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Casenotes: Constitutional Law — First Amendment — Regulation Prohibiting Sleeping in National Parks Upheld as a Valid Time, Place, and Manner Regulation Regardless of Whether Sleeping Is Speech. Clark v. Community for Creative Non-Violence, 104 S. Ct. 3065 (1984)

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CONSTITUTIONAL LAW — FIRST AMENDMENT — REGULATION PROHIBITING SLEEPING IN NATIONAL PARKS UPHELD AS A VALID TIME, PLACE, AND MANNER REGULATION REGARDLESS OF WHETHER SLEEPING IS SPEECH. *Clark v. Community for Creative Non-Violence*, 104 S. Ct. 3065 (1984).

A community activist group applied to the National Park Service for a permit to conduct a demonstration in Lafayette Park near the White House and on the Mall to illuminate the plight of the homeless.[1] The group planned to erect two symbolic campsites where it would stage a continuing twenty-four hour vigil. The demonstration would include sleeping.[2] The Park Service granted both the twenty-four hour permit and permission to erect the temporary structures, but denied the activist group permission to actually sleep in the structures because, according to Park Service regulations, sleeping in the structures constitutes "camping," an activity expressly prohibited in Lafayette Park and on the Mall.[3] The activist group brought suit in the United States District Court for the District of Columbia seeking a preliminary injunction against the Park Service's application of the no-camping regulations to the demonstration.[4] The district court denied the injunction and granted the government's motion for summary judgment.[5] On appeal the United States Court of Appeals for the District of Columbia Circuit reversed and enjoined application of the no-camping regulation, finding that although the activist group's proposed sleeping activities fell within the purview of the regulations,[6] the proposed act of sleeping was so highly communica-

1. Clark v. Community for Creative Non-Violence, 104 S. Ct. 3065, 3068 (1984).
2. *Id.*
3. *Id.* The activist group had previously sought permission to sleep in connection with a similar demonstration and was denied such permission by the Park Service pursuant to regulation 36 C.F.R. § 50.27(a) (1981), which prohibited "camping primarily for living accommodation." The group successfully challenged the denial by contending that its sleep within the context of the demonstration was not primarily for living accommodation. *See* Community for Creative Non-Violence v. Watt, 670 F.2d 1213 (D.C. Cir. 1982) (per curiam), *aff'd on rehearing*, 703 F.2d 586 (D.C. Cir. 1983) (per curiam) (en banc), *rev'd sub nom.* Clark v. Community for Creative Non-Violence, 104 S. Ct. 3065 (1984). In direct response, the Park Service amended its regulation specifically to include the type of activity in which the activist group sought to engage. The amended regulation prohibiting camping defined that activity as "the use of park land for living accommodation purposes such as sleeping activities" and provided further that such activities constitute camping "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.*" (Emphasis added). 36 C.F.R. § 50.27(a) (1982) (The current version is identical. *See* 36 C.F.R. § 50.27(a) (1984)).
4. Community for Creative Non-Violence v. Watt, D.C. Civil Action No. 82-02501 (D.D.C.), *rev'd*, 670 F.2d 1213 (D.C. Cir. 1982) (per curiam), *aff'd on rehearing*, 703 F.2d 586 (D.C. Cir. 1983) (per curiam) (en banc), *rev'd sub nom.* Clark v. Community for Creative Non-Violence, 104 S. Ct. 3065 (1984).
5. *Id.*
6. Community for Creative Non-Violence v. Watt, 703 F.2d 586, 591 (D.C. Cir. 1983)

tive within the context of the demonstration that it qualified as speech entitled to first amendment protection. The court found that the activist group's first amendment right outweighed the government's interest in the no-camping regulation as applied to the group's activity.[7] The Supreme Court upheld the regulation, reversing the circuit court.[8] The Court assumed, but did not decide, that the sleeping activity in this case constituted protected speech.[9] It then held that the no-camping regulation was a valid time, place, and manner regulation of speech in a public forum.[10]

Because the exercise of first amendment[11] rights in public places, such as sidewalks, streets, and parks, is both an effective and inexpensive method of conveying messages to large groups, public forums historically have been held open to the use of the public for purposes of assembly and communication.[12] The extent to which the government may restrict speech in public forums is therefore limited.[13]

Courts long have held that speech is not confined to verbal or written expression, but that appropriate types of conduct may also qualify as speech protected by the first amendment.[14] Such communicative conduct serves an important first amendment function in that it enables a larger and more diverse group of people to communicate, it promotes the communication of a wider range of ideas, and it exposes more people to the message.[15] Diverse activities such as the "silent and reproachful presence" of blacks participating in a sit-in in a segregated public library,[16] refusal to salute the flag,[17] wearing a jacket with "Fuck the Draft" printed on it,[18] and wearing black arm bands in school to protest

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(per curiam) (en banc), *rev'd sub nom.* Clark v. Community for Creative Non-Violence, 104 S. Ct. 3065 (1984).

7. *Id.* at 599 (six to five decision).
8. Clark v. Community for Creative Non-Violence, 104 S. Ct. 3065, 3067 (1984).
9. *Id.* at 3069.
10. *Id.* at 3069-71.
11. The first amendment to the Constitution provides, in relevant part: "Congress shall make no law . . . abridging the freedom of speech, or of the press . . . ." U.S. CONST. amend. I.
12. Hague v. Community for Indus. Org., 307 U.S. 496, 515 (1939); *see also* Kalven, *The Concept of the Public Forum: Cox v. Louisiana*, 1965 SUP. CT. REV. 1, 11-12.
13. United States v. Grace, 461 U.S. 171, 177 (1983) (to be valid, the regulation must satisfy the requirements of time, place, and manner restrictions); *see infra* notes 25-27 and accompanying text.
14. 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).
15. Note, *supra* note 14, at 470-71; *see also* Note, *Symbolic Conduct*, 68 COLUM. L. REV. 1091, 1107 (1968) (denying first amendment protection for symbolic speech unnecessarily alienates those who do not possess verbal skills).
16. Brown v. Louisiana, 383 U.S. 131, 141-42 (1966).
17. West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943).
18. Cohen v. California, 403 U.S. 15 (1971).

war[19] have been found to be speech protected by the first amendment.

Despite a basic recognition that communicative conduct may be considered protected speech, however, the Court does not accept the view that any conduct intended by the actor to express an idea can be labeled speech entitled to protection under the first amendment.[20] *Spence v. Washington*[21] represents the Supreme Court's most substantial effort to articulate principles for distinguishing between expressive conduct that deserves first amendment protection and noncommunicative conduct that is not worthy of such protection.[22] In *Spence*, the defendant attached a peace symbol to the American flag and hung it out of his apartment window to express his feeling that America stands for peace. He was convicted of violating a state statute prohibiting misuse of the American flag. The Court found that the government's interest in prohibiting the alleged misuse was not great enough to outweigh Spence's first amendment right to free speech, if in fact he was entitled to first amendment protection under the circumstances.[23] In deciding whether to overturn his conviction, the Court was thus required to determine whether Spence's activity qualified as symbolic speech. According to the test formulated in *Spence*, conduct qualifies as speech if the intent of the speaker is to convey a particular message and there is a great likelihood that the message will be understood by those who view it.[24]

Even when conduct does qualify as speech, it may nevertheless be subject to some restriction by government regulation. The government may validly regulate the time, place, or manner of speech in a public forum to assure public safety, convenience, and welfare.[25] When such a regulation inhibits communicative expression, it is nevertheless valid so long as the regulation is content neutral,[26] is narrowly tailored to serve a significant government interest, and leaves available ample alternative

19. Tinker v. Des Moines Indep. Comm. School Dist., 393 U.S. 503 (1969).

20. United States v. O'Brien, 391 U.S. 367, 376 (1968) (defendant who publicly burned his draft card in protest of the draft and the Vietnam War unsuccessfully contended that his action was symbolic speech protected by the first amendment).

21. 418 U.S. 405 (1974) (per curiam).

22. *See generally* Note, *supra* note 14, at 476-78.

23. *Spence*, 418 U.S. at 415.

24. *Id.* at 409-11.

25. One of the earliest cases to articulate this principle was Cox v. New Hampshire, 312 U.S. 569 (1941), a case involving the validity of a statute prohibiting parades or processions on public streets without a permit. *Id.* at 576; *see also* Heffron v. International Soc'y for Krishna Consciousness, 452 U.S. 640, 647-48 (1981) (Supreme Court upheld a regulation prohibiting the sale or distribution on a fairgrounds of any merchandise or printed material unless sold or distributed from fixed locations (booths) where the purpose of the regulation was to maintain the orderly movement of the crowd at the fair).

26. "Content neutral" means that the regulation restricts communication regardless of the message, as opposed to a content based regulation, which restricts communication precisely because of the message to be conveyed. *See generally* Stone, *Content Regulation and the First Amendment*, 25 WM. & MARY L. REV. 189, 189-90 (1983).

channels of communication.[27]

The government may also regulate conduct, even if the regulation infringes incidentally on symbolic expression that qualifies as speech. This type of regulation was challenged in *United States v. O'Brien*,[28] in which the Court upheld a conviction for violating an ordinance prohibiting the knowing destruction of draft cards, when the defendant had publicly burned his draft card to protest both the draft and the Vietnam War. The Court found that the government's interest in prohibiting the destruction of draft cards outweighed the defendant's interest in burning his card to protest the war, regardless of whether the act of burning the card qualified as speech. The *O'Brien* Court noted that when speech and nonspeech elements are combined in a course of conduct, the governmental interest in regulating the nonspeech element can justify incidental infringement upon speech if the interest is substantial.[29] The Court indicated that the regulation may be justified if it meets the following criteria: 1) it is within the constitutional power of the government; 2) it furthers a substantial governmental interest; 3) this interest is unrelated to suppression of free expression; and 4) the incidental restriction on first amendment rights is no greater than necessary to further the government interest.[30]

Both the time, place, and manner regulations and the *O'Brien* criteria for justifying government regulation of communicative conduct rely in part upon the substantiality of the government's interest to be furthered by the regulation in question. The Supreme Court clarified the method for weighing that interest in *Heffron v. International Society for Krishna Consciousness*.[31] The Court specified that the justification for a regulation must be measured by the overall harm the regulation seeks to prevent rather than by the harm that would result by exempting one particular group from the regulation.[32]

The Supreme Court applied these principles in *Clark v. Community for Creative Non-Violence*[33] to determine whether the no-camping regulation violated the activist group's first amendment rights. First, the Court found that the promulgation of a regulation prohibiting camping in Lafayette Park and on the Mall was constitutionally within the authority of the Park Service.[34] Additionally, it found the no-camping regulation to be content neutral, because it applied equally to all persons who may

27. Heffron v. International Soc'y for Krishna Consciousness, 452 U.S. 640, 647-48 (1981).
28. 391 U.S. 367 (1968).
29. *Id.* at 377.
30. *Id.* at 376-77.
31. 452 U.S. 640 (1981).
32. *Id.* at 652-54.
33. 104 S. Ct. 3065 (1984).
34. *Id.* at 3071-72. The Court noted that the activist group did not contest the constitutionality of the regulation except as to its effect on the group's proposed demonstration. *Id.*

desire to camp in the restricted areas, and because its implementation was not based on a Park Service disagreement with any messages that might otherwise be presented by persons seeking to use the park areas for public forum speech.[35] Finally, the Court pointed out that the prohibition on camping in Lafayette Park and on the Mall did not preclude the activist group from communicating its message to the public, as it had ample alternative channels of communication open to it by virtue of its twenty-four hour permit and permission to erect symbolic structures in connection with its demonstration.[36]

The parties disputed only whether the government's interest to be served by the regulation was substantial and whether the regulation was sufficiently narrow to be no more restrictive than necessary to fulfill the government's interest.[37] The Court upheld the regulation as to both challenges.[38] It found the government's interest in alleviating wear and tear on the parks and in maintaining those areas in an attractive condition, available for the enjoyment and use of the public, to be substantial.[39] The Court further found that allowing camping in those areas would be totally inimical to the advancement of those interests.[40] Because the no-camping regulation prohibits camping by both demonstrators and non-demonstrators alike, the Court found the regulation to be as least restrictive as possible because damage to the parks, as well as their partial inaccessibility to the public, would result from camping, whether engaged in for speech purposes or purely as a living accommodation.[41]

Finally, the Court rejected the finding of the court of appeals that because there were less speech-restrictive alternatives available to the Park Service, the no-camping regulation was invalid.[42] The Court stated that these alternatives, such as reducing the size, duration, or frequency of demonstrations in the area, would still curtail the total allowable communication by demonstrators.[43] It added that such alternatives merely represented a disagreement with the Park Service over how much protection should be afforded the parks and how that protection should be effectuated. The Court pointed out that such determination legitimately belongs to the Park Service, not the judiciary.[44]

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35. *Id.* at 3070.
36. *Id.* A regulation will not be invalidated even if the alternative channel is not the most effective means of communication, because although the first amendment guarantees the right to deliver a message, it does not guarantee any right to deliver that message in the most effective manner possible. *See, e.g.*, Heffron v. International Soc'y for Krishna Consciousness, 452 U.S. 640 (1981); Lloyd Corp. v. Tanner, 407 U.S. 551 (1972); Adderley v. Florida, 385 U.S. 39 (1966).
37. Clark v. Community for Creative Non-Violence, 104 S. Ct. 3065, 3070-72 (1984).
38. *Id.*
39. *Id.* at 3070.
40. *Id.*
41. *Id.* at 3071.
42. *Id.* at 3072.
43. *Id.*
44. *Id.*

The Court acknowledged the anomalous situation that resulted when the no-camping regulation was applied to demonstrators with twenty-four hour permits and permission to erect temporary structures, because the act of sleeping by such demonstrators would not appear in and of itself to add any additional wear and tear on the parks.[45] Based on the overall harm to be prevented by the camping prohibition, which is the correct measure of the government's interest in a regulation,[46] the Court rejected the contention that the existence of such an anomaly invalidated the no-camping regulation.[47] It added that even were the government's interest to be assessed by applying the camping prohibition directly to demonstrators holding twenty-four hour permits with permission to erect structures, the government's interest in prohibiting sleeping was still substantial; the prohibition on sleeping would limit the nature, extent, and duration of around-the-clock demonstrations and would prevent some of those demonstrations from materializing at all, thus effectively easing the pressure on the parks.[48]

Justices Marshall and Brennan dissented vehemently from the majority opinion. They found that the activist group's proposed sleep, within the context of its demonstration, clearly satisfied the *Spence* test, thus qualifying as speech.[49] Weighing the activist group's free speech rights against the countervailing interests of the government in imposing its no-camping regulation to protect the parks, the dissent found the government's interest too insubstantial to sustain the regulation as applied to the group.[50] The dissent's reasoning concerning the substantiality of the government's interest agreed with that of six of the eleven judges of the lower court: because the Park Service allowed the activist group to erect temporary structures and to engage in a twenty-four hour vigil (symbolic camping), it was illogical to suggest that although the government did not prohibit feigned sleeping, it had a substantial interest in prohibiting real sleeping — so substantial, in fact, as to outweigh the activist group's first amendment rights.[51]

The key to the issue in *Clark* was the correct standard for determin-

45. *Id.* at 3070-71. Park Service regulations originally prohibited both 24-hour demonstrations as well as the erection of temporary structures. In response to lower court opinions invalidating those regulations, *see, e.g.*, United States v. Abney, 534 F.2d 984 (D.C. Cir. 1976) (per curiam); A Quaker Action Group v. Morton, 516 F.2d 717 (D.C. Cir. 1975); Women Strike for Peace v. Morton, 472 F.2d 1273 (D.C. Cir. 1972) (per curiam), the Park Service chose to change its regulations rather than to appeal the decisions to the Supreme Court. Ironically, it is that decision to allow the 24-hour vigils and erection of temporary structures that has created the anomaly caused by the sleeping prohibition.

46. Heffron v. International Soc'y for Krishna Consciousness, 452 U.S. 640, 652-54 (1981); *see supra* text accompanying notes 31-32.

47. Clark v. Community for Creative Non-Violence, 104 S. Ct. 3065, 3070-71 (1984).

48. *Id.* at 3071.

49. *Id.* at 3073 (Marshall, J., dissenting).

50. *Id.* at 3078 (Marshall, J., dissenting).

51. *Id.* (Marshall, J., dissenting).

ing whether the regulation furthers a government interest that is substantial, which, under *Heffron*, is measured by the overall harm the regulation seeks to prevent.[52] The Court found that the government's interest in alleviating wear and tear on its national parks, so that they will be attractive and available for public use and enjoyment, is substantial. The Court did not, however, provide any new guidance for use of the *Spence* test in determining whether conduct qualifies as speech protected by the first amendment. The Court merely assumed for the sake of its decision that the camping/sleeping activity in this case was protected communicative conduct.

The significance of *Clark v. Community for Creative Non-Violence* thus lies in the Court's characterization of the government's interest in reducing wear and tear on its national parks as substantial. Because of this substantial interest, not only can the Park Service validly prohibit actual camping in national parks, but it follows that the currently permitted symbolic camping can be prohibited as well. Indeed, the Court's dicta suggests this conclusion. In response to lower court decisions, the Park Service had changed its regulations to allow twenty-four hour vigils and the erection of temporary structures in connection with demonstrations.[53] The majority twice implied that should the Park Service choose to reinstate its original prohibition on both practices, the Supreme Court would uphold the regulation.[54] Instead of affording demonstrators fuller first amendment protection in public forums, as the activist group had hoped, the ultimate result of this case may be the imposition of stricter time, place, and manner regulation of communicative speech in Lafayette Park and on the Mall, as well as in other national parks.

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52. *Heffron*, 452 U.S. 640, 652-54 (1981); *see supra* text accompanying notes 31-32.
53. *See supra* note 45.
54. "In the first place, we seriously doubt that the First Amendment requires the Park Service to permit a demonstration in Lafayette Park and the Mall involving a 24-hour vigil and the erection of tents to accommodate 150 people." Clark v. Community for Creative Non-Violence, 104 S. Ct. 3065, 3070 (1984). "Perhaps these purposes would be more effectively and not so clumsily achieved by preventing tents and 24-hour vigils entirely in the core areas." *Id.* at 3071.