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Constitutional Law - Camping on First Amendment Rights - Clark v. Community for Creation Non-Violence

Debra June Van Mark

CASE NOTES

CONSTITUTIONAL LAW—Camping on First Amendment Rights. *Clark v. Community for Creative Non-Violence,* 468 U.S. 288 (1984).

In 1982, the Community for Creative Non-Violence (CCNV) received a permit from the National Park Service to set up symbolic tent cities on the Mall and Lafayette Park in Washington, D.C.[1] The purpose of the tent cities was to dramatize the plight of the homeless in the United States. The Park Service granted permission for the demonstrators to maintain a twenty-four hour vigil in the park but denied permission to camp in the tents because a Park regulation prohibited camping in the park.[2] CCNV sought injunctive relief against the Park Service's enforcement of the no camping regulation. The Federal District Court for the District of Columbia granted the government's motion for summary judgment and denied CCNV's injunction.[3] The federal Court of Appeals for the District of Columbia reversed the lower court and found that enforcement of the regulation violated CCNV's first amendment right to freedom of speech.[4] After granting certiorari, the United States Supreme Court reversed the Court of Appeals.[5] The Court held that, even if sleep was speech,[6] the regulation reasonably furthered a substantial governmental interest and was valid as a time, place, and manner restriction.[7]

This casenote will examine the Court's failure to balance the first amendment right against an asserted governmental interest of aesthetics in *CCNV.*[8] This examination shows that the Court's failure to balance these competing interest has lowered protection of traditionally protected first amendment speech.

BACKGROUND

When the exercise of free speech conflicts with a governmental regulation based on aesthetics, the parties effectively call upon the Court to

1. Brief for Petitioners at 2, Clark v. Community for Creative Non-Violence, 468 U.S. 288 (1984) (No. 82-1998). Lafayette Park is a square of approximately seven acres located across the street from the White House. President Jefferson set aside this park for the use of residents and visitors to Washington. The park contains five statutes honoring heroes of the early days of the Republic and "functions as a formal garden park of meticulous landscaping with flowers, trees, fountains, walks and benches. . . ." The Mall is a stretch of land running westward from the Capitol to the Lincoln Memorial, approximately two miles long. *Id.*

2. The regulation defined "Camping" as:

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

36 C.F.R. § 50.27 (1986).

3. Community for Creative Non-Violence v. Watt, 670 F.2d 1213 (D.C. Cir. 1982).

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

5. Clark v. Community for Creative Non-Violence, 468 U.S. 288 (1984).

6. *Id.* at 293. The Supreme Court did not decide whether sleep is communication protected by the First Amendment. Justice White, writing for the majority, stated that the regulation was constitutional even if First Amendment rights were implicated. Chief Justice Burger, in his concurrence, stated that sleeping "simply [is] not speech." *Id.* at 300 (Burger, C.J., concurring).

7. *Id.* at 297.

8. *Id.* at 288.

balance these conflicting values. The Court has faced a few cases in recent years which required it to address the issue of this balancing. In *United States v. O'Brien* the Court declared the appropriate test for balancing the time, place, and manner of speech against a conflicting government interest.[9] In that case the defendant unsuccessfully contended that the public burning of his draft card, in protest of the Vietnam War, was symbolic speech protected by the first amendment.[10] The Court articulated four criteria, which determine whether a regulation violates speech protected by the first amendment.[11]

Until recently the Court applied the *O'Brien* test only to speech that traditionally qualified for full first amendment protection.[12] The current trend is to give protection to traditionally unprotected speech.[13] This trend extends as well to balancing speech against governmental interests in preserving aesthetics.[14]

The Court balanced obscene speech against aesthetics in *Young v. American Mini Theaters.*[15] There a Detroit zoning ordinance attempted to disperse various types of enterprises offering adult-oriented entertainment throughout the city.[16] The asserted city interest in need of protection was the particular living environment of the community.[17] The Court's balancing concluded that the offensive language at issue deserved less protection than traditionally protected speech. The aesthetic concerns, therefore, could restrict the speech in question.[18]

In *Metromedia, Inc. v. City of San Diego,* the Court balanced ordinary commercial speech against aesthetics.[19] A San Diego ordinance prohibited all off-premises outdoor advertising display signs.[20] The extent of the Court's balancing is exemplified by stating that there was no "substantial doubt that the twin goals the ordinance seeks to further [traffic safety and promoting aesthetic values] were substantial governmental goals."[21] Thus, the Court endorsed greater state power to promote a more attractive community through balancing time, place, and manner regulations at the expense of free speech.

The Court again attempted to balance these competing interest in *City Council v. Taxpayers for Vincent.*[22] In *Vincent,* the Court allowed a city

9. United States v. O'Brien, 391 U.S. 367 (1968).
10. *Id.* at 376.
11. *Id.* at 377.
12. Abood v. Detroit Bd. of Educ., 431 U.S. 209, 231-32 (1977) (The nature of the speech is not a criteria in determining its constitutionality.).
13. Quadres, *Content-Neutral Public Forum Regulations: The Rise of the Aesthetic State Interest, the Fall of Judicial Scrutiny,* 37 HASTINGS L.J. 439, 442 (1986).
14. *Id.* at 496.
15. Young v. American Mini Theaters, 427 U.S. 50 (1976).
16. *Id.* at 50.
17. *Id.* at 72.
18. *Id.* at 69-72.
19. Metromedia, Inc. v. City of San Diego, 453 U.S. 490 (1981).
20. SAN DIEGO, CAL., MUNICIPAL ORDINANCE 10,795 (Mar. 14, 1972) (cited in *Metromedia,* 453 U.S. at 493 n.1).
21. *Metromedia,* 453 U.S. at 507-08.
22. City Council v. Taxpayers for Vincent, 466 U.S. 789 (1984).

to ban the use of political campaign posters on its public streets.[23] A sign company draped Vincent's political campaign posters over the cross supports of public utility poles.[24] Acting in accordance with the ordinance the city removed the signs.[25] Ironically, in *Young,* the Court expressly denied any intention of equalizing the level of political speech to the level of commercial or offensive language protection;[26] yet, in *Vincent* the Court did exactly that.[27] The Court found that the aesthetic interests, as declared in *Metromedia,*[28] now applied not only to commercial speech, but to all speech.[29]

THE PRINCIPAL CASE

Balancing prior to *CCNV* reflected the Court's growing tendency to uphold aesthetic values over speech in its balancing analysis, be it commercial, offensive or even political speech. In *CCNV* the Court affirmed this balancing trend by allowing aesthetics to regulate political speech. Although the *CCNV* Court dealt with a number of issues, this casenote deals only with the issue of balancing political speech against aesthetics.

Before balancing these interests, the Court usually determines whether the first amendment protects the disputed behavior. In *CCNV,* the Court assumed, without deciding, that sleep was entitled to first amendment protection.[30] The Court then applied the *O'Brien* test to the facts of the case.[31] Because *CCNV* did not contest all four elements of the *O'Brien* test, the Court only focused on two contested issues: (1) whether the regulation furthered a substantial governmental interest and (2) whether the Court should require the Park Service to use less restrictive means for protecting the Park.

The Court readily found that protecting the aesthetic appearance of the Park was a significant governmental interest.[32] Its analysis was based primarily on the congressional mandate given to the Park Service.[33] The Court found the regulation to be narrowly tailored to serve this governmental interest because it left ample alternatives and did not significant-

23. *Id.* at 816-17.
24. *Id.* at 792.
25. *Id.* at 793.
26. *Young,* 427 U.S. at 69 n.32.
27. *Vincent,* 466 U.S. at 817.
28. *Metromedia,* 453 U.S. at 493.
29. *Vincent,* 466 U.S. at 807-17.
30. *CCNV,* 468 U.S. at 293.
31. *Id.* at 298.
32. *Id.* at 296. The Court found that "[it is] apparent to us that the regulation narrowly focuses on the Government's substantial interest in maintaining the parks in the heart of our Capital in an attractive and intact condition, readily available to the millions of people who wish to see and enjoy them by their presence."
33. *Id.* at 290 (citing 16 U.S.C. §§ 1, 1a-1, 3 (1982)). The Court stated:

> The Secretary is admonished to promote and regulate the use of the parks by such means as conform to the fundamental purpose of the parks, which is "to conserve the scenery and the natural and historic objects . . . in such manner and by such means as will leave them unimpaired for the enjoyment of future generations."

ly tax the demonstrators' ability to communicate their message.[34] In concluding its analysis, the Court stated that the *O'Brien* test did not provide the judiciary with the "authority to replace the Park Service as the manager of the Nation's parks."[35]

In his dissent, Justice Marshall criticized the majority in two respects: First, the majority did not closely examine the planned expression by assuming sleep was speech.[36] Second, the majority failed to explain how the ban on camping would further the significant governmental interest in aesthetics.[37] In short, Marshall argued that the majority failed to balance these interests because it neither defined aesthetics nor the speech at issue.

ANALYSIS

Historically, many of the national parks, particularly in Washington, D.C., have been used by the public for the exercise of their first amendment right of speech. Such use provides an inexpensive and effective method for conveying a particular message to a large audience.[38] Prior to 1960 the Washington, D.C. parks saw relatively few demonstrations, but since the Vietnam War era, protest groups have made continuous use of the Washington-core parks.[39] Consequently, it is of little surprise that a case finally reached the Supreme Court asking it to balance the interests of speech and aesthetics when they conflict with each other in a national park. Even if the result in *CCNV* is correct, the analysis implemented by the Court failed to provide a meaningful basis for balancing the competing interests of speech and aesthetics. The Court's failure is seen in its treatment of the speech issue, its omission of standards for evaluating aesthetics, and the resulting devaluation of speech.

Before the Court could begin balancing it had to address the issue of whether sleep was communicative conduct deserving first amendment protection.[40] Justice White avoided answering this question by assuming, for purposes of this case, that the conduct of sleep deserved first amendment protection.[41] The Court has consistently refused to draw a line beyond which the first amendment content of expressive conduct ceases to be significant.[42] The question of when expressive conduct de-

34. *See id.* at 299.
35. *Id.*
36. *Id.* at 301.
37. *Id.*
38. Comment, *The Concept of the Public Forum:* Cox v. Louisiana, SUP. CT. REV. 1, 11-12 (1965).
39. Interview with Rick Robbins, Solicitor General for Department of the Interior, Washington, D.C. (June 21, 1986).
40. Note, *First Amendment Protection of Ambiguous Conduct,* 84 COLUM. L. REV. 467, 469 (1984); *see also* Henkin, *The Supreme Court, 1967 Term—Forward: On Drawing Lines,* 82 HARV. L. REV. 63, 79-80 (1968) (discussion of Supreme Court holdings on expressive conduct).
41. *CCNV,* 468 U.S. at 293. Many years earlier, Chief Justice Warren applied identical reasoning in *United States v. O'Brien* to avoid the same issue. 391 U.S. 367, 376-77 (1968).
42. Further evidence of this is seen in *Cowgill v. California,* where Justices Harlan and Brennan stated, "The Court has, as yet, not established a test for determining at what point

serves first amendment protection is obviously a difficult one, which the Court has avoided for years.[43] For purposes of this casenote it is sufficient to recognize that the Court did not end the conduct/speech debate in *CCNV*. The speech that the Court balanced against aesthetics received full first amendment protection only because the Court chose to assume that protection.[44]

After setting the balance of fully protected speech on the one hand, the Court had to address the issue of aesthetics. In assessing what produces a more visually pleasing environment a court walks a fine line. Although the Court addressed the issue of protected speech versus aesthetic interests, it did not properly balance them.[45] Despite the difficulty of the task, the Court must implement some standard of evaluation to promote consistency in its decisions.

The Court's balancing in *CCNV* was defective because it failed to articulate a standard by which to evaluate aesthetics. This failure is particularly disturbing in light of society's increased concern for aesthetics. In the past, the Court has used two standards in evaluating aesthetic interests that conflict with first amendment rights. These standards are cultural identity[46] and measurable reduction.[47] In the first standard the Court evaluates aesthetics according to that which promotes or enhances the cultural identity of an area.[48] Under this requirement the Court must take into account location, history and other possible elements that may help to determine cultural identity.

Even though the Court accepted cultural identity as a standard, it neglected to apply it in *CCNV*. The dissenters criticized the majority for failing to take a closer look at the context in which the conduct (sleeping in tents) would be displayed.[49] The majority's analysis is devoid of any consideration concerning the significance of the Park's location for

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conduct becomes so intertwined with expression that it becomes necessary to weigh the State's interest in proscribing conduct against the constitutionally protected interest in freedom of expression." 396 U.S. 371, 372 (1970).

43. Note, *Symbolic Conduct*, 68 COLUM. L. REV. 1091, 1107 (1968).

44. *CCNV*, 468 U.S. at 293.

45. Quadres, *supra* note 13, at 466. Professor Quadres notes:

> The net result is that, in trying to establish a standard for evaluating what constitutes a visually pleasing environment, a reviewing court must look either to itself or attempt to gauge the public's point of view. Should it attempt to do the former, it has no legal standards upon which to rely. Should it attempt the latter, it allows the values and tastes of the majority to overwhelm those of the willing minority, a result inconsistent with first amendment principles.

46. See generally Costonis, *Law and Aesthetics: A Critique and a Reformation of the Dilemmas*, 80 MICH. L. REV. 355, 394 n.119 (1982) (citing Schad v. Borough of Mount Ephraim, 452 U.S. 61 (1981), and Young v. American Mini Theatres, 427 U.S. 50 (1976)), for the proposition that courts have implicitly or expressly recognized that the cultural identity rationale is at the heart of aesthetic regulation.

47. *Schad*, 452 U.S. 61.

48. Costonis, *supra* note 46, at 392-94; *see* White House Vigil for the ERA Comm. v. Clark, 746 F.2d 1518, 1537 n.117 (1984) (The Court uses the cultural identity analysis in evaluating the aesthetic interest of protest signs on the White House sidewalk.).

49. *CCNV*, 468 U.S. at 302.

demonstrators.[50] The majority also conveniently ignored the history of political demonstrations in Lafayette Park.[51] If it had considered these factors under the cultural identity standard, perhaps it would have found that a more visually pleasing environment included protesters camping in the Park. In balancing, however, the Court did not evaluate aesthetics according to this standard and, therefore, did not have to consider this possibility.

The Court also could have evaluated aesthetics under the measurable reduction standard.[52] This standard forces the government regulation in question to produce a measurable reduction in at least a clearly recognizable environmental harm to be constitutionally valid.[53] This requirement would force the Court not only to identify the harm but also to attempt to quantify it.

The majority's analysis never adequately explained how prohibiting CCNV's planned activity would further the government's aesthetic interest.[54] There is little, if any, difference in harm to the Park between allowing the protesters stay for twenty-four hours without sleeping and allowing them to sleep in the park. The distinction the majority tried to draw is that, if protestors are not allowed to sleep in the Park, fewer persons will stay in the Park on a twenty-four hour basis.[55] Thus, fewer round-the-clock demonstrations will occur, which will result in less wear and tear on the Park.[56] The flaw in the majority's argument is that it is unsupported by a factual showing that a real and measurable, as opposed to a merely speculative, harm exists. If the Court is interested in carefully balancing, then the measurable reduction standard must be part of its evaluation of aesthetics.

Given society's increasing concern for the environment in general and aesthetics in particular,[57] *CCNV* presented to the Court an opportunity to clarify the relationship between free speech and aesthetics. The Court's failure to seize this opportunity will only accelerate the demise of free speech to the extent that it spurs community demands for greater "aesthetic" regulation.[58] This disturbing prospect makes it imperative that the Court adhere to standards against which to balance aesthetic interests and first amendment concerns.

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50. *Id.*
51. *Id.* at 303.
52. Schad v. Borough of Mt. Ephraim, 452 U.S. 61 (1981).
53. *CCNV*, 468 U.S. at 311.
54. *Id.* at 308.
55. *Id.* at 297.
56. *Id.*
57. *Developments In the Law—Zoning*, 91 HARV. L. REV. 1427, 1578-79 (1978) (quoting R. WAGNER, ENVIRONMENT AND MAN 93-195 (1971)); *see* Calvert Cliffs' Coordinating Comm., Inc. v. United States Atomic Energy Comm'n, 449 F.2d 1109, 1112 (D.C. Cir. 1971) (establishes the substantive standards under which the Environmental Protection Act of 1969 receives authority for protection of the environment).
58. Costonis, *supra* note 46, at 459.

The trend of the Court's analysis in balancing aesthetics has progressed steadily to the point where even fully protected first amendment speech is easily overcome by the government's asserted interest in aesthetics.[59] The trend began quietly in *Young*, where the Court ruled that aesthetic interests were sufficiently compelling to regulate traditionally-unprotected obscene language.[60] The Court reinforced its *Young* holding when it reached the same conclusion, with respect to traditionally-unprotected commercial speech in *Metromedia*.[61] In *Vincent* the Court radically extended its trend to hold that a government interest in aesthetics was sufficient to restrict traditionally-protected political speech.[62] Following *Vincent* it appeared that no form of speech could overcome aesthetic interests. In *CCNV*,[63] the Court confirmed the broad sweep that aesthetic interests have over political speech.

Thus, in the course of eight years[64] the Court completely undermined the viability of free speech in the face of governmental interests in aesthetics. In the process the Court has devalued the weight of the constitutional right of speech. What is perhaps most distasteful in the Court's approach is its utter lack of principle in balancing. The Court avoided the hard questions of defining the contours of both speech and aesthetics. Had the Court taken a more principled approach to defining these contours its balancing would have been more legitimate. Instead, the Court set up a straw man of sleep as speech and proceeded to easily knock it down with an undefined concept of aesthetics.

While the evaluation of aesthetics will always be subjective, this difficulty does not reduce the need for such a standard. By analyzing the cultural identity of the aesthetic location and the measurable reduction in harm to the aesthetic interest, the Court would have a means by which to balance the otherwise nebulous concept of aesthetics against important first amendment claims. Leaving this relationship undefined, the Court has placed these two interests on a collision course; free speech is sure to be the loser. Though the Court has not defined aesthetics, it nevertheless has elevated the concept to an unprecedented position without providing a workable standard of review. It allows an undefined, subjective concept to restrict fully protected first amendment speech. Balancing this undefined concept against first amendment rights leads to an ill defined result. The effect of the decision subordinates speech to the whims of aesthetics. No true balancing occurs; instead aesthetics takes precedence over fully protected first amendment speech. The result is the devaluation of speech.

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59. Quadres, *supra* note 13, at 443.
60. Young v. American Mini Theatres, 427 U.S. 50, 69-72 (1976).
61. Metromedia, Inc. v. City of San Diego, 453 U.S. 490 (1981).
62. City Council v. Taxpayers for Vincent, 466 U.S. 789, 807-17 (1984).
63. *CCNV*, 468 U.S. 288.
64. *Compare* Young v. American Mini Theatres, 427 U.S. 50 (1976) *with CCNV*, 468 U.S. 288 (1984).

CONCLUSION

The ease with which the *CCNV* Court accepted the subjective and unquantifiable aesthetic interest is particularly disturbing since a first amendment right was at stake. What began in 1976 with *Young*, extending protection to traditionally unprotected obscene speech, peaked in 1984 in *CCNV*, when the Court devalued political speech to the level where something as nebulous as aesthetics could regulate it. No longer is only traditionally-unprotected speech subject to aesthetic regulation. After *Vincent* and *CCNV* all speech is subject to aesthetic interests. The ultimate result is a devaluation of the constitutional right to freedom of speech.

With society's growing concern for aesthetics, the courts can be sure that many more cases like *CCNV* will arise. Consequently, it is imperative that the Court adhere to a convincing balancing approach to meet the burgeoning interest in aesthetics. Sound balancing dictates that the Court apply standards for evaluating aesthetics against a first amendment right. Two standards that the Court has endorsed but did not apply in *CCNV* are the cultural identity test and measurable reduction test. Application of these standards would add legitimacy and consistency to the Court's decisionmaking.

DEBRA JUNE VAN MARK