved the same parties and issues, was the impetus that the Park Service needed. The alleged need for more restrictive regulations, therefore, seemed to be based on pretext. Thus, there was more than enough evidence in this case to have impelled the Court to subject the government's re-

162. Id. (citing Police Dept. of the City of Chicago v. Mosley, 408 U.S. 92, at 95-96 (1972)).
163. Id. at 3080.
164. Id.
165. Id. (citing Goldberger, supra note 41, at 208).
166. Id.
167. Id.
168. Id.
169. Id., at 3080 n.17.
strictive policy to something more than mere minimal scrutiny.\(^{170}\)

**CONCLUSION**

The *Clark* decision, even if read narrowly and confined to its specific facts, will have an obvious "chilling effect" on legitimate organizations and individuals wishing to employ the special symbolism of symbolic speech in public forums.\(^{171}\)

The Court's analysis, however, sheds light on how this decision will effect future first amendment free-speech cases. For example, the four prong *O'Brien* test and the reasonable time, place, and manner test apparently have been blurred into a single hybrid test.\(^{172}\) This test may very well be the new standard that must be met when deciding whether a regulation is in conflict with an individual's or organization's first amendment rights. Also, the Court's minimal scrutiny of governmental regulations that they deem "content-neutral" evinces a trend that will shift the balance in favor of the governmental entity, at the expense of the group asserting first amendment protection.

*Christopher J. Marengo*

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170. *Id.*


172. *Clark*, 104 S. Ct. at 3076 (Marshall, J., dissenting) (agreeing with the majority that there was no substantial difference that distinguishes the reasonable time, place, and manner test from the test articulated in *O'Brien*, 319 U.S. 367).